2019 HOUSE POLITICAL SUBDIVISIONS COMMITTEE

HB 1362

2019 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee
Prairie Room, State Capitol

1/31/2019
HB 1362
Job # 31968
☐ Subcommittee
☐ Conference Committee

Committee Clerk: Carmen Hickle typed by Mary Brucker

Explanation or reason for introduction of bill/resolution:

Relating to the right of utilities to cross over or under a railroad right of way; and to provide for application.

Minutes: Attachments 1-11

Chairman J. Dockter: Opened the hearing on HB 1362.

Representative Munson: Introduced the bill. This bill is to get more uniformity of the charges and the time it takes to get permits to do the borings underneath some of the rail lines. I've distributed proposed amendments, 19.0623.02001, dated January 30, 2019 (attachment 1). The amendments will replace "oil" with "liquid hydrocarbons" and on page 4 line 20 it inserts the ability for the insurance to be self-insured.

Representative Adams: What is this for? Is there an issue with the utilities and the railroad?

Representative Munson: The state's attorney in Cavalier County represents industry people who have had delays before they get their permit before they can do the drilling. There has been a 90-day delay in some which makes it a problem.

Representative Adams: Does this bill get them to speed up the process of getting the permits?

Representative Munson: It does a little more than that. It is modeled after Minnesota and South Dakota law. We don't have a law that regulates this. We'd like to speed up the process as well as put a limit on the charges. We don't want them to lose money on it.

Chairman Dockter: Is there support for HB 1362?

David Crothers, Broadband Association of ND: Distributed testimony, see attachments # 2 and 3. Read his testimony and described the attached maps and other attachments. Ended testimony at 14:42.

Representative Ertelt: Have there been any instances of a denied crossing?

David Crothers: Waiting six to nine months is basically denying them.

Representative Johnson: Has the railroad appealed to a higher court?

David Crothers: I would certainly assume they could. I'm not aware that it has happened.

Representative Hatlestad: Is the crossing fee eliminated by this bill?

David Crothers: No. Everyone uses different terms to describe different things. Under this bill the fee would be $750 for the permit then there are provisions for if there are any additional costs, like the flagging costs. If there is any damage, then those fees are recoverable.

Representative K. Koppelman: You described other states that have similar legislation. Prior to that were there attempts to negotiate? In those states are both the policy and the fee structure similar?

David Crothers: Yes, there have always been negotiations with the railroad. The negotiations just aren't working and that's why we're here. The fee is identical to South Dakota. Minnesota has a $1,250 fee. I've been told that's the highest fee in the country along with the state of Nebraska. The wait times Minnesota and the broad FCCs advisory committee have recommended 35 days instead of 30 days. North Dakota matches South Dakota with a 30-day law.

Chairman Dockter: Is there further testimony in support?

James Walter, President/CEO of 702 Communications: Distributed testimony, see attachment #4. Ended testimony at 24:33.

Representative Ertelt: Can you relate the substantial increase of the permit costs to the cost of the project?

James Walters: The overall cost of the project was $2 million.

Representative Magrum: Did a telecommunications or any of the utilities exercise quick take eminent domain very often on these?

James Walter: No. I have not experienced that at all.

Vice Chairman Pyle: When you say crossing is it per line of track?

James Walter: When I say crossing it's from one side of the railroad track to the other, whether that's one or ten tracks.

Representative K. Koppelman: Is there a way around the delays?

James Walter: The delay in my case would have been a problem. There are contracts signed and deadlines that have to be met.

Chairman Dockter: Is there further support?

Shane Hart, CEO and General Manager of Reservation Telephone Cooperative (RTC): Distributed testimony, attachment #5. Ended testimony at 29:03.

Chairman Dockter: Is there anyone else in support?

Deb Syvertsen, Plant Maintenance Manager at Red River Communications: Distributed testimony, attachment #6. Ended testimony at 35:52.

Representative Ertelt: When you're running these lines do you go across private property? How do you go through that process?

Deb Syvertsen: Typically we are the right a way of the road.

Representative K. Koppelman: Do you operate in Minnesota? What's your experience there?

Deb Syverstsen: We haven't done any crossings in several years. It's been about 10 years since we've done any. We had a few issues but that was years ago.

Chairman Dockter: Is there anyone else in support?

Zac Smith, North Dakota Association of Rural Electric Cooperatives: Distributed testimony, see attachment #7. Ended testimony at 41:07.

Representative Adams: You are the first person to mention going over. Do they charge you for stringing one fold to another over the tracks?

Zac Smith: This bill covers both over and under. I don't have an example of the cost for going over but I that was also an issue.

Representative Ertelt: Can you comment on the engineering drawings that would be provided for the proposed placement what the cost associated with that might be?

James Walter: It's about $1000.

Chairman Dockter: Is there anyone else for support?

Carly McCleod, President of the Utilities Shareholders of North Dakota: We are also in support. We recognize that the railroads are businesses that have been operating in the communities in North Dakota as long as our investor owned utilities and perhaps longer. It is never our desire to push legislation down an industry's throat. If there are friendly amendments that would make these sorts of requirements more palatable to the railroads we would be willing to work with them on that.

Chairman Dockter: Any further support?

Russ Hanson, Associated General Contractors: Supports the bill and requests a do pass.

Ron Day, Public and Government Affairs Manager for Marathon Petroleum and also represents Empower: We voted in support of this bill for several reasons but mostly for certainty. Without certainty it creates the inefficiencies and creates the certainty for capital investment in our projects whether it be for pipelines, underground utilities, etc. As energy producers of North Dakota we certainly like that piece of certainty.

Brady Pelton, represents North Dakota Petroleum Council: North Dakota is producing a great deal of crude oil and natural gas, all of which require a substantial amount of pipeline to transport that oil and gas. Those will run into railroad lines that have to be tunneled and buried under. This bill helps to produce a consistent, standardized, and efficient process for getting those rights of way crossings done.

Dannette Welsh, Director of Government Relations for ONEOK: We stand in support of the bill and in support of the amendments that Representative Monson. The amendments actually come from us. The change from liquid hydrocarbons from oil simply makes it more comprehensive and is in keeping with the rest of the chapter. The insurance piece gives us greater flexibility in how we meet the insurance requirements for the railroad.

Representative K. Koppelman: The way the bill was worded originally wouldn't have included your industry, correct? What's the reason for changing it to hydrocarbons?

Dannette Welsh: It says natural gas in the list, however, natural gas is one type of product we carry. Liquid hydrocarbons is a natural gas liquid and that is the other type.

Chairman Dockter: Is there anyone else in support? Is there anyone in opposition?

Blaine Bilderbeck, BNSF Director of Corporate Real Estate Development: Distributed testimony, see attachment # 8. Ended testimony at 58:00.

Representative Ertelt: You issue over 2,000 permits per year? That's not all in North Dakota?

Blaine Bilderbeck: That's across the system.

Representative Ertelt: Are you just in charge of the permitting?

Blaine Bilderbeck: No, I'm in charge of all the transaction work that we do on the real estate side.

Representative Ertelt: What is the average cost to BNSF for permitting?

Blaine Bilderback: We heard those say they were being charged different fees every time they apply for a permit which is not accurate for us. The only variance to that is if there's a longitudinal component to that permit. Pollution Liability insurance is only required for hazardous commodities like the oil and gas pipelines.

Representative Guggisberg: You talked about the legal consequences of the other state's laws. Have you had any operational consequences because of those laws being passed, specifically in Minnesota and South Dakota?

Blaine Bilerback: Not due to the law I would say. We have consequences related to permanent installations. We've had cut signal line that provided signalized information to the crossing device next to a school so that could have been catastrophic had we not caught it.

Representative Guggisberg: Of those 2,000 permits how many were in North Dakota and how many took longer than 30 days?

Blaine Bilderback: There's a lot of them that take longer than 30 days. It takes us 20 days to receive an application and turn it back to the applicant. From that point if they don't like the contract or they don't want to provide insurance and things like that goes on between two parties which takes a longer time. We have to get attorney and this raises the costs as well as the time.

Representative Guggisberg: What percentage of the permits do you currently issue that would be effected by this law?

Blaine Bilderback: I don't have the count for North Dakota.

Representative K. Koppelman: In Minnesota you have the opportunity to assess other fees through another means. You also said you're litigating in other states. In the states you've mentioned have these types of laws hampered your ability to do your business?

Blaine Bilderback: It doesn't really hamper our railroad operation but it costs us money to process these permits. We have third party subcontractors that work for us in processing these permit and we don't recover our costs for these.

Representative K. Koppelman: Thank you for your service in North Dakota. You said this is unconstitutional under the United States and North Dakota Constitutions but you didn't say why.

Blaine Bilderback: I will let Lydia explain that.

Representative Hatlestad: Can you tell me the depth beneath the track where you're required to drill or bore and the distance on each side of the track?

Blaine Bilderback: It varies based on commodity for one thing and whether or not it's encased.

Chairman Dockter: Is there further opposition?

Lydia Bjorge, Executive Director of State Government Affairs with BNSF Railroad: Distributed testimony, see attachment #9. Ended testimony at 1:11:40.

Representative K. Koppelman: You've talked about the constitutional issues and you've referenced the taking of property. We're talking about rights of way and easements, is that correct?

Lydia Bjorge: We consider an underground utility as a taking of our property.

Representative K. Koppelman: But the surface of your property is what you utilize for railroad purposes and that's still yours to own and use.

Lydia Bjorge: Yes, but we have to be very careful about what's underneath our property and the substructures. Anything above or below the ground is still considered a taking.

Representative K. Koppelman: Have the courts in North Dakota agreed with that definition?

Lydia Bjorge: We have several North Dakota cases specific to railroads and a couple specific to utilities that I can show you.

Representative K. Koppelman: They've called them takings and considered them that way as well.

Lydia Bjorge: Yes, we have clear case law.

Representative K. Koppelman: We've heard testimony today about working with you since something similar exists in other states. Are you willing to work on the amendments that may be more amenable?

Lydia Bjorge: South Dakota and Minnesota are still very new. We are still in active litigation. We're still trying to figure out what's working and what's not. I think we need to sit down and really think hard about that.

Representative K. Koppelman: How about Nebraska and Iowa?

Lydia Bjorge: I'm not as familiar with them. There were some cases that were decided on varying grounds.

Representative K. Koppelman: I would really encourage you sit down with the proponents of the bill and try to work something out for all sides.

Representative Magrum: Do you think the lack of planning ahead is a problem here?

Lydia Bjorge: I think it is clear what our process is. Anyone who's had a permit from us knows what our application looks like or could get that online at any time. A hazardous

material or oil pipeline or other more volatile utilities will take longer because there's more engineering and environmental review. They all know that as well. Folks should know how far in advance they need to come to us. The examples where it took a long time is largely the utility red lining our contract then going back and forth with lawyers, environmental attorneys, and engineering experts about what can and can't be in that contract. If you know you're going to be having a project, we absolutely want you to chat with us first to make sure you're not in a certain distance from a signal switch.

Representative Simons: Do you feel quick take? Is that a threat or what is that exactly?

Lydia Bjorge: It's concerning to have someone entering railroad property without having a discussion with us. There are trains going by so we need to make sure everyone is safe. From a safety perspective we are really concerned with the 30 days. From a private property owner perspective, we're really worried about someone being able to take our property without rail review and conversation.

Chairman Dockter: Is there anyone else in opposition?

Dan Zink, Red River & Western Railroad Company: Distributed testimony, see attachment #10. Testimony ended at 1:23:07.

Jim Chase, SMART Transportation Division: Distributed testimony, see attachment #11. Ended testimony at 1:25:36.

Chairman Dockter: Is there anyone else in opposition? Is there any neutral testimony? Seeing none we will close the hearing on HB 1362.

2019 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee
Prairie Room, State Capitol

HB 1362
2/15/2019
Job # 32850

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Carmen Hickle typed by Mary Brucker

Explanation or reason for introduction of bill/resolution:

Relating to the right of utilities to cross over or under a railroad right of way; and to provide for application.

Minutes: No attachments

Chairman J. Dockter: Opens for committee work. I asked the two parties to get together and try to figure something out. In getting feedback there wasn't a lot of compromise so I'm looking for direction here.

Representative K. Koppelman: In my notes there was only one opponents were from one railroad, is that correct?

Chairman Dockter: That's correct.

Representative Johnson: DO PASS

Representative Longmuir: SECONDED

Chairman Dockter: Is there any discussion?

Representative K. Koppelman: I'm disappointed that the parties couldn't get together. In testimony we heard that this is basically the law in several other states with a few minor differences. We also heard from the opponents that it's under litigation. This is an opportunity for them to get together and try to work on something. I was thinking some levels could be changed.

Representative Fegley: We received some proposed amendments during testimony. Do we need to look at the amendments?

Chairman Dockter: On page 1 line 24 it says to replace "oil" with "liquid hydrocarbons" and on page 4 after line 20 insert "the insurance obligations required under this section may be satisfied by the utility using any combination of primary, excess, or self-insurance."

Representative Johnson: WITHDRAW MOTION FOR DO PASS

Representative Longmuir: SECONDED

Representative K. Koppelman: MADE A MOTION TO ADOPT AMENDMENT .02001 FROM REPRESENTATIVE MONSON.

Representative Longmuir: SECONDED

Chairman Dockter: Is there any discussion?

VOICE VOTE: MOTION CARRIED

Chairman Dockter: We have amended HB 1362 before us.

Representative Johnson: MADE A MOTION FOR A DO PASS AS AMENDED

Representative Longmuir: SECONDED

Chairman Dockter: Is there any discussion?

Representative Ertelt: The main concern I have with this bill is that it does not insure that the railroads are compensated for their expenses. It's bad legislation to force two parties into a contract where one party is not able to reclaim their costs.

Representative K. Koppelman: I thought there was something in the bill that allowed for reclamation of some costs.

Chairman Dockter: It is part of the bill. They are just defining what the payments are.

Representative K. Koppelman: On page 3 lines 17-19 it has to do with the flagging expense. I think there are similar provisions with the other items as well.

Chairman Dockter: On page 3 line 20 it also discusses the expenses.

Representative Ertelt: The flagging expenses are not the only expenses associated with this transaction between the two entities. I don't think the railroads even brought up the argument because it's very unlikely it's going to change the value of the land. It's the cost associated with their evaluation of the crossing.

Vice Chairman Pyle: On page 3 it says no additional fees can be assessed. $750 is the crossing fee. I think Representative Ertelt has a valid point on some of the other charges for the other costs that go into a crossing project.

Representative K. Koppelman: Immediately following that line it says "in addition to the standard crossing fee…" Some of this is already under the supervision of the Public Service Commission and the bill addresses that.

Chairman Dockter: Remember in South Dakota is $750 and $1,250 for Minnesota so I think that's how they came up with the $750 as the amount.

Representative K. Koppelman: I was prepared to have us change the fee to something maybe a little higher but the motion on the floor is for a do pass.

Representative Ertelt: The flagging fee is not the only fee in there. There are additional fees; engineering, legal, environmental review, recording, etc. These are all expenses by the railroad that is not being covered.

Representative Simons: I am going to resist what I heard in discussion because they already have this in place. This is really about the speed of access of making this ball work. Government works slow so why do we expect the railroad to work any faster than government? The railroad is all for these easements. They have to make sure that this comes through. It's not easy as private industry working through an easement, it takes a long time. I think we really need to consider our actions here.

Vice Chairman Pyle: Is the GIS, the engineering, and all those a part of the application? Do the railroads just review those items and they're already paid for by the utility companies?

Representative Ertelt: Some of that work may be done by the utilities that are seeking to cross. The railroad, because it is their property, has a vested interest in ensuring that those are correct and they are going to employ their own services to perhaps duplicate them because they are protecting their property. It's their prerogative.

Vice Chairman Pyle: I understand that part. The restitution to the property owners is not always fair and just.

Representative Johnson: Railroads were granted this property from the United States government. This is not a huge burden on the railroads. We need to get internet access to the public.

Representative K. Koppelman: There is provision on taxes. On page 7 lines 4-6 it gives me comfort because if there are grievances in place they continue. I think there is room for negotiations.

Representative Ertelt: The section of the bill just sited is for existing agreements, it doesn't address future agreements. Both parties are at the table. The average time that was not disputed by the utilities is 23 days for this process. Getting internet access to the people of North Dakota is not the responsibility of the government and is not a life and death circumstance. Regardless of whether or not this was public land at one point doesn't mean that's the case today. It is privately owned land.

Representative K. Koppelman: Existing does not mean prior to today, it means when the law goes into effect which isn't until this summer. If we pass the law they'll have months to get together and work things out.

Chairman Dockter: Part of the reason this issue was up is because they don't have anything in writing.

Representative K. Koppelman: I appreciate what the railroad does for our state. We didn't hear from the other railroads.

Representative Ertelt: There was more than one railroad represented here. They have a few months to come to an agreement. The utilities want what is in the bill. So now the railroads are put into a position of negotiating where they are today. They have full right to that just compensation but now you're putting them into a position of accepting less than that.

Representative Hatlestad: On page 2 line 16 -20 it appears both sides are taken care of. The idea is that they will sit down and negotiate. Some of this is unnecessary.

Chairman Dockter: We have a do pass as amended motion before us.

ROLL CALL VOTE: 11 YES 3 NO 0 ABSENT
MOTION CARRIED

Representative K. Koppelman will carry this bill.

DP 2/13/19

19.0623.02001
Title.03000

Prepared by the Legislative Council staff for
Representative Monson
January 30, 2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1362

Page 1, line 24, replace "Oil" with "Liquid hydrocarbons"

Page 4, after line 20, insert:

"6. The insurance obligations required under this section may be satisfied by the utility using any combination of primary, excess, or self insurance."

Renumber accordingly

Date: 2-15-19
Roll Call Vote #: 1

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1362

House Political Subdivisions Committee

☐ Subcommittee

Amendment LC# or Description: 19.0623.02001

Recommendation: ☑ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Koppelman Seconded By Rep. Longmuir

Representatives	Yes	No	Representatives	Yes	No
Chairman J. Dockter:					
Vice Chairman Pyle:					
Rep. Ertelt:					
Rep. Fegley:					
Rep. Hatlestad:					
Rep. Johnson					
Rep K. Koppelman:					
Rep. Longmuir					
Rep. Magrum:					
Rep. Simons:					
Rep. Toman:					
Rep. Strinden:					
Rep. Adams:					
Rep. Guggisberg					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Replace "oil" with "liquid hydrocarbons"
Insert insurance obligations
Voice vote Carried

Date: 2-15-19
Roll Call Vote #: 2

2019 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1362

House Political Subdivisions Committee

☐ Subcommittee

Amendment LC# or Description: 19.0623.02001

Recommendation: ☐ Adopt Amendment
☑ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☑ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Rep. Johnson Seconded By Rep. Longmuir

Representatives	Yes	No	Representatives	Yes	No
Chairman J. Dockter:	/				
Vice Chairman Pyle:	/				
Rep. Ertelt:		/			
Rep. Fegley:	/				
Rep. Hatlestad:	/				
Rep. Johnson	/				
Rep K. Koppelman:	/				
Rep. Longmuir	/				
Rep. Magrum:	/				
Rep. Simons:		/			
Rep. Toman:		/			
Rep. Strinden:	/				
Rep. Adams:	/				
Rep. Guggisberg	/				

Total (Yes) 11 No 3

Absent 0

Floor Assignment Rep. Koppelman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1362: Political Subdivisions Committee (Rep. Dockter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (11 YEAS, 3 NAYS, 0 ABSENT AND NOT VOTING). HB 1362 was placed on the Sixth order on the calendar.

Page 1, line 24, replace "Oil" with "Liquid hydrocarbons"

Page 4, after line 20, insert:

"6. The insurance obligations required under this section may be satisfied by the utility using any combination of primary, excess, or self insurance."

Renumber accordingly

2019 SENATE INDUSTRY, BUSINESS AND LABOR

HB 1362

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1362
3/13/2019
Job #33677

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to the right of utilities to cross over or under a railroad right of way, and to provide for application.

Minutes: Att. #1- 11

Chairman Klein: Opened the hearing on HB 1362. All members were present.

Representative Monson, District 10: see attachment #1 for testimony in support of the bill.

David Crothers, Broadband Association of North Dakota: see attachment #2 for testimony in support of the bill.

(13:35)Senator Piepkorn: On page 2, what conditions exist that would affect the negotiating position of the utilities? Size, location? You said the smaller they are the less negotiating power they have.

David: We have a witness here today that will testify to exactly that. (gave examples) A small cooperative that is not a part of an association was charged a much higher fee simply because they don't belong to the association.

Chairman Klein: Why do you want to add the note onto #6? Aren't you just asking for more opportunity for litigation? Who is going to, won't they always assert the crossing?

David: The diminution of value language where the rail roads are allowed to pursue that. We want this bill to pass. That became an issue at the Minnesota court of appeals. They referred to it as the ability for the rail roads to pursue through inverse condemnation, when there have been damages. We want this bill to pass that's why we've modeled it on two other states. This gives the rail roads that avenue to pursue. We want to answer all the questions by all the parties.

Chairman Klein: If someone would suggest that we could've worked this out, there's conflict here. Have your orgs tried to work across the table? Have we reached out to try to soften some concerns?

David: I was approached by one of the six railroads prior to the house hearing. They wanted an amendment it didn't work out; I have not heard from them since.

James Walter, President/CEO, 702 Communications: see attachment #3 for testimony in support of the bill.

(22:25) Chairman Klein: You wrote here your experience with Minnesota construction, so you worked across the river and your experience shows that it works well?

James: There is no negotiating power currently in North Dakota, now there is in Minnesota. You submit the permit, you know that you're going to have a charge, you know you have x mount for insurance, you have x amount of time frame to make it happen. Now that we've got that law approved in Minnesota that process is a consistent cost and a consistent timeframe.

Chairman Klein: Has that law been in place a couple of seasons? You've proved it works well?

James: A couple of season yes. As far as I understand, yes, it works well.

Senator Piepkorn: When you are ready for this crossing in Minnesota, is there a set fee?

James: There is a set fee. If you're in the right of way there's no fee, if you're in private property there is a fee of $1250 and its charged automatically.

(24:38) Deb Syvertsen, Red River Communications: see attachment #4 for testimony in support of the bill.

(32:33) Chairman Klein: Talking about the insurance side of it, do you have a common carrier that you work with or do you have to purchase a policy?

Deb: We get ours through our agent.

(33:50) Brooks Goodall, Chief Operations Officer, Reservation Telephone Cooperative: see attachment #5 for testimony in support of the bill.

(35:47) Chairman Klein: we're talking about the $750 application fee, but then there's a permit fee too? Will that be gone?

Brooks: I'm not sure.

(37:00) Seth Arndorfer, Chief Executive Officer, Dakota Carrier Network: see attachment #6 for testimony in support of the bill.

(42:14) Senator Burckhard: So when the railroad reduced the price was there an explanation for that?

Seth: There really wasn't.

Zac Smith, North Dakota Association of Rural Electric Cooperatives: see attachment #7 for testimony in support of the bill.

(44:53) Chairman Klein: We're not putting a 32-inch culvert under these, your analysis of the boring underneath in the rural areas, is it very different?

Zac: There is a difference between broadband and electricity. Part of the reason this bill talks about different insurance coverage is because there are different considerations for those products.

Carlee McLeod, USND: testified in support of the bill. We think this would benefit our rate payers.

(46:52) Brady Pelton, North Dakota Petroleum Council: see attachment #8 for testimony in support of the bill.

(47:55)Senator Piepkorn: Somebody before you made a specific reference to pipelines transferring liquids. It was pipelines as opposed to cable, is there some liability issues with liquid?

Brady: The product is different. As far as the contents of this bill goes, the liability of the pipeline company is not changed. It does not change the obligation of the pipeline company to oversee the completion of that product and the safety of that line.

Chairman Klein: As we heard from Zac, you will pay more for insurance?

Brady: That's correct.

Senator Piepkorn: I found the reference I was looking for in Deb Syvertsen's testimony, about recent applications, an additional insurance policy is required. A pollution liability insurance is new to you. Is there a pollution problem with that or is that a reference to an oil carrying products?

Deb: It's my understanding that typically those increased limits are required for pipelines crossings. However, when I spoke with the railroad representative he insisted that these were the limits we needed on that policy and we also needed the additional policy.

Senator Piepkorn: So there is no pollution with the cable?

Deb: Nope.

Lydia Bjorge, BNSF Railway: see attachment #9 for testimony in opposition to the bill.

(1:02:52) Chairman Klein: We could always argue the quick take, or the takings. In North Dakota I think we were all around when we added the additional protections for takings but, South Dakota, Minnesota, how are they managing and you're staying out of litigation?

Lydia: We're not staying out of litigation. We have litigated in Minnesota, and the courts found that it is a taking and the rail roads can go get money for the property that they lost.

Chairman Klein: What about South Dakota?

Lydia: We have not litigated in SD.

Chairman Klein: Why is that?

Lydia: They're both relatively new, we're a 32,000-mile railroad so we prioritize.

Chairman Klein: So then what about beyond that? Can you speak to any other areas of the country? Does it happen in other parts of the country beyond these three states?

Lydia: This process is our process across the country in states across the country that have set fees, that's what we charge. We try to stay as close to this process as possible.

Chairman Klein: You told us about how many thousands of miles of rail track across the country, we're just wondering if anyone else has ever done something similar and how are they fairing?

Lydia: I'm not familiar with them all. I don't want to give you the wrong answer.

Senator Piepkorn: To your normal person outside of the room, boring under the land I wouldn't consider as taking land can you explain that?

Lydia: The substructure is just as important. The FRA also regulates the substructure of the track. From a safety perspective you're boring underneath the land that is important. Growing in North Dakota, we've added over billion dollars in investments.

Senator Kreun: In talking about the taking of land, you have 150 feet wide on the tracks?

Lydia: 200 is the average.

Senator Kreun: So the taking that you're talking about is 150 feet, in the century code, 49.09.01 that's what you're referring to and that's what it says here. So you're charging engineering fees on things that I also wonder, on a track that carries multiple million pounds of freight. I would think you check that all the time, there's a $10,000 fee for that? How far do you go on each side of the boring? You're indicating that that is a taking? But then also do you have the ability to drive alongside of the road, do you lease that too?

Lydia: Fiber can parallel us versus water which is straight across. I hear you on the 150 feet, but the engineering review isn't that we're not necessarily looking at our property, as you point out we know a lot about our property. We're looking to make sure that the commodity is fit to go under our right of way and its safe and the right depth. But the engineering review isn't necessarily about our property, more so the project. The third question was the public use of inspection purposes?

Senator Kreun: Yes, for inspection purposes and also its a public right of way?

Lydia: We typically own between 150-200 feet from our center line. I'm sure there are specific examples, about snow removal and access.

Senator Kreun: It says when it shall be necessary to protect such railroad from snow, to use extra width on construction such a corporation shall have the right to take and hold use the street within 200 feet of width. But that's not your land. You get to use that and that's how much you get to use am I correct?

Lydia: I'm not sure that's not really my area.

Senator Kreun: Well you said there are other issues that could be dealt with, I guess if we want to be looking at it, maybe we have to put a charge on that land for lease for using that land that's free right now, and that's state land. It seems we need to work together on this as well. That is for 150 feet wide, you also indicated if you run parallel, is water or cable line put in the easement or public land as well?

Lydia: Are you asking about the rail versus cable right of way?

Senator Kreun: It does vary, but that's public land and you shouldn't be charging them for that.

Lydia: I don't think we would dispute that we would not be charging for the use of public land.

Senator Kreun: You just indicated that you would?

Lydia: If its parallel to our property I should've been more clear.

Chairman Klein: I'm trying to figure out, I thought taking was government infringing upon without compensating them, but you're implying it can be other business taking or seeming to use. A government action that results in a mere diminution of property value. So I'm wondering how does industry use the word taking…

(1:16:00) Jim Chase, SMART- Transportation Division of the International Association of Sheet, Metal, Air, Rail, and Transportation employees: see attachment #10 for testimony in opposition.

(1:17:56) Chairman Klein: obviously somebody calls you before they begin the process on how that works with you?

Jim: With this language it would allow them to do that without this process.

Chairman Klein: So in your mind you envision them just showing up and doing this?

Jim: They've put that section in there to be sure that they get this done in 30 days, all I'm concerned about is the safety.

Chairman Klein: I could argue that this gets stretched out for months, and 22 days would suggest that its certainly possible to get this done in 30 days. They just want this not slowed down, because they are also covering insurance. They want some kind of blessing from your company.

Jim: Yes, I believe that would be correct, but we don't want to be put in that position.

Chairman Klein: Well we certainly don't want a crane to fall on the track again or something.

Jim: Exactly, disturb the track bed. That my major concern, as long as there are engineering professionals have a say in it then I don't have a dog in the fight.

Chairman Klein: Well their engineers are busy working on this also and I'm sure they want to be compliant as well.

Jim: I believe that's the case but we want people especially trained in rail operations and road beds to be reviewing this.

Chairman Klein: Are your colleagues busy working on Minnesota and South Dakota? Have you had any conversations with them?

Jim: I haven't heard anything about the 30-day provision. I don't think they can just go out there and start punching holes under the track.

Chairman Klein: Well I don't think any of us think that is going to happen here either.

(1:24:00) Illona Jeffcoat-Sacco, Public Service Commission: neutral testimony. The commission has no position. The amendment has nothing to do with the policy, it simply has to do with the timing of the case if it came before the commission and also the way the cost would be reimbursed. We needed some magic words in order to bill the parties, receive the payment and put it into the valuation fund. The first part simply provides a little bit more time, we are proposing that the commission get a notice if a petition is filed within 15 days, and then an order out after either the notice period runs or a hearing is held; but get an order out within 30 days. See attachment #11 for proposed amendments to the bill.

Senator Piepkorn: This is all under the 49.09.01, if there is an objection, so we're trying to take care of stuff so there aren't objections?

Illona: Yes, whether there are or aren't objections we're not getting into that. but on page five there is two places where petitions can be filed and that's what this address. And then part of those two sections about the petitions talk about the companies involved paying our costs, processing the case and words for how to do that.

Chairman Klein: The oversight is with the public service commission?

Illona: What oversight is still with state is with the public service commission.

Chairman Klein: This really doesn't affect what you folks do. As we're trying to speed up the process of these crossings, I'm looking for comment from the regulators?

Ilonna: The public service commission has authority to adjudicate disputes of one utility cross another, or boring underneath or whatever. It's a cause about public convenience and necessity requirements. There are a lot more entities that would qualify now because of the definition of public utility in the bill. But it's all the same to us. And then the timing was an issue for us. How quickly it would have to get done. We don't think it's really possible.

Chairman Klein: closed the hearing on HB 1362. We'll have the amendments worked up.

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1362
3/13/2019
Job #33682

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to the right of utilities to cross over or under a railroad right of way, and to provide for application.

Minutes: None.

Chairman Klein: Opened the committee work session on

Senator Kreun: I'm waiting on that engineer guy to show me that section. It doesn't come up on our century code. I'd like to see that before we move anything. And they only own 150 feet of railroad track, the rest of it, except for variations all over, so when they're talking about putting a waterline next to the track that's going on an easement that's not theirs. You aren't going to put a rural water line closer than 150 feet from the rail road. They keep saying we're taking the land. A ten-inch sleeve how does that relate to all that money?

Senator Roers: You're still going through their land; you're still taking something. I would like to address what's been the history and the value of a ten-inch pipe.

Chairman Klein: I don't know if the word taking is correct.

David Crothers: I would urge you to look it up in the dictionary.

Chairman Klein: Well it says action by government. Seizure of private property or deprivation of the right to its free use or enjoyment that is caused by government action and especially by the exercise of eminent domain.

Senator Piepkorn: I have a historical bias not necessarily against the railroads, but in the settlement days the railroads were given millions of acres of land. It has no relevance to this we're debating today.

Chairman Klein: But that's a good question. When the railroads were given that, how did they handle that?

Senator Piepkorn: The sold a lot of that to the people to get them to move there.

Senator Roers: But the part that's under the tracks

Chairman Klein: This 150 how did the government, we gave them that land? That was part of the agreement?

Senator Roers: They told us they bought the land when they bought the railroad. That's where the taking comes from, if you're going to go through anybody's land you are doing some form of taking.

Senator Piepkorn: Well that's look up able?

Senator Roers: When we look at the South Dakota plan and the Minnesota plan and the 30 days, they boil it down to three main issues? And what did they do to address those main issues? That's what we should be focusing on. 30 days seems to be way to excessive. Could they limit 45? That wouldn't be terrible bad from the utilities perspective. 90 days is obviously crazy too much. What did they do in Minnesota and North Dakota to work through those lines?

Chairman Klein: adjourned the discussion.

2019 SENATE STANDING COMMITTEE MINUTES

Industry, Business and Labor Committee
Roosevelt Park Room, State Capitol

HB 1362
3/18/2019
Job #33859

☐ Subcommittee
☐ Conference Committee

Committee Clerk: Amy Crane

Explanation or reason for introduction of bill/resolution:

Relating to the right of utilities to cross over or under a railroad right of way, and to provide for application.

Minutes: None.

Chairman Klein: Opened the committee work session on HB 1362.

Chairman Klein: We had some amendments from the public service commission. One point of discussion was that 30 days wasn't enough time. So I decided what I heard was that we could move to 35 days. Explained the proposed amendments to the committee.

Senator Burckhard: Moved to Adopt Amendment.

Vice Chairman Vedaa: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Burckhard: Moved a Do Pass As Amended.

Senator Kreun: Seconded.

A Roll Call Vote Was Taken: 6 yeas, 0 nays, 0 absent.

Motion Carried.

Senator Burckhard will carry the bill.

SK 3/18 19

19.0623.03001
Title.04000

Prepared by the Legislative Council staff for
Senator Klein
March 14, 2019

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1362

Page 3, line 2, replace "Thirty" with "Thirty-five"

Page 5, line 3, replace ", after" with "shall issue a"

Page 5, line 3, replace "and" with "of hearing or notice of"

Page 5, line 3, remove ", shall"

Page 5, line 4, remove "issue an order"

Page 5, line 4, replace "sixty" with "fifteen"

Page 5, line 4, after "petition" insert ", and shall issue an order within thirty days after the hearing or, if a hearing is not held, after expiration of the period during which a hearing could be requested"

Page 5, line 7, after the underscored period insert "The parties shall pay the costs within thirty days after receipt of a bill for payment from the commission. Amounts collected by the commission under this subsection must be deposited in a special account within the commission."

Page 5, line 21, after "shall" insert "issue a notice of hearing or notice of opportunity for hearing within fifteen days after the filing of the petition, and shall"

Page 5, line 21, replace "ninety" with "thirty"

Page 5, line 21, remove "of filing the"

Page 5, line 22, replace "petition, after notice and opportunity for hearing" with "after the hearing or, if a hearing is not held, after expiration of the period during which a hearing could be requested"

Page 5, line 25, after the underscored period insert "The parties shall pay the costs within thirty days after receipt of a bill for payment from the commission. Amounts collected by the commission under this subsection must be deposited in a special account within the commission."

Renumber accordingly

Date: 3/18
Roll Call Vote #: 1

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1362

Senate Industry, Business and Labor Committee

☐ Subcommittee

Amendment LC# or Description: 19.0623.03001

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Burckhard Seconded By Vedaa

Senators	Yes	No	Senators	Yes	No
Chairman Klein	X		Senator Piepkorn	X	
Vice Chairman Vedaa	X				
Senator Burckhard	X				
Senator Kreun	X				
Senator Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent: 30 to 35 days, public service requests

Date: 3/28
Roll Call Vote #: 2

2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1362

Senate Industry, Business and Labor Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Burckhard Seconded By Kreun

Senators	Yes	No	Senators	Yes	No
Chairman Klein	X		Senator Piepkorn	X	
Vice Chairman Vedaa	X				
Senator Burckhard	X				
Senator Kreun	X				
Senator Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Burckhard

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1362, as engrossed: Industry, Business and Labor Committee (Sen. Klein, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1362 was placed on the Sixth order on the calendar.

Page 3, line 2, replace "Thirty" with "Thirty-five"

Page 5, line 3, replace ", after" with "shall issue a"

Page 5, line 3, replace "and" with "of hearing or notice of"

Page 5, line 3, remove ", shall"

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Page 5, line 4, replace "sixty" with "fifteen"

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Page 5, line 25, after the underscored period insert "The parties shall pay the costs within thirty days after receipt of a bill for payment from the commission. Amounts collected by the commission under this subsection must be deposited in a special account within the commission."

Renumber accordingly

2019 TESTIMONY

HB 1362

#1
HB 1362
1-31-19

19.0623.02001
Title.

Prepared by the Legislative Council staff for
Representative Monson
January 30, 2019

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1362

Page 1, line 24, replace "Oil" with "Liquid hydrocarbons"

Page 4, after line 20, insert:

"6. The insurance obligations required under this section may be satisfied by the utility using any combination of primary, excess, or self insurance."

Renumber accordingly

#2
HB 1362
1-31-19
p. 1

BAND broadband association of north dakota
P.O. Box 1144 • Mandan, ND 58554
Phone 701-663-1099 • Fax 701-663-0707
www.broadbandnd.com

HOUSE BILL 1362

HOUSE POLITICAL SUBDIVISIONS COMMITTEE

JANUARY 31, 2013

DAVID CROTHERS
BROADBAND ASSOCIATION OF NORTH DAKOTA

My name is David Crothers from the Broadband Association of North Dakota. The Association represents all of the cooperative and independent broadband companies in the State. Those companies serve 96 percent of North Dakota's geographic territory.

The Association urges you to adopt House Bill 1362.

Members of the Association believe the State of North Dakota needs to adopt a policy governing utilities and others crossing railroad right-of-way. This bill does exactly that.

Currently, the railroads want a separate agreement with each company or industry for permits to cross. As a result, everyone pays a different fee, is required to have different insurance coverages, face arbitrary wait times for receiving permission to cross and has no place to take disputes for resolution. Adoption of House Bill 1362 will bring fairness, predictability and an avenue for the affordable resolution of disputes between parties. Today, none of that exists. As a result, North Dakotans are waiting unreasonable amounts of time for access to high-speed Internet, businesses are forced to pay unreasonable costs, deployment of critical infrastructure is delayed, and it is more expensive to do business in the State.

The railroads and the utilities in North Dakota have had a contentious relationship over crossings throughout the years. Fifteen years ago, we were at a point similar to today.

Legislation was about to be introduced. Instead the telecom and cooperatively-owned electric companies entered into a master agreement with Burlington Northern. It has been a failure.

The cost of permits has escalated, some railroads have handed off the management of crossing agreements to out-of-State third parties, delays for approving permits have increased and new requirements are constantly being added by the railroads.

Today, we have six railroads operating in the State with their own widely disparate rules and fees. Their approach: it is our property, take it or leave it.

As a result, a utility may be told by the railroad it costs $750 for a permit; or $3,750. The fees charged by the six different railroads in the State to the utilities are arbitrary and inconsistent. The less negotiating power a company has, the higher the permit crossing. There are a number of telephone companies that operate in North Dakota that are not members of the Association either because they are too small or have no interest. Burlington Northern quotes a fee 500 percent higher for them to cross. However, the railroad periodically takes the same approach when dealing with the Association's own members. Union Pacific charges $750 for a "permit", but then adds $5,000 for a "crossing fee". The railroad routinely charges for the "crossing fee" to one utility and not to an adjacent telecom company. Burlington Northern has done the same and imposed the "crossing fee" in addition to a permit fee to some North Dakota telephone cooperatives.

Of particular concern is the time required to get a permit to cross railroad property. Wait times of 90 days and longer are not uncommon. I have included a letter from a representative of United Communications detailing the 7 month process it took them to get a permit from Burlington Northern. With North Dakota's abbreviated construction season the inaction by railroad companies and their designees routinely mean that projects are pushed into the next year, additional expenses are incurred, and individuals and businesses are forced to wait for services.

House Bill 1362 addresses these two critical issues that are holding back the deployment of high-speed Internet and broadband access in North Dakota. The language you have before you, however, is not new, nor is it novel, it is virtually identical

to statutes passed in Minnesota and South Dakota in the last few years. Those two States joined Nebraska and Iowa in recognizing that it is in the public interest to adopt legislation.

The Federal Communications Commission has also recognized the roadblock that railroads present to the deployment of critical infrastructure. In response they have created a Broadband Deployment Advisory Committee, which has a specific chapter devoted to model legislation for railroad crossings. It is very similar to the language found in House Bill 1362.

There are three elements to House Bill 1362:

1) Establishes a $750 fee for a permit to cross.
2) Allows railroads a 30-day window to approve or deny a permit.
3) Prohibits railroads from charging fees for use of public right-of-way.

The bill establishes clear, concise and fair rules for both railroads and utilities.

To initiate a crossing a telecom company must submit an application by registered mail in a form that has been approved by the railroad with a fee of $750, proof of the insurance coverages required under the law and an engineer's drawings of the proposed placement. The railroad has 30 days to deny the permit request. The North Dakota legislation matches South Dakota's $750 and 30-day provisions. Minnesota requires a fee of $1,250 and allows 35 days. The FCC's Broadband Deployment Advisory Committee proposes a $500 fee and 35 days.

Railroad companies in Minnesota and South Dakota also had a voice in the passage of their respective bills. Protections for railroads include:

1) Require a utility to include engineer drawings and proof of insurance specific to that project before the 30-day time limit for railroads to act begins.
2) Provides the opportunity for railroads to deny a permit if it believes the crossing would poses a threat to safe operations or the current use of the railroad right-of-way.

3) Provides the opportunity to go to the Public Service Commission when an agreement cannot be reached with the utilities for resolution of any disputes.
4) Allows railroads to charge utilities additional fees for flagging expenses during the project. The railroad has sole discretion to determine if the additional service is necessary.
5) Protects the railroads by mandating prescribed levels of insurance coverage depending on the type of material or service crossing the property. For example, broadband companies are required to buy a policy with coverage of $2-4 million. Gas and hazardous material providers are required to carry coverages of between $5-10 million.
6) The Association noted earlier that House Bill 1362 was similar to the South Dakota and Minnesota statutes. However, this bill actually expands the protection for railroads by giving them a third option for additional monies from the utilities when they assert a crossing will cause a reduction in the railroad's land value. The Association believes the diminution of value to a railroad associated with a fiber crossing is small, but if a railroad claims that its property value has diminished, it has a right to seek compensation for that value. The addition of this language gives railroads the right to demand additional compensation, but in order to do so, it must provide evidence of the reduced property value because of the boring.

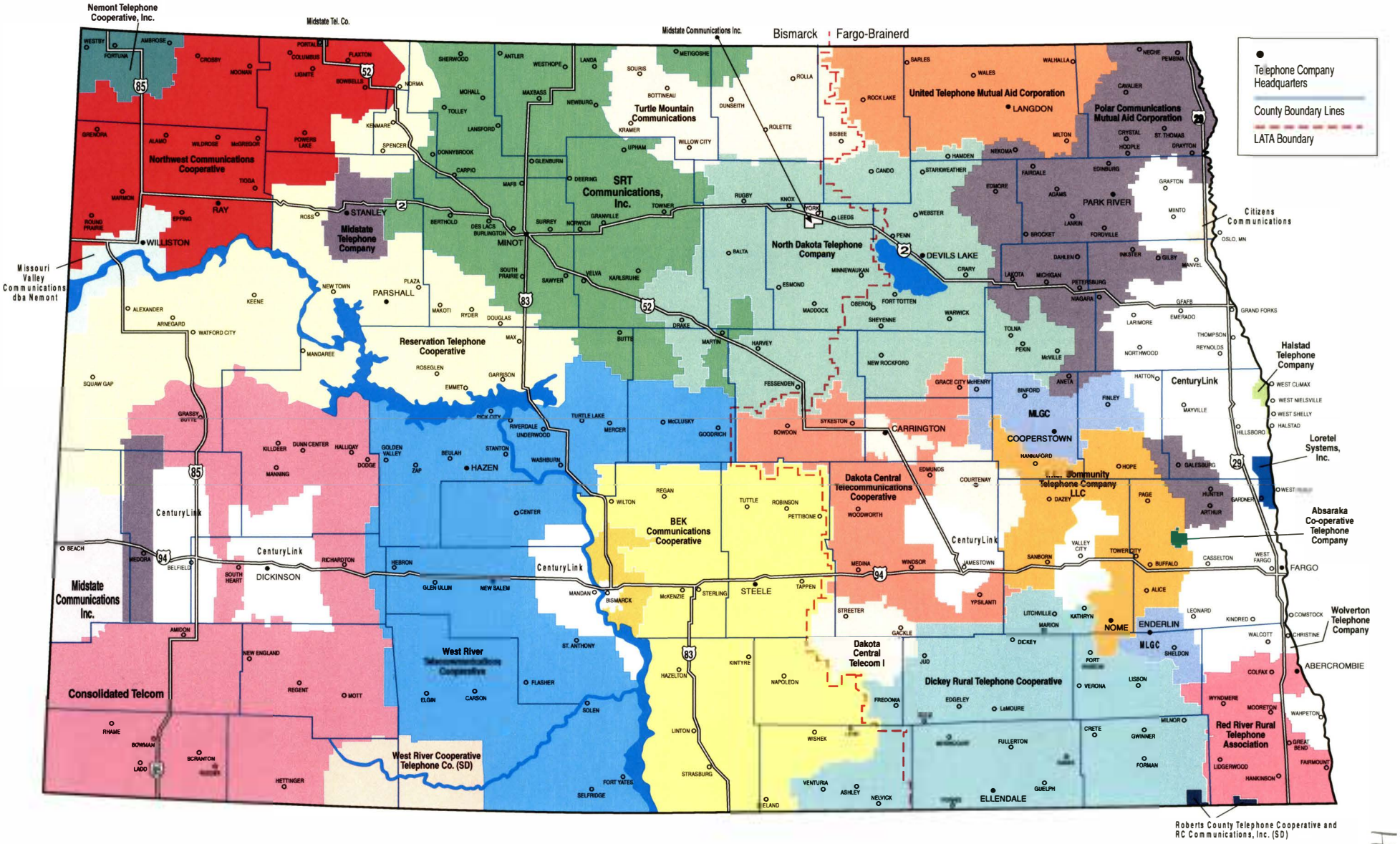
Similarly, in Minnesota, Burlington Northern argued before that State's Court of Appeals the State's statute that this bill is modeled upon was unconstitutional because it permits an uncompensated "taking" and the Minnesota law was preempted by Federal Law (49 USC Section10501). The Court of Appeals struck down both of Burlington Northern's constitutional claims.

Mr. Chairman, members of the committee, the Association believes the interests of both railroads and those seeking to cross railroad property are fairly addressed in House Bill 1362. We further believe that adopting a statute addressing such a critical step in the delivery of services to North Dakota residents is long overdue.

Members of the Broadband Association of North Dakota recommend a "DO PASS" on House Bill 1362.

#3

NORTH DAKOTA TELEPHONE EXCHANGE AREAS



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HB 1362
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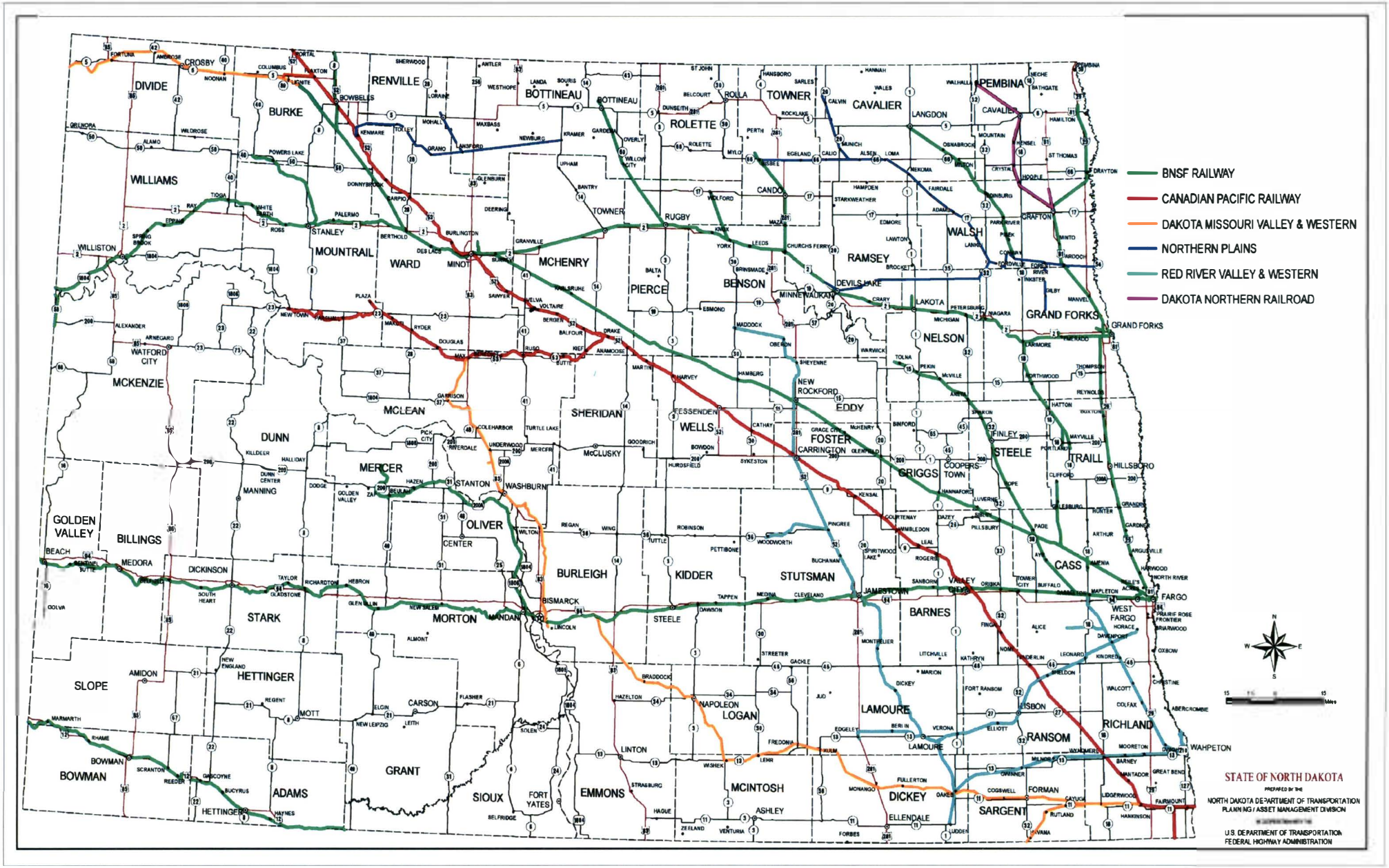
p. 1



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1-31-19
p. 3

R. SCOTT STEWART, PC

306 NINTH AVENUE, P.O. BOX 151, LANGDON, ND 58249-0151

R. SCOTT STEWART
ATTORNEY AT LAW

Telephone (701) 256-2851
Facsimile (701) 256-2852
e-mail address: sstewart@nd.gov

November 15, 2018

David Monson
313 Rainbow Road
Osnabrock, ND 58269

RE: United Telephone/Railroad Permits

Dear David:

I spoke earlier about the permitting process the United Telephone went through to try and bore under some railroad right-of-ways.

Just a little background on this particular incident. Ross Feil is in charge of construction for United Telephone and wanted five (5) permits from Burlington Northern initially they wanted $3,750.00 per permit. The permits were for five (5) locations in the western part of the Turtle Mountain Communications service area, and in a couple of them they were boring fiber to the farm and for only one (1) customer. They could have done all five sites in one day and they know the train schedule and would have done it when there was no trains. Ross and I were able to negotiate the permit fee down to $750.00 each but it took from approximately February to almost September to get to that process. The management company we were dealing with is out of Dallas and we tried to impress upon them that construction season in North Dakota does not last twelve months.

I was told at a recent legal seminar for the National Telephone Cooperative Association that the FCC through their broadband advisory comity is urging states to put a cap on the permit process and encourage states to try and pas legislation to speed up the permitting process.

I am enclosing a statue out of Minnesota, the talking points that were prepared in support of the legislation and also a model ordinance that the FCC has adopted.

Initially Burlington Northern wanted us to have a flagman at the site at United Telephone's cost and required that United Telephone have a two million dollar insurance policy in place.

The insurance part of it is not so onerous but to have a flagman there on a rural country road is simply ridiculous. I believe Ross was able to get around the flagman requirement this time.

For more information you can call Ross Feil at 256-5156.

If you have any questions, please feel free to contact me.

Sincerely,

SCOTT STEWART

SS:ts

CC: Ross Feil

Enclosure

#3
HB 1362
1-31-19
p. 5

Date: Jan. 29, 2019

TO: Representatives of the House Political Subdivisions Committee

FROM: Kent Schimke, DRN CEO/GM

RE: House Bill 1362

Ladies and Gentlemen,

I am writing you today in support of HB 1362.

Dickey Rural Telephone Cooperative (DRN) is a telecommunications/broadband cooperative that serves over 8,000 members with 4,280 miles of fiber optic cable and provides gigabit broadband throughout its 32 exchanges in southcentral/southeast North Dakota.

DRN deals with four railroad companies, Red River Valley and Western, Dakota Missouri Valley and Western, Canadian Pacific and Burlington Northern Santa Fe, in our service area. When DRN is asked to provide new service to a member that requires a fiber optic cable to be placed and/or constructed where a portion of the construction is required to cross below a railroad structure, all the above-mentioned railroad companies require a $750 non-refundable permit fee.

In addition to the permit fee, there is a crossing fee that ranges from $2,000 to $5,000. The additional crossing fee does vary each time and those variances seem to be related to location and length of crossing. These crossing fees have never been clearly defined by the railroad companies.

DRN encourages passage of HB 1362. It is time for North Dakota to adopt a law that provides guidelines for both utilities and railroads. The current approach is time consuming and unnecessarily expensive.

Please give HB 1362 a do-pass recommendation.

Sincerely,

Kent Schimke
CEO/General Manager

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1-31-19
p 6

SOUTH DAKOTA LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

CHAPTER 49-16A

INTRASTATE RAILROAD REGULATION

49-16A-100. Utility poles and wires on right-of-way--Commission to regulate. The Public Utilities Commission shall make rules and regulations for the setting of poles on railroad right-of-way, and the stringing or suspending of telephone, telegraph, electric, or other wires over the track of railroads.
Source: SDC 1939, § 52.0258; SDCL, § 49-7-3; SL 1980, ch 322, § 99.

49-16A-100.1. Right of utilities to cross over or under railroad right-of-way--Fee--Regulation and negotiation. Each electric utility, public utility, gas utility, municipal utility, municipal power agency, joint action agency, consumers power district, pipeline company, telecommunications company, and rural water system has the right to cross over or under the railroad right-of-way for the placement of facilities, upon payment of a reasonable fee, subject to reasonable regulation and negotiation in good faith as to location, placement, and compensation, when the placement of facilities is outside the public right-of-way.
Source: SL 2006, ch 232, § 2.

49-16A-100.2. Definitions relating to utility crossing of railroad right-of-way. Terms used in §§ 49-16A-100.2 to 49-16A-100.10, inclusive, mean:

(1) "Railroad," any nonpublic association or corporation, or other entity, engaged in operating a common carrier by rail or any other entity responsible for the management of crossings or collection of fees for the railroad;

(2) "Rural water system," an entity engaged in the treatment, distribution, and sale of water to rural consumers that was created by chapters 34A-5, 46A-3A, or 46A-9 or any nonprofit corporation engaged in such activity;

(3) "Utility," electric utility, public utility, gas utility, municipal utility, municipal power agency, joint action agency, consumers power district, pipeline company, telecommunications company, and rural water system;

(4) "Crossing," the construction, operation, repair, or maintenance of a facility, over, under, or across a railroad right-of-way by a utility. The term does not include longitudinal occupancy of railroad right-of-way;

(5) "Facility," any item of personal property placed over, across, or underground for use in connection with the storage or conveyance of water; sewage; electronic, telephone, or telegraphic communications; fiber optics; cablevision; electric energy; oil; gas; hazardous liquids; or other substances including pipes, sewers, conduits, cables, valves, lines, wires, manholes, or attachments;

(6) "Special circumstances," includes the railroad crossing's relationship to other property, location of the crossing in urban or other developed areas, the existence of unique topography or natural resources, or other dangers inherent in the particular crossing.
Source: SL 2014, ch 217, § 9; SL 2016, ch 223, § 1.

49-16A-100.3. Notice and application for placement of utility facility across railroad right-of-way. Any utility that intends to place a facility across a railroad right-of-way shall provide to the railroad notice of the placement at least thirty days before the placement. The notice shall include a completed crossing application, including a drawing showing the location of the proposed crossing and the railroad's property, tracks, and wires that the utility will cross. The utility shall submit the crossing application on a form provided or approved by the railroad, if available. The crossing application shall be sent to the railroad by certified mail, return receipt requested. The application shall be accompanied by the crossing fee as set forth in § 49-16A-100.5, and a certificate of insurance as required by § 49-16A-100.6.
Source: SL 2014, ch 217, § 1; SL 2016, ch 223, § 2.

49-16A-100.4. Commencement of construction across railroad right-of-way--Exception. Thirty days after the receipt by the railroad of the completed crossing application, the fee, and certificate of insurance, the utility may commence the construction of the crossing, unless the railroad notifies the utility in writing that the proposed crossing is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way. In all other instances the utility shall be deemed to have authorization to commence construction of the facility.
Source: SL 2014, ch 217, § 2; SL 2016, ch 223, § 3.

49-16A-100.5. Standard crossing fee--Flagging expense. Unless otherwise agreed by the parties, a utility that crosses a railroad right-of-way, other than a crossing within the public right-of-way, shall pay the railroad a one-time standard crossing fee of seven hundred fifty dollars for each crossing. The standard crossing fee is in lieu of any license, permit, application, processing fee, or any other fees or charges to reimburse the railroad for the direct expenses incurred by the railroad as a result of the crossing. No other fee may be assessed by the railroad or by any railroad agent, contractor, or assignee to the utility or to any agent or contractor of the utility. The utility shall also reimburse the railroad for any reasonable and necessary flagging expense associated with a crossing, based on the railroad traffic at the crossing, in addition to the standard crossing fee. No crossing fee is required if the crossing is located within a public right-of-way.
Source: SL 2014, ch 217, § 3; SL 2016, ch 223, § 4.

49-16A-100.6. Certificate of insurance or coverage for utilities crossing railroad right-of-way . The certificate of insurance or coverage submitted by a municipality shall include commercial general liability insurance or equivalent form with a limit of not less than one million dollars for each occurrence and an aggregate of not less than two million dollars. The certificate of insurance submitted by any other utility other than a gas or hazardous materials pipeline utility shall include commercial general liability insurance with a combined single limit of a minimum of two million dollars for each occurrence and an aggregate limit of at least four million dollars. The certificate of insurance submitted by a gas or hazardous materials pipeline utility shall include commercial general liability insurance with a combined single limit of a minimum of five million dollars for each occurrence and an aggregate limit of at least ten million dollars. The railroad may require protective liability insurance with a combined single limit of two million dollars for each occurrence and four million dollars aggregate. The coverage may be provided by a blanket railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual crossing. The coverage shall be required only during the period of construction, repair, or replacement of the facility.
Source: SL 2014, ch 217, § 4; SL 2016, ch 223, § 5.

49-16A-100.7. Notice of objection by railroad--Petition for dispute resolution--Appeal. If a railroad objects to the proposed crossing due to the proposal being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad shall provide notice of the objection and the specific basis of the objection to the utility by certified mail, return receipt requested. If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution of the disputed crossing application within thirty days from receipt of the objection. Before filing a petition, the parties shall confer in good faith in an attempt to

resolve the objection. If a petition is filed, the Public Utilities Commission, after notice and opportunity for hearing, must issue an order within sixty days of filing of the petition, during which time the crossing shall be stayed. The order may be appealed pursuant to chapter 1-26. The Public Utilities Commission shall assess its costs associated with a petition equitably against the parties.
Source: SL 2014, ch 217, § 5; SL 2016, ch 223, § 6.

49-16A-100.8. Additional requirements imposed by railroad--Objection by utility--Petition for resolution of objection--Appeal. If a railroad asserts in writing by certified mail return receipt requested that special circumstances exist, or imposes additional requirements upon a utility for crossing its lines, other than the proposed crossing being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the utility may object to one or more of the requirements. In such event, the utility shall provide notice of the objection and the specific basis of the objection to the railroad by certified mail, return receipt requested. If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution of the objection within thirty days from receipt of the objection. Before filing a petition, the parties shall confer in good faith in an attempt to resolve the objection. If a petition is filed, the Public Utilities Commission, within ninety days of filing the petition, shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the crossing. The order may be appealed pursuant to chapter 1-26. The Public Utilities Commission shall assess its costs associated with a petition equitably against the parties.
Source: SL 2014, ch 217, § 6; SL 2016, ch 223, § 7.

49-16A-100.9. Existing agreements--Eminent domain. Nothing in §§ 49-16A-100.2 to 49-16A-100.10, inclusive, prevents a railroad and a utility from continuing under an existing agreement or otherwise negotiating the terms and conditions applicable to a crossing or the resolution of any disputes relating to the crossing. Nothing in §§ 49-16A-100.2 to 49-16A-100.10, inclusive, impairs the authority of a utility to secure crossing rights by easement pursuant to the exercise of the power of eminent domain.
Source: SL 2014, ch 217, § 7.

49-16A-100.10. Application of §§ 49-16A-100.2 to 49-16A-100.9. Sections 49-16A-100.2 to 49-16A-100.9, inclusive, apply to:

(1) Any crossing in existence before July 1, 2014 if an agreement concerning the crossing has expired or is terminated. In such instance, if the collective amount of seven hundred fifty dollars has been paid to the railroad during the existence of the crossing, no additional fee is required; and

(2) Any crossing commenced on or after July 1, 2014.
Source: SL 2014, ch 217, § 8.

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237.045 RAILROAD RIGHTS-OF-WAY; CROSSING OR PARALLELING BY UTILITIES.

Subdivision 1. **Definitions.** (a) For the purposes of this section, the following terms have the meanings given them.

(b) "Crossing" means a utility facility constructed over, under, or across a railroad right-of-way. The term does not include longitudinal occupancy of railroad right-of-way.

(c) "Facility" or "utility facility" means any item of personal property placed over, across, or underground for use in connection with the storage or conveyance of:

(1) water;

(2) sewage;

(3) electronic, telephone, or telegraphic communications;

(4) fiber optics;

(5) cable television;

(6) electric energy;

(7) oil;

(8) natural gas; or

(9) hazardous liquids.

Facility includes, but is not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments.

(d) "Parallel" or "paralleling" means a utility facility that runs adjacent to and alongside the lines of a railroad for no more than one mile, or another distance agreed to by the parties, after which the utility facility crosses the railroad lines, terminates, or exits the railroad right-of-way.

(e) "Railroad" means any association, corporation, or other entity engaged in operating a common carrier by rail, or its agents or assigns, including any entity responsible for the management of crossings or collection of crossing fees.

(f) "Utility" means cooperative electric association, electric utility, public utility, transmission company, gas utility, municipal utility, municipal power agency, municipality, joint action agency, pipeline company, rural water system, or telephone, telegraph, telecommunications, cable, or fiber optic carrier. Utility includes contractors or agents.

Subd. 2. **Application.** (a) This section applies to:

(1) any crossing in existence before July 1, 2016, if an agreement concerning the crossing has expired or has been terminated. In such instance, if the collective amount that equals or exceeds the standard crossing fee under subdivision 6 has been paid to the railroad during the existence of the crossing, no additional fee is required; and

(2) any crossing commenced on or after July 1, 2016.

(b) This section does not apply to a crossing or paralleling of a large energy facility, as defined in section 216B.2421, subdivision 2, regardless of length.

Subd. 3. **Right-of-way crossing; application for permission.** (a) Any utility that intends to place a facility across or upon a railroad right-of-way shall request prior permission from the railroad.

(b) The request must be in the form of a completed crossing application, including an engineering design showing the location of the proposed crossing and the railroad's property, tracks, and wires that the utility will cross. The engineering design must conform with guidelines published in the most recent edition of the (1) National Electric Safety Code, or (2) Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association. The utility must submit the crossing application on a form provided or approved by the railroad, if available.

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(c) The application must be accompanied by the standard crossing fee specified in subdivision 6 and evidence of insurance as required in subdivision 7. The utility must send the application to the railroad by certified mail, with return receipt requested.

(d) Within 15 calendar days of receipt of an application that is not complete, the railroad must inform the applicant regarding any additional necessary information and submittals.

Subd. 4. **Inductive interference study.** (a) A railroad may require an electric utility to conduct an inductive interference study if:

(1) the facility is for an electric energy transmission line of at least 125 kilovolts; and

(2) in accordance with guidelines in the National Electric Safety Code and the Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association, the railroad reasonably determines that the proposed facility poses a material possibility of creating induction issues or interference with railroad property.

(b) The utility must arrange and pay for the study, perform and pay for any costs of modifications to the proposed facility, and pay for any costs of modifications to railroad property that are necessary to ensure safe and reliable railroad operations. The study must be performed by a qualified engineer approved by the railroad.

(c) A utility facility for which an inductive interference study has been performed under this subdivision may not be energized until at least 30 calendar days after the railroad receives notice from the utility that the facility is ready to be energized. Within 30 days of receiving notice that the facility is ready to be energized, the railroad shall conduct any appropriate tests to ensure that there will not be any interference with safe operation of the railroad following energization.

Subd. 5. **Right-of-way crossing; construction.** Beginning 35 calendar days after the receipt by the railroad of a completed crossing application, crossing fee, and certificate of insurance, the utility may commence the construction of the crossing unless the railroad notifies the utility in writing that the proposed crossing or paralleling is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way.

Subd. 6. **Standard crossing fee.** (a) Unless otherwise agreed by the parties or determined under section 237.04, a utility that crosses a railroad right-of-way, other than a crossing within a public right-of-way, must pay the railroad a onetime standard crossing fee of $1,250, adjusted as provided in paragraph (e), for each crossing. Except as otherwise provided in this subdivision, the standard crossing fee is paid in lieu of any license, permit, application, processing fee, or any other fee or charge to reimburse the railroad for direct expenses incurred by the railroad as a result of the crossing. No other fee or charge may be assessed to the utility by the railroad.

(b) In addition to the standard crossing fee, the utility shall also reimburse the railroad for any reasonable and necessary flagging expense associated with a crossing, based on the railroad traffic at the crossing.

(c) No crossing fee is required if the crossing is located within a public right-of-way.

(d) The placement of a single conduit and its content is a single facility. No additional fees are payable based on the individual fibers, wires, lines, or other items contained within the conduit.

(e) Annually each May 1, the standard crossing fee under paragraph (a) must be adjusted based on the percentage change in the annual average producer price index for the preceding year compared to the year prior to the preceding year. Each adjustment is effective for applications submitted on or after June 1. The producer price index is final demand, finished consumer energy goods, as prepared by the Bureau of Labor Statistics of the United States Department of Labor.

Subd. 7. **Certificate of insurance; coverage.** (a) The certificate of insurance or coverage submitted by:

(1) a municipal utility or municipality must include commercial general liability insurance or an equivalent form with a limit of at least $1,000,000 for each occurrence and an aggregate of at least $2,000,000;

(2) a utility providing natural gas service must include commercial general liability insurance with a combined single limit of at least $5,000,000 for each occurrence and an aggregate limit of at least $10,000,000; or

(3) a utility not specified in clauses (1) and (2) must include commercial general liability insurance with a combined single limit of at least $2,000,000 for each occurrence and an aggregate limit of at least $6,000,000.

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(b) The railroad may require protective liability insurance with a combined single limit of $2,000,000 for each occurrence and $6,000,000 aggregate. The coverage may be provided by a blanket railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual crossing. The coverage is required only during the period of construction, repair, or replacement of the facility.

(c) The insurance coverage under paragraphs (a) and (b) must not contain an exclusion or limitation related to railroads or to activities within 50 feet of railroad property.

(d) The certificate of insurance must be from an insurer of the utility's choosing.

Subd. 8. **Objection to crossing; petition to Public Utilities Commission.** (a) If a railroad objects to the proposed crossing or paralleling due to the proposal being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad must notify the utility of the objection and the specific basis for the objection. The railroad shall send the notice of objection to the utility by certified mail, with return receipt requested.

(b) If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for assistance via mediation or arbitration of the disputed crossing application. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

(c) If a petition is filed, the Public Utilities Commission must issue an order within 120 days of filing of the petition. The order may be appealed under chapter 14 and section 216B.27. The Public Utilities Commission must assess the costs associated with a petition equitably among the parties.

Subd. 9. **Additional requirements; objection and petition to Public Utilities Commission.** (a) If a railroad imposes additional requirements on a utility for crossing its lines, other than the proposed crossing being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the utility may object to one or more of the requirements. If it objects, the utility shall provide notice of the objection and the specific basis for the objection to the railroad by certified mail, with return receipt requested.

(b) If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution or modification of the additional requirements. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

(c) If a petition is filed, the Public Utilities Commission shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the crossing. The Public Utilities Commission must issue an order within 120 days of filing of the petition. The order may be appealed under chapter 14 and section 216B.27. The Public Utilities Commission shall assess the costs associated with a petition equitably among the parties.

Subd. 10. **Operational relocation.** (a) A railroad may require a utility to relocate a facility when the railroad determines that relocation is essential to accommodate railroad operations, and the relocation is not arbitrary or unreasonable. Before agreeing to the relocation, a utility may require a railroad to provide a statement and supporting documentation identifying the operational necessity for requesting the relocation. A utility must perform the relocation within a reasonable period of time following the agreement.

(b) Relocation is at the expense of the small utility. A standard fee under subdivision 6 may not be imposed for relocation.

Subd. 11. **Existing agreements.** Nothing in this section prevents a railroad and a utility from continuing under an existing agreement, or from otherwise negotiating the terms and conditions applicable to a crossing or the resolution of any disputes relating to the crossing. A utility may elect to undertake a crossing or paralleling under this section or section 237.04. Nothing in this section impairs the authority of a utility to secure crossing rights by easement through exercise of the power of eminent domain.

History: *2016 c 180 s 2*

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Draft 7/19/18

Broadband Deployment Advisory Committee

State Model Code for Accelerating Broadband Infrastructure Deployment and Investment

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State Model Code for Accelerating Broadband Infrastructure Deployment and Investment

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ARTICLE 6: SPECIAL PROVISIONS FOR RAILROAD CROSSINGS

1. Title of Public Right-of- Way for Railroad Crossings

Notwithstanding any other provisions, when Railroad operations cross on a Public Right-of-Way owned by the relevant Authority, the title or interest held by the Authority in such Public Right-of-Way shall be retained by the Authority for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes; except that such Public Right-of-Way shall not be used by members of the general public without permission of the Authority as managed by the Manager. The Authority shall allow abutting farm operations to use the land over which the Public Right-of-Way passes for agricultural purposes. Unless use and occupancy of Railroad rights-of-way adversely affect Railroad safety, Broadband Facilities and wireless and other telecommunications Facilities that are installed along or within the Railroad right-of-way in compliance with applicable operations and safety standards at the time of installation are consistent with existing and future transportation purposes.

2. Rights of Access to Railroad Crossings

2.1. Application

2.1.1. This Article applies to:

(1) any Crossing in existence before the effective date of this Model Code if an agreement concerning the Crossing has expired or has been terminated. In such instance, if the collective amount that equals or exceeds the standard Crossing fee under subsection 2.4. has been paid to the Railroad during the existence of the Crossing, no additional fee is required; and

(2) any Crossing commenced on or after the effective date of this Article.

2.2. Railroad Right-of-Way Crossing; Application for Permission

2.2.1. Any Communications Provider or Network Support Infrastructure Owner that intends to place a Facility across or upon a Railroad right-of-way shall request prior permission from the Railroad.

2.2.2. The request must be in the form of a completed Crossing Application, including an engineering design showing the location of the proposed Crossing and the Railroad's property, tracks, and wires that the Communications Provider or Network Support

Infrastructure Owner will cross. The engineering design must conform with guidelines published in the most recent edition of the (1) National Electric Safety Code, or (2) Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association. The Communications Provider or Network Support Infrastructure Owner must submit the Crossing Application on a form provided or approved by the Railroad, if available.

2.2.3. The Application must be accompanied by the standard Crossing fee specified in subsection 2.4. and evidence of insurance as required in subsection 2.5. The Communications Provider or Network Support Infrastructure Owner must send the Application to the Railroad by certified mail, with return receipt requested.

2.2.4. Within 15 calendar days of receipt of an Application that is not complete, the Railroad must inform the Applicant regarding any additional necessary information and submittals.

2.3. Railroad Right-of-Way Crossing; Construction

Beginning 35 calendar days after the receipt by the Railroad of a completed Crossing Application, Crossing fee, and certificate of insurance, the Communications Provider or Network Support Infrastructure Owner may commence the construction of the Crossing unless the Railroad notifies the Communications Provider or Network Support Infrastructure Owner in writing that the proposed Crossing or Paralleling is a serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way.

2.4. Standard Crossing Fee

2.4.1. Unless otherwise agreed by the parties, a Communications Provider or Network Support Infrastructure Owner that crosses a Railroad right-of-way, other than a Crossing within a Public Right-of-Way, must pay the Railroad a onetime standard Crossing fee of $500 per Crossing adjusted as provided in Subsection 2.4.5, for each Crossing. Except as otherwise provided in this subdivision, the standard Crossing fee is paid in lieu of any license, permit, Application, processing fee, or any other fee or charge to reimburse the Railroad for direct expenses incurred by the Railroad as a result of the Crossing. No other fee or charge may be assessed to the Communications Provider or Network Support Infrastructure Owner by the Railroad.

2.4.2. In addition to the standard Crossing fee, the Communications Provider or Network Support Infrastructure Owner shall also reimburse the Railroad for any reasonable and necessary flagging expense associated with a Crossing, based on the Railroad traffic at the Crossing.

2.4.3. No Crossing fee is required if the Crossing is located within a Public Right-of-Way.

2.4.4. The placement of a single Conduit and its content is a single Facility. No additional fees are payable based on the individual fibers, wires, lines, or other items contained within the Conduit.

2.4.5. Annually, the standard Crossing fee under Subsection 2.4.1 must be adjusted based on the percentage change in the annual average producer price index for the preceding year compared to the year prior to the preceding year. Each adjustment is effective for Applications submitted on or after July 1. The producer price index is final demand, finished consumer energy goods, as prepared by the Bureau of Labor Statistics of the United States Department of Labor.

2.5. Certificate of Insurance; Coverage

2.5.1. The certificate of insurance or coverage submitted by:

(1) a municipal Utility or municipality must include commercial general liability insurance or an equivalent form with a limit of at least $1,000,000 for each occurrence and an aggregate of at least $2,000,000;

(2) a Utility providing natural gas service must include commercial general liability insurance with a combined single limit of at least $5,000,000 for each occurrence and an aggregate limit of at least $10,000,000; or

(3) a Communications Provider or Network Support Infrastructure Owner not specified in Subsections (1) and (2) must include commercial general liability insurance with a combined single limit of at least $2,000,000 for each occurrence and an aggregate limit of at least $6,000,000.

(4) the Railroad may require protective liability insurance with a combined single limit of $2,000,000 for each occurrence and $6,000,000 aggregate. The coverage may be provided by a

blanket Railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual Crossing. The coverage is required only during the period of construction, repair, or replacement of the Facility.

(5) The insurance coverage under Subsections (1) and (2) of 2.5.1. must not contain an exclusion or limitation related to railroads or to activities within 50 feet of Railroad property.

2.5.2. The certificate of insurance must be from an insurer of the Communications Provider's or Network Support Infrastructure Owner's choosing.

2.6. Objection to Crossing; petition to State Regulatory Authority

2.6.1. If a Railroad objects to the proposed Crossing or Paralleling due to the proposal being a serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way, the Railroad must notify the Communications Provider or Network Support Infrastructure Owner of the objection and the specific basis for the objection. The Railroad shall send the notice of objection to the Communications Provider or Network Support Infrastructure Owner by certified mail, with return receipt requested.

2.6.2. If the parties are unable to resolve the objection, either party may petition the Manager for assistance via mediation or arbitration of the disputed Crossing Application. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

2.6.3. If a petition is filed, the Manager must issue an order within 120 days of filing of the petition. The order may be appealed. The Manager must assess the costs associated with a petition equitably among the parties.

2.7. Additional Requirements; Objection and Petition to Manager

2.7.1. If a Railroad imposes additional requirements on a Communications Provider or Network Support Infrastructure Owner for crossing its lines, other than the proposed Crossing being a serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way, the Communications Provider or Network Support Infrastructure Owner may object to

one or more of the requirements. If it objects, the Communications Provider or Network Support Infrastructure Owner shall provide notice of the objection and the specific basis for the objection to the Railroad by certified mail, with return receipt requested.

2.7.2. If the parties are unable to resolve the objection, either party may petition the Manager for resolution or modification of the additional requirements. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

2.7.3. If a petition is filed, the Manager shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the Crossing. The Manager must issue an order within 120 days of filing of the petition. The order may be appealed. The Manager shall assess the costs associated with a petition equitably among the parties.

2.8. Operational Relocation

2.8.1. A Railroad may require a Communications Provider or Network Support Infrastructure Owner to relocate a Facility when the Railroad determines that relocation is essential to accommodate Railroad operations, and the relocation is not arbitrary or unreasonable. Before agreeing to the relocation, a Communications Provider or Network Support Infrastructure Owner may require a Railroad to provide a statement and supporting documentation identifying the operational necessity for requesting the relocation. A Communications Provider or Network Support Infrastructure Owner must perform the relocation within a reasonable period of time following the agreement.

2.8.2. Relocation is at the expense of the Communications Provider or Network Support Infrastructure Owner. A standard fee under subsection 2.4 may not be imposed for relocation.

2.9. Existing Agreements

Nothing in this Article prevents a Railroad and Communications Provider or Network Support Infrastructure Owner from continuing under an existing agreement, or from otherwise negotiating the terms and conditions applicable to a Crossing or the resolution of any disputes relating to the Crossing. A Communications Provider or Network Support Infrastructure Owner may elect to undertake a Crossing or

Paralleling under this Article. Nothing in this Article impairs the authority of a Communications Provider or Network Support Infrastructure Owner to secure crossing rights by easement through exercise of the power of eminent domain.

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Testimony of James Walter

President/CEO, 702 Communications

In Support of HB1362

January 31, 2019

My name is James Walter, and I am the President/CEO of 702 Communications. Our company is located in Fargo, ND, and we provide telecommunication services throughout the West Fargo, Fargo, and Wahpeton areas including some properties in Minnesota.

When you think of telecommunications and video services; internet access, dial tone, long distance, Ethernet circuits, and cable TV might pop into your head. 702 provides all of these. We have approximately 200 miles of fiber cable in the previously mentioned cities and we place approximately one million five hundred thousand (1,500,000) dollars of facility each year in just the Fargo area.

In 2016, 702 Communications won a project to provide a national wireless company with a fiber network in Fargo and West Fargo. It required us to utilize fiber in our existing network, but also needed to construct more than twenty (20) miles of additional fiber. Included in these new fiber lines were five (5) BNSF railroad crossings. We started the permitting process in early April to allow for plenty of time to receive approval. Yet we didn't receive approved permits until July 17 – well into the construction phase of the project. Our first attempt to process permits resulted in permit fees of $750/crossing. However, before we received official approved permits, BNSF provided notification the rates they required for the permit fee would be changed to $3,700 and up to as much as $17,218/crossing. We were told that because we weren't a specific type of company we didn't qualify for the $750/permit rate. Our total bill for the five permits would now be $37,597. A substantial increase. During the course of almost

three months and threatened litigation we finally reduced our costs back to the original $750/crossing. This encounter just proves the need for approval of House Bill #1362.

House Bill #1362 will provide for a consistent time frame of 30 days to process a permit allowing utility companies assurance of obtaining permits to construct in a timely manner. It requires a consistent and reasonable fee to process permits where the utility is on private railroad property. Reasonable insurance coverage is required by the bill with the flexibility to obtain it as necessary. Which is actually beneficial to all parties. Yet on the other side, it allows the railroad companies to obtain reimbursement of flagging expenses, requires insurance coverage and most important of all, a safe construction process by the utility companies. This bill is modeled after laws in effect in both Minnesota and South Dakota. Our experience on Minnesota construction projects shows that it works very well.

House Bill #1362 strives to solve the issues our company faced during this experience. It seeks to reduce the permit timeframe, stop excessive costs, and keep pricing consistent for all utilities which puts us all on the same footing. The bill not only addresses utility company concerns, but also those of the railroad companies: documentation of utility crossings, insurance requirements, safety concerns, and a dispute resolution process. Overall, if passed, this bill would put to rest many issues the railroad companies and utility companies have in working with one another.

Again, We urge the committee's support of HB1362 as it allows for safe and timely utility crossings necessary to provide crucial services to the residents of North Dakota.

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HB 1362 Testimony

My name is Shane Hart and I am the CEO and General Manager of Reservation Telephone Cooperative or RTC as we are more widely known as. RTC is headquartered in Parshall, ND. RTC serves a 6,000 square mile area which includes large portions of McLean, Mountrail and McKenzie counties including the communities of Garrison, Max, Parshall, New Town, Watford City along with 12 other communities in those areas.

CP Rail and BNSF are the 2 railroad companies whose tracks run through RTC's service area. Historically, CP Rail and BNSF have charged RTC a $750 application fee. If the application is approved RTC then must submit a $5,000 permit fee to cross the railroads property. Flagging fees (if required by the railroad) are additional to the $5,000 permit fee. The most recent experience with this happened in October 2016 when RTC needed to plow fiber optic cable to a Verizon Cell Tower that was within about 100 yards of the railroad tracks and we needed to get fiber optic cable from the south side of the railroad tracks to the north side of the railroad tracks. RTC's contractor bored under the railroad bed at the railroad's required depth of 10' and exited 75 feet on either side of the railroad tracks. $5,000 for this permit fee to cross underneath the tracks seems excessive when no railroad property is touched.

In discussion with my colleagues at the other rural telecom cooperatives, the $750 application fee seems consistent for all, but the permit fee to cross seems to be all over the board. Some pay as much as $5,000 and some don't have to pay anything at all.

I am here to ask you to vote yes on HB 1362 to mandate a clear fair process for all.

Thank you.

Shane Hart
CEO/General Manager
Reservation Telephone Cooperative

Shane Hart
CEO/General Manager

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Testimony of Deb Syvertsen
Red River Communications

IN SUPPORT OF HOUSE BILL NO. 1362

January 31, 2019

Mr. Chairman and members of the House Political Subdivisions Committee:

My name is Deb Syvertsen and I am the Plant Maintenance Manager at Red River Communications. I am here today to support House Bill No. 1362 on behalf of Red River Communications. Red River Communications is a member-owned cooperative in southeast ND, that was incorporated in 1951. We are headquartered in Abercrombie, ND and we serve 4,000 customers with 2,700 miles of fiber optic cable.

I would like to speak to you today about the rights of utilities needing to cross under the railroad rights-of-way. Our Cooperative has fiber optic cable and other communications infrastructure that crosses property owned and operated by CP Rail, BNSF, Soo Line, Red River Valley & Western, and Dakota Missouri Valley & Western railroads.

While we do not argue that there are costs involved and processes that need to be completed in the permitting process, we have had multiple documented issues with getting permits and licenses to cross the railroads' property and rights-of-way. The issues specifically are the length of time it takes to get a license or permit, the insurance requirements and the fees that we are charged. I have three examples I would like to share with you today.

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A RED RIVER RURAL TELEPHONE ASSOCIATION COMPANY

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We have a project planned to install three new fiber optic routes connecting four of our exchange offices as part of a maintenance plan to upgrade our critical infrastructure. We will need to cross the Soo Line Railroad (a subsidiary of CP Rail) in the cities of Lidgerwood, ND and Wyndmere, ND. Our engineering company Vantage Point Solutions submitted applications to Soo Line Railroad Company on August 24, 2018, with one thousand dollars ($1,000) in application fees, five hundred dollars ($500) for each application. On January 14th, 2019 we received the applications from the Soo Line Railroad. We waited four and a half months for the application to be processed through their engineering department. We are expecting to pay at least one thousand dollars ($1,000), up to ten thousand dollars ($10,000) more for two license fees. We don't know for sure what the additional fees will be, however. The last time we acquired licenses from Soo Line Railroad in 2015, they were five thousand dollars ($5,000) for each license.

Of particular note with this crossing is the fact that we were unable to place the much needed fiber optic cable in 2018 due to delays I have mentioned. This route will be replaced due to age and capacity issues.

Yesterday on January 30, 2019, we had crews working out in -35 temperature repairing a stretch of the old fiber optic cable due to a failure in the cable. Had we gotten the required permits in a timely manner in 2018, this route would have been replaced and we would not be in the position now to put our technicians at risk by having to repair the cable in life threatening conditions. The railroads' inability to issue permits in a timely manner has prevented us from doing preventative maintenance to critical infrastructure. While multiple redundant routes are in place throughout our network, a failure of this infrastructure has the potential to put public safety at risk due to an inability to place phone calls and carry other important network traffic.

The insurance requirements that we are required to purchase before we will receive a "Utility Occupancy License" are listed in detail within the application for a crossing permit. The insurance requirements are now far greater that any we have had with previous licenses.

Our Commercial General Liability Insurance requirement has increased from one million dollars to two million dollars. The Automobile Liability and Property Damage limits have increased from one million dollars to two million dollars. A Railroad Protective Liability Insurance Policy is required with limits of five million dollars per occurrence and ten million dollars per aggregate. The cost of the Railroad Protective Liability policy is four thousand five hundred ($4,500) dollars. The previous requirements for the Railroad Protective Liability were two million dollars and 6 million dollars, and the cost of that policy was one thousand eight hundred dollars ($1,800). That is an increase of two thousand seven hundred dollars ($2,700). There is an additional policy required, a Contractor's Pollution Liability Insurance with a limit of two million dollars. The Contractor's Pollution Liability Insurance has not been a requirement in previous license applications. I have spoken to our insurance agent and he has never written this type of policy for a communications company crossing a railroad. At this time, I don't know what the contractor's Pollution Liability policy will entail and what it will cost.

Because the limits of the insurances are so much higher than in the past, I have tried to contact the Real Estate Department at Soo Line Railroad. They have not answered any of my calls or returned my messages. I also spoke to the Right of Way Specialist at Vantage Point Solutions who prepared the application and she had the same problem. For several months she called and left messages and they did not return her calls.

We waited four and a half months for the applications to be processed and the choices we have now, are to pay the higher costs for the higher limit policies or wait until we can finally talk to someone at the railroad and hopefully have the limits reduced to what was required in the past.

I am expecting it will take at least 7-8 months to complete this application, when I take into consideration what has happened over the last 5 months. The lack of clear and consistent processes in the permitting process directly impacts our Cooperative's ability to maintain its network.

In September 2018 we received a request for fiber optic service to a new electric substation that was being built for Central Power Electric Coop just north of Wahpeton ND. The crossing application was sent to Red River Valley and Western Railroad on September 18, 2018. Red River Valley and Western operates on BNSF Rail so the permitting is done at that level. After approximately 6 weeks, we had not heard anything on our permit and we were getting to the end of construction season. This new power substation will serve as a distribution substation to 6 electric cooperatives serving over 65,000 customers and was needing our service. A call was made to the public service commission, who in turn reached out to the railroad. We were given an email saying it was okay to proceed. We did go ahead and proceed with our work and were able to complete it before the ground froze up. We received our permit on December 14th.

In 2015 we had a need to cross Soo Line Railroad in Hankinson. In that crossing there was one active rail line and one that had been abandoned and the rail had been removed. We were required to have a license to cross the abandoned bed and were still required to use a 10" steel casing. The extra cost to install the 10" steel casing was sixteen thousand four hundred dollars ($16,400). The cost of the license was five thousand dollars ($5,000) plus the required insurance which was one thousand eight hundred dollars ($1,800). We paid twenty-three thousand two hundred dollars ($23,200) to cross property that the Soo Line Railroad owned where the rail had been removed.

Ultimately, we are looking for three things: reasonable timelines, standardized insurance requirements and standardized costs for crossing.

Four to six or more months is not a reasonable timeframe. The construction season is typically May through October in North Dakota. If we get a request for service that requires a railroad crossing, we would need to start the application before July 1st to be able to expect to get our permit completed in time to do the work in the same year. That is not reasonable.

We need standard insurance requirements. If the insurance limits were standardized, we could start the insurance quote and application at the same time that we start the railroad crossing application. That would cut two weeks out of the length of time needed to get a permit. The cost of these policies with the increased limits is a big factor. The difference in the cost of the Railroad Protective Policies was two thousand seven hundred dollars ($2,700) when the limits were increased.

We need standardized fees. We need to be able to budget for these crossings accurately. We need to be able give accurate quotes to our customers who are waiting to get service from us. When you factor in all the fees needed to cross a railroad, it could be anywhere from one thousand five hundred dollars ($1,500) to five thousand five hundred dollars ($5,500), plus the insurance. It should be noted that our neighbors in Minnesota and South Dakota have already passed legislation on this matter.

I encourage the committee to recommend DO PASS on House Bill No. 1362.

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January 31, 2019

To: House Political Subdivisions Committee – Representative Jason Dockter, chairman

RE: Support for HB 1362

From: Zac Smith, communications and government relations director, NDAREC

Chairman Dockter and members of the House Political Subdivisions committee, my name is Zac Smith, and I am testifying on behalf of the North Dakota Association of Rural Electric Cooperatives ("NDAREC") in support of House Bill 1362. We support this bill as it will provide economic certainty and efficient delivery of services for all North Dakota utilities.

The North Dakota Association of Rural Electric Cooperatives represents sixteen electric distribution cooperatives and five generation and transmission cooperatives providing the generation and distribution of electricity all across the state of North Dakota. Collectively, our member cooperatives provide more than half of all the retail electric power sold in the state. As you can imagine, such service requires going over and under a lot of railroad right of ways. Currently, the state has no policy in place, thus each railroad operating in the state has separate agreements with each member cooperative and sometimes for each individual crossing. This complexity leads to inefficient, disparate, and arbitrary fees, insurance coverages, and wait times.

House Bill establishes 1) a uniform crossing fee of $750 for going through a railroad right of way, 2) gives railroads a 30 day window to object to a utilities application before a utility can proceed with the work, 3) prohibits railroads from charging for use of a public right of way, and

4) protects the railroads by mandating prescribed levels of insurance coverage depending on the type of material or service crossing the property. These clear rules will prevent the current undue delays and expenses faced when crossing a railroad right of way.

In preparation for today's hearing I asked my members about their experience crossing railroad right of ways. Those experiences varied from small, inexpensive annual fees for crossing an abandoned right of way to nearly $10,000 each in costs for a permitted crossing. There was also a great disparity in the level, type and availability of the insurance required by the railroad for a crossing. Finding the insurance can prove not only costly but time consuming. Finally, House Bill 1362 provides a reasonable timeline for the permitting process that will allow utilities to complete construction within the short North Dakota construction season. This piece is critical, as even a two month permitting process can jeopardize a project's timeline. Without House Bill 1362, lengthy approval times of up to a year can occur.

House Bill 1362 will provide protections to the railroads operating in North Dakota while providing much needed consistency and a measure of certainty to the North Dakota electric cooperatives who must cross railroad rights of way in providing service to their member owners. It will also protect any customer who pays a water, electric, internet or phone bill from undue costs if railroad rights of way were crossed in providing that service. NDAREC urges a Do Pass on House Bill 1362.

That concludes my testimony. Thank you and I would be happy to try to answer any questions you may have.

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Testimony by Blaine Bilderback
BNSF Director of Corporate Real Estate Development

I. Introduction

My name is Blaine Bilderback, and I am Director of Real Estate and oversee all utility permits at BNSF. BNSF Railway consists of 32,500 miles in 28 states and three Canadian provinces. We receive over 2,000 applications for permits per year. When we process an application, we are processing an application for an entity to access and take our property, and we are creating a private contract between two parties.

Today I will walk through our current process, the rationale for why we handle the permits the way we do, and our concerns with HB 1362.

II. Current Process

I thought it would be helpful to walk through our existing process for permitting underground utilities through our property. The requirements/specifications for accessing and installing utilities on our property is also publicly available online in our BNSF Utility Accommodation Policy. The policy outlines our general policies and guidelines for utilities paralleling railroad property; utilities crossing railroad property; and plans, approvals, and procedures for utility installation. The policy was developed in the interest of safety, protection, utilization, and the accommodation of future BNSF development with due consideration given to public and private service afforded by adequate and economical utility installations.

Generally, the existing procedure is as follows:

1. First, the utility applies for the permit. That begins the process and the fee covers the time and expense for 3rd party personnel to check the proposed utility location against existing property ownership and utility maps, prepare maps for exhibits, and confirm the location of the proposed utility is available, that it is a safe option, and not disruptive to the current or future use of the right of way.
2. Next, if the utility location is found reasonable, the permit manager assembles the full permit application file. The costs for that process covers:
    a. the costs of our 3rd party real estate and engineering firms to keep systems and mapping up to date;
    b. correspondence with the applicant; and
    c. a full engineering review, which is conducted for the safety of the track, substructure of the track, construction workers during installation, and BNSF employees.
3. In a survey of permits from 2017-2018, the average time of a utility permit from the time BNSF received a completed application to the time BNSF turned around a contract was 22 days.
4. BNSF provides an umbrella railroad protective liability insurance policy that applicants are able to purchase rather than going into the private market. Anecdotally, we're told our insurance is about half of what it costs to buy in the private market, and even when applicants have the option to purchase on their own, they use BNSF insurance.
5. Federal rules also require a flagger be available in certain circumstances. Much of BNSF's 1,600 miles in North Dakota is main-line track and sees hundreds of trains a week. It's very important to have flagging available to keep railroad and construction workers safe. We thank the author for the recognition of this in the bill.

III. Concerns with the Bill

1. **Safety Concerns**
    a. The bill limits the railroads ability to require additional engineering review by limiting the amount of time we have to review the application to 30 days. In certain circumstances, this does not allow for adequate review of those utilities.
        i. This is especially true for high-risk utilities included in the bill, like oil, gas, electric energy and hazardous liquids.
        ii. Those utilities carry additional risk during construction and during the life of the utility under BNSF property.
        iii. It's unclear whether the safety exception included in the bill could be raised here, since a full review would need to take place before raising that exception.
    b. The bill also limits the railroads ability to require additional review and inspection during and after construction by limiting what the railroad is able to charge the utility.
        i. Occasionally, the railroad will require additional on-the-job inspection of a project to ensure the utility is properly installed and using the right materials.
        ii. Likewise, the railroad will sometimes double-check a utilities work to ensure correct installation of the project.
        iii. Again, it's unclear whether the safety exception included in the bill could be raised here, since a full review would need to take place before raising that exception.
    c. The bill also allows utilities to enter railroad property without safety protections such as training and a flagman after thirty days. This is a major safety concern for the railroad and for the utility, contractor and railroad employees. No one should enter railroad property without proper protections.
    d. Here are some examples of what can happen when construction is not done properly.
        i. AT&T cut a signal line during installation that provided control to crossing devices at a public crossing next to a school.
        ii. During a bore, the track embankment subsided that could have caused a derailment had a flagger not been present. Result required shutting the track down, which interrupted rail service.
        iii. Water line installation in the wrong location blocked access to a rail customer's property and interrupted service.

2. **Inhibits Growth to our Network**

The bill as drafted could harm our ability to expand to meet the needs of North Dakota customers. Right now, part of what we consider during utility installation permits is future potential use for that right of way. In our current process, we can often accommodate for that future potential use by simply working with the utility.

    a. Under the bill, Railroads can only object if there's a threat to safe operations or current use, but does not take into account potential future use of the right-of-way, such as expansion of a second line or siding, additional infrastructure owned by BNSF or a customer, technology like wayside detectors or signal systems (PTC), or other growth opportunities.
    b. BNSF has put $1.4 billion of investment into its infrastructure in North Dakota in the last five years alone – this is a lot of track and infrastructure in the ground. You can quickly see how important it becomes to know where all utilities are, and ensure future expansion plans are considered when approving utilities.

c. If the railroad requires the utility to move, the bill implies the utility has approval authority by requiring the railroad provide the utility the "operational necessity" for requesting a relocation BEFORE the utility has to agree. This could be a hindrance to growth and is likely federally preempted under the Interstate Commerce Commission Termination Act.

3. **Increases Cost of Rail Transportation**

The bill puts railroads in a situation where it's losing money for every permit application.

a. The fee of $750 is unacceptable in that it does not cover our costs of processing an application and does not increase over time. The bill also prohibits railroads from recovering direct expenses that the railroad incurs.
b. In Minnesota, BNSF litigated over a fee of $1,250, and the courts found that BNSF is able to collect the loss of value of the property through an inverse condemnation action. Through that action, BNSF is reimbursed by the utility for attorney's fees. That process is long and costly for all parties, and often times will result in an even higher fee than the simple application fee they pay now.

4. **Result in Costly Litigation for the Utilities, Railroads & State**

My colleague will address this in more detail, but the bill is in direct conflict with the US Constitution, the North Dakota Constitution and Federal Statute. We have seen this pass in other states, and in those states, we have already litigated and will continue to do so. This is a transportation corridor and strategic asset that BNSF owns as a private property owner whose business depends on complete control over a contiguous network of property, it's important BNSF and the State of North Dakota consider the implications of chipping away at those property rights.

IV. In Closing

1. **Address Unfortunate Circumstances**

We strive hard to be a good community and business partner. We take feedback seriously and will continue to work on our areas of opportunity when it comes to utility permits. We have and will continue to be very willing to sit-down with organizations who have questions or concerns relating to specific utility permits. We have demonstrated that willingness in North Dakota this past summer after a rural water issue was brought to our attention. Unfortunately we have not had the opportunity to sit-down with private entities with similar concerns.

We will look into the instances brought to our attention today during testimony.

2. **Vote do not pass.**

- **END TESTIMONY**

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Testimony by Lydia Bjorge
BNSF Executive Director of State Government Affairs

I. Introduction

My name is Lydia Bjorge and I am the Executive Director of State Government Affairs for BNSF Railway. I will address BNSF's legal concerns with this draft legislation under the North Dakota and federal constitutions as well as the federal Interstate Commerce Commission Termination Act, ICCTA.

II. Constitutional Concerns

Our first set of legal issues revolve around North Dakota and the US Constitution's entitlement to just compensation for any taking of property.

A taking of property happens when there's a permanent physical occupation of property, no matter how minimal the impact on the owner. The physical occupation of a railroad right-of-way by a utility, as contemplated in this bill, **is a taking** under the takings clause of the North Dakota and federal constitutions.

As such, there are three constitutional issues with the bill:

1. **The first constitutional issue is that HB 1362 Sets a Flat Fee for Any Taking instead of providing just compensation.**
    a. Property owners are entitled to receive just compensation for a taking of property under the US and North Dakota Constitutions' takings clause.
    b. The bill sets a flat fee and expressly states the payment is in lieu of the loss of land value as a result of the taking, regardless of any facts and circumstances related to the taking. **49-09.1-05**
    c. The bill later addresses a situation where a railroad alleges a loss of value. In that section, it places the sole burden on the railroad to pay for a certified appraisal. This further violates the longstanding US Supreme Court ruling that it is unconstitutional for the legislature to determine the amount of compensation for a taking.
    d. Other similar state statutes have faced constitutional scrutiny on the issue of a single, flat fee.
        i. **In Minnesota**, the Court of Appeals found the standard crossing fee does not represent a determination of just compensation for any taking, and that the issue can be addressed in condemnation proceedings if necessary.
        ii. **In Iowa and Wisconsin**, the courts heard the issue of constitutionality for similar flat fee crossing statutes, but the cases were decided on other grounds. In Wisconsin, the court noted that railroads possessed a colorable claim for constitutional deprivation of just compensation.
        iii. **North Dakota** has even stronger protections for landowners facing takings of private property baked into its constitution. In my final two constitutional points, you'll see that the North Dakota Constitution and state court precedence have unique provisions whereby HB 1362 would face even more judicial scrutiny than the other states.

So the utility is a taking of railroad property, and there isn't just compensation for the taking.

2. **The second constitutional issue is that even if there is just compensation for the property, the compensation itself is decided by an administrative agency, not a jury. This is a direct violation of the North Dakota Constitution, state rulings and ND Century Code.**
    a. The North Dakota Constitution Article 1, Section 16 states compensation [for any taking of private property] "shall be ascertained by a jury, unless a jury be waived."
    b. ND is one of a few states in the nation that require the issue of just compensation for a taking of property to be determined by a jury directly in its constitution. The other states where similar bills recently passed do not have this jury requirement provision in their constitutions.
    c. North Dakota case law and Century Code affirm these rights, and expressly require that any taking of private property be decided by a North Dakota district court and the issue of damages be decided by a jury.
    d. Instead, the bill before you proposes the PSC adjudicate the takings issues, including damages. Administrative agency decisions have limited court review and would not allow a jury to determine the issue of damages.
    e. By stripping the railroad of these private property owner protections, the bill is in direct violation of the North Dakota Constitution.

So the utility is taking railroad property; there isn't just compensation; and if the amount of compensation is challenged by the railroad, it's determined at an agency level instead of in front of a jury, as required by the North Dakota constitution.

3. **The third constitutional issue is that HB 1362 Proposes a Non-Governmental Quick-Take of Private Property.**
    a. As many of you know, North Dakota law protects property owners from potential abuses by non-governmental entities that seek to use the great power of condemnation by expressly prohibiting them from using a quick-take condemnation procedure.
    b. The North Dakota Constitution grants quick-take authority only to the state or any of its departments, agencies or political subdivisions.
    c. North Dakota courts have found that utilities are not permitted to condemn property via North Dakota's quick-take procedure under eminent domain statutes.
    d. In HB 1362, the bill sets-up a quick-take procedure by allowing a utility to simply file a application, pay $750 and provide proof of insurance, and then take possession of railroad property and commence construction within 30 days. The issue of inadequate compensation for the property is not an allowable objection to stop the utility from commencing construction.
    e. This taking occurs before all proceedings are completed by the public services commission.

So, the utility is a taking of railroad property, there isn't just compensation; and if the amount of compensation is challenged by the railroads, it's determined at an agency level instead of in front of a jury; and the bill allows for a quick-take by a non-governmental entity, which is prohibited. These unique provisions in the North Dakota constitution mean this legislation would face even greater judicial scrutiny than other states.

III. HB 1362 is Preempted by ICCTA

Those are the constitutional concerns with the bill, but we also believe the bill is federally preempt by the Interstate Commerce Commission Termination Act (ICCTA).

ICCTA grants the Surface Transportation Board exclusive jurisdiction over railroad regulation throughout the United States. The purpose of ICCTA was to centralize railroad regulation to prevent fragmented legislation state-by-state. Under the Supremacy Clause, state laws that are inconsistent with federal agency or Congressional policy reflected in ICCTA are preempted. ICCTA attempts to regulate property rights, such as adverse possession and condemnation. There are two substantive preemption issues in this bill:

1. First, the bill allows parallel, adjacent sometimes called longitudinal crossings or longitudinal occupancies. While the bill *attempts* to exclude longitudinal occupancies, allowing an adjacent facility that's one mile in length is the same as allowing a longitudinal occupancy. Courts have found longitudinal occupancies have more impact on railroad operations, and are therefore are of interest to the federal Surface Transportation Board, and preempted by ICCTA.
2. Second, the bill mandates important decisions such as the amount of insurance required, when a relocation of a utility is "essential to accommodate railroad operations", and when "special circumstances" exist that necessitate additional requirements for the utility. This type of piecemeal state regulation is what Congress sought to preempt when it passed ICCTA.

IV. In Conclusion

Existing North Dakota eminent domain laws already address all substantive and procedural aspects of a utility's proposed taking of railroad property. These procedures adequately protect railroads and all other owners of private property with guarantees of due process and just compensation. We ask that you vote do not pass on HB 1362.

Before you embark on such an unconstitutional approach, we respectfully recommend the constitutional issues I've raised today be looked at by legislative counsel.

Also, I'll reiterate Blaine's commitment to continue working with entities who have questions or concerns relating to utility permits. We welcome to the opportunity to sit-down with those organizations and work through those concerns.

- **END TESTIMONY**

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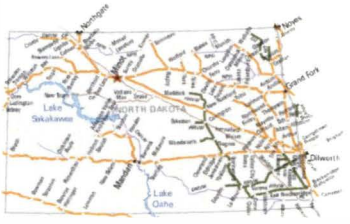
Vote Do Not Pass on HB 1362

Protect North Dakota's Strong Rail Network



Railroads need to be able to review and approve utility installations on their property to ensure accurate mapping; thorough safety reviews of engineering, substructure and utility; and planning for future rail expansion.

Vote Do Not Pass on HB 1362 because:

- **Reduces Safety**
  - Limits Railroad's rights for Additional Engineering/Safety Review
  - Limits Railroad's rights to require additional inspection
  - Allows Contractors to enter property without proper safety protocols
- **Unconstitutionality Leads to Costly Litigation**
  - Other states that have passed similar legislation have been confronted with litigation on the issue, which is costly for utilities, the railroad and ND Taxpayers
  - Allows a taking without just compensation, violating US Constitution
  - Allows any compensation recovered to be decided by an administrative agency, not a jury, violating the North Dakota Constitution
  - Allows private-entity Quick-Take process, violating the North Dakota Constitution
  - A court in Minnesota recently found state constitutional issues with similar legislation, and the North Dakota Constitution provides even stronger property rights than Minnesota's Constitution
- **Limits Growth**
  - Limits railroad's right to object to utility plans that hinder future railroad expansion
  - Requires utility review of future plans for railroad's own property
- **Costly Increases on Critical Transportation Provider**
  - Low fee does not cover processing permit costs, including processing the application, reviewing insurance coverage, engineer reviews, site review and other reviews needed to approve access to property
  - One private industry - the railroads is being asked to subsidize utilities

HB1362 is wrong for North Dakota.

- VOTE NO TO PROTECT SAFETY
- VOTE NO TO AVOID COSTLY LITIGATION
- VOTE NO TO SUPPORT RAIL GROWTH

Railroads own the property in and around its track. When utilities need to pass over or under BNSF property, they follow the publicly-available Utility Accommodation Policy. That policy was developed in the interest of safety, protection, utilization, and the accommodation of future BNSF development with due consideration given to public and private service afforded by adequate and economical utility installations.

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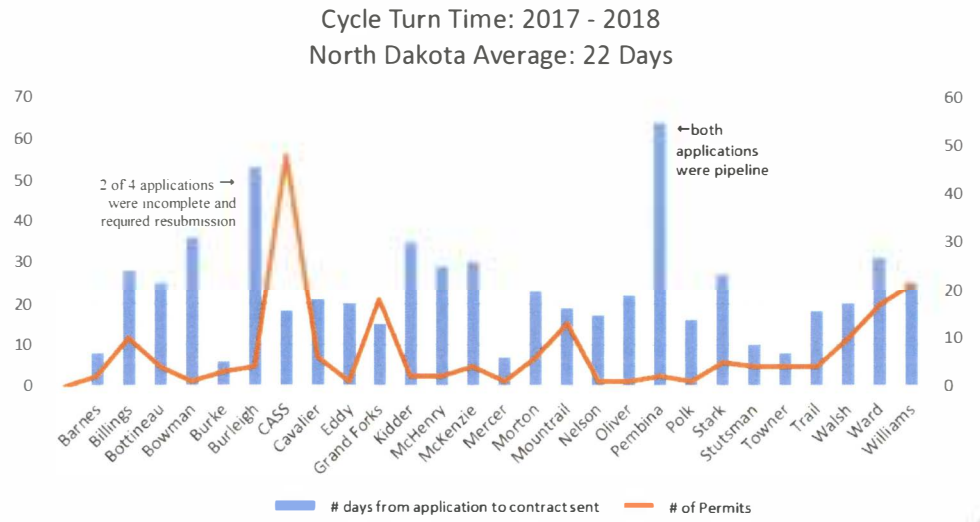
- **Fixes a Problem that Doesn't Exist**
  - Aims at restrictive regulations that react to exceptions, not the norm, in processing permits
  - The average turnaround cycle for a BNSF permit in ND is 22 days



HB 1362 is Unconstitutional Because:

- **HB 1362 Sets a Flat Fee for Any Taking – *Violating the U.S. Constitution.*** The US Supreme Court and U.S. Constitution require just compensation for a taking. The bill makes clear the $750 fee is in lieu of all damages due to taking, including the loss of land value. Minnesota recently found a similar standard crossing fee does not represent just compensation.

- **Just Compensation is decided by an Administrative Agency, not a Jury – *Violating the North Dakota Constitution.*** HB 1362 violates the North Dakota Constitution by taking private railroad property without just compensation, because compensation is decided by the PSC, not a Jury (N.D. Constitution Article 1, §16).

- **HB 1362 Proposes a Non-Governmental Quick-Take of Private Property by a Non-Governmental entity – *Violating the North Dakota Constitution.*** North Dakota constitution (Article 1, §16) and North Dakota Century Code prohibit non-governmental entities from using a quick-take condemnation procedure. HB 1362 sets-up a quick-take procedure by allowing a utility to simply file an application, pay $750 and provide proof of insurance, and then take possession of railroad property and commence construction within 30 days.

- **HB 1362 Is Preempted by ICCTA** by practically allowing longitudinal crossings (adjacent crossings up to one mile), and because of other business and operational regulations, the bill attempts to regulate issues of interest to the federal Surface Transportation Board, which is preempted by ICCTA.

BNSF RAILWAY

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#10
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1-31-19

Testimony of: Daniel Zink
Red River Valley & Western Railroad Company
Wahpeton, ND

Re: HB 1362
Date: January 31, 2019

Mr. Chairman and Committee members, my name is Dan Zink, with the Red River Valley & Western Railroad Company in Wahpeton. The RRVW is one of 4 short line railroads in ND. These small railroad companies operate over the most rural and light volume branch lines that were at risk of abandonment in the 1970s and 1980s, and took over operating these lines when the larger railroads were unable to operate the branch lines profitably. These companies serve primarily smaller rural communities, most of our customers are grain shippers or otherwise related to agriculture.

The RRVW owns its track and structures and has easement rights over the real estate. In seven years the RRVW will own all its track and land outright. Since BNSF still owns the real estate over which we operate, our permits for utility crossings are governed by BNSF forms and requirements. We act as a facilitator to help guide the permits through the process. In 7 years when we own the track and property we will be able to adopt our own rules related to the permits and insurance requirements.

While most of the permits move through the process smoothly, there are cases where it has been delayed, and almost always because of some delay in complying with the insurance requirements in the permit. The most common delay by far is the time it takes for an insurance company to send a copy of the policy to us for inclusion in the permit package. We have asked insurance companies repeatedly why a policy cannot be generated quickly in this technology age, and have not received a satisfactory answer. Recently, however, RRVW has found an insurance company who agrees to provide both a binder and the policy itself within 1-3 days of submitting an application. This would be a significant improvement in the timing and turnaround of the utility crossing permits issued on RRVW. I realize this only helps in a part of the State that RRVW operates in, but this could be an important improvement for many of the utility cooperatives who have facilities in central and southeast North Dakota. I believe that these kind of improvements can be accomplished without legislation, and is an example of the problems that can be resolved through continued discussions between railroad companies and the utility cooperatives in ND. I am aware of only 2 meetings that have been held where discussions have taken place to improve the permit process between railroads and the ND utility cooperatives. In both of these meetings, there was much misunderstanding on what the core issues were, and what may be done to improve the permitting process.

I believe the progress that has been made, and more can be made through continued discussion. For this reason I do not support HB 1362, and recommend that the Committee ask the parties to continue discussions on improving the crossing permit process.

I would be glad to answer any questions.

Respectfully,

Daniel L. Zink
Red River Valley & Western Railroad
Wahpeton, ND

#11
HB 1362

1-31-19
p. 1

M CHASE
State Legislative Director

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SHEET METAL | AIR | RAIL | TRANSPORTATION

SMART®

Transportation Division
North Dakota Legislative Board

Testimony of Jim Chase
Before the House Political Subdivisions Committee
In Opposition of HB 1362
January 31, 2019

Chairman Dockter and members of the House Political Subdivisions Committee, my name is Jim Chase. I represent SMART-Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation employees. SMART is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen and yardmasters; I am a locomotive engineer for BNSF Railway at Mandan.

I am here to testify in opposition to House Bill 1362 as written due to serious safety concerns with language contained in this bill.

Section 49-09.1-04 states that after 30 days of the receipt of the application by the railroad the utility may commence the construction of the crossing unless the railroad notifies the utility in writing that the proposed crossing is a serious threat to the safe operations of the railroad or the current use of the railroad right of way.

The railroads hire engineering and maintenance professionals who are tasked with keeping the tracks safe for the operations of trains. As you can imagine, railroads are inundated with utility crossing requests from all over the country and the 30-day notification period may not be realistic. In the event of a clerical error or if the railroad could not respond in time, the utility could commence work with no review as to the safety of the proposed utility crossing by the owner of the property.

It is important to bear in mind that there are federal requirements regarding roadbed, track gauge (width), alignment and track surface, any of which could be impacted by boring underneath the tracks. We need to insure that proposed crossings are reviewed and approved by the appropriate staff engineers in all cases to protect the track integrity.

Please refer to the excerpt below, taken from Page 3 of HB 1362. I recommend that the language in 49-09.1-04 be revised to remove the adjective "serious" from the phrase "serious threat" as ANY threat to the safe operations of the railroad should be sufficient cause for thorough review by the railroad prior to allowing the utility to commence construction.

I urge you to Vote "Do Not Pass" on HB 1362 as written.

Excerpt from HB 1362, Page 3:

Sixty-sixth Legislative Assembly

49-09.1-04. Commencement of construction across railroad right of way.

Thirty days after the receipt by the railroad of the completed crossing application, crossing fee, and certificate of insurance, the utility may commence the construction of the crossing, unless the railroad notifies the utility in writing that the proposed crossing is a **serious** threat to the safe operations of the railroad or to the current use of the railroad right of way. In all other instances, the utility is deemed to have authorization to commence construction of the facility.

HB1362 3/13/19 Att#1 p.1

NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360

Representative David Monson
District 10
P.O. Box 8
Osnabrock, ND 58269-0008

R: 701-496-3394
F: 701-496-3394
dmonson@nd.gov

COMMITTEES:
Appropriations - Education and Environment Division, Chairman

March 13, 2019
Senate IBL Committee
Testimony on HB 1362

Chairman Klein and members of the Senate IBL Committee, for the record I am Rep. David Monson of District 10 in far northeastern ND. I put this bill in for my constituents from Cavalier County who told me of long waits and delays as well as very high charges to bore under railroad tracks. These charges cost the citizens of my district in that they end up paying higher natural gas, electric, water, telephone, and other utility fees when these charges and delays get passed on to them to cover the boring costs assessed by the railroads. When I went to find people to co-sign on the bill, I found that this is not a unique problem in my corner of the state. As late as yesterday when one of my county commissioners was a guest of mine on the House floor, he told me it is still going on in my county where a utility was recently charged $3,000 for a simple boring project.

This bill is modeled after what is in law in SD and very similar to what is in statute in MN. I am not an authority on this topic, but I do have a letter from my county states attorney who prompted me to introduce this bill on behalf of my county and the utilities in my area. I only have the one copy of it, but I am sure your clerk can make copies for any of you who wish to add more paper to your file. There are others behind me who know much more about this topic and can answer your questions far better than I, but I will try to answer your questions if you wish.

Thank you for your favorable consideration of HB 1362.

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Att#1
p. 2

R. SCOTT STEWART, PC

306 NINTH AVENUE, P.O. BOX 151, LANGDON, ND 58249-0151

R. SCOTT STEWART
ATTORNEY AT LAW

Telephone (701) 256-2851
Facsimile (701) 256-2852
e-mail address: sstewart@nd.gov

November 15, 2018

David Monson
313 Rainbow Road
Osnabrock, ND 58269

RE: United Telephone/Railroad Permits

Dear David:

I spoke earlier about the permitting process the United Telephone went through to try and bore under some railroad right-of-ways.

Just a little background on this particular incident. Ross Feil is in charge of construction for United Telephone and wanted five (5) permits from Burlington Northern initially they wanted $3,750.00 per permit. The permits were for five (5) locations in the western part of the Turtle Mountain Communications service area, and in a couple of them they were boring fiber to the farm and for only one (1) customer. They could have done all five sites in one day and they know the train schedule and would have done it when there was no trains. Ross and I were able to negotiate the permit fee down to $750.00 each but it took from approximately February to almost September to get to that process. The management company we were dealing with is out of Dallas and we tried to impress upon them that construction season in North Dakota does not last twelve months.

I was told at a recent legal seminar for the National Telephone Cooperative Association that the FCC through their broadband advisory comity is urging states to put a cap on the permit process and encourage states to try and pas legislation to speed up the permitting process.

I am enclosing a statue out of Minnesota, the talking points that were prepared in support of the legislation and also a model ordinance that the FCC has adopted.

Initially Burlington Northern wanted us to have a flagman at the site at United Telephone's cost and required that United Telephone have a two million dollar insurance policy in place.

The insurance part of it is not so onerous but to have a flagman there on a rural country road is simply ridiculous. I believe Ross was able to get around the flagman requirement this time.

For more information you can call Ross Feil at 256-5156.

If you have any questions, please feel free to contact me.

Sincerely,

SCOTT STEWART

SS:ts

CC: Ross Feil

Enclosure

HB1362 3/13/19 Att #2

broadband association of north dakota
P.O. Box 1144 • Mandan, ND 58554
Phone 701-663-1099 • Fax 701-663-0707
www.broadbandnd.com

HOUSE BILL 1362

SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE

MARCH 13, 2019

DAVID CROTHERS
BROADBAND ASSOCIATION OF NORTH DAKOTA

My name is David Crothers from the Broadband Association of North Dakota. The Association represents all of the cooperative and independent broadband companies in the State. Those companies serve 96 percent of North Dakota's geographic territory.

The Association urges you to adopt House Bill 1362.

Members of the Association believe the State of North Dakota needs to adopt a policy governing utilities and others crossing railroad right-of-way. This bill does exactly that.

Currently, the railroads want a separate agreement with each company or industry for permits to cross. As a result, everyone pays a different fee, is required to have different insurance coverages, face arbitrary wait times for receiving permission to cross and some have no place to take disputes for resolution. Adoption of House Bill 1362 will bring fairness, predictability and an avenue for the affordable resolution of disputes between parties. Today, none of that exists. As a result, North Dakotans are waiting unreasonable amounts of time for access to high-speed Internet, businesses are forced to pay unreasonable costs, deployment of critical infrastructure is delayed, and it is more expensive to do business in the State.

The railroads and the utilities in North Dakota have had a contentious relationship over crossings throughout the years. Fifteen years ago, we were at a point similar to today.

Legislation was about to be introduced. Instead the telecom and cooperatively-owned electric companies entered into a master agreement with Burlington Northern. It has been a failure.

The cost of permits has escalated, some railroads have handed off the management of crossing agreements to out-of-State third parties, delays for approving permits have increased and new requirements are constantly being added by the railroads.

Today, we have six railroads operating in the State with their own widely disparate rules and fees. Their approach: it is our property, take it or leave it.

As a result, a utility may be told by the railroad it costs $750 for a permit; or $3,750 or $41,000. The fees charged by the six different railroads in the State to the utilities are arbitrary and inconsistent. The less negotiating power a company has, the higher the permit crossing. There are a number of telephone companies that operate in North Dakota that are not members of the Association either because they are too small or have no interest. Burlington Northern quotes a fee 500 percent higher for them to cross. However, the railroad periodically takes the same approach when dealing with the Association's own members. Union Pacific charges $750 for a "permit", but then adds $5,000 for a "crossing fee". The railroad routinely charges for the "crossing fee" to one utility and not to an adjacent telecom company. Burlington Northern has done the same and imposed the "crossing fee" in addition to a permit fee to some North Dakota telephone cooperatives.

Of particular concern is the time required to get a permit to cross railroad property. Wait times of 90 days and longer are not uncommon. I have included a letter from a representative of United Communications detailing the 7 month process it took them to get a permit from Burlington Northern. With North Dakota's abbreviated construction season the inaction by railroad companies and their designees routinely mean that projects are pushed into the next year, additional expenses are incurred, and individuals and businesses are forced to wait for services.

House Bill 1362 addresses these two critical issues that are holding back the deployment of high-speed Internet and broadband access in North Dakota. The language you have before you, however, is not new, nor is it novel, it is virtually identical

to statutes passed in Minnesota and South Dakota in the last few years. Those two States joined Nebraska and Iowa in recognizing that it is in the public interest to adopt legislation.

The Federal Communications Commission has also recognized the roadblock that railroads present to the deployment of critical infrastructure. In response they have created a Broadband Deployment Advisory Committee, which has a specific chapter devoted to model legislation for railroad crossings. It is very similar to the language found in House Bill 1362.

There are three elements to House Bill 1362:

1) Establishes a $750 fee for a permit to cross.
2) Allows railroads a 30-day window to approve or deny a permit.
3) Prohibits railroads from charging fees for use of public right-of-way.

The bill establishes clear, concise and fair rules for both railroads and utilities.

To initiate a crossing a telecom company must submit an application by registered mail in a form that has been approved by the railroad with a fee of $750, proof of the insurance coverages required under the law and an engineer's drawings of the proposed placement. The railroad has 30 days to deny the permit request. The North Dakota legislation matches South Dakota's $750 and 30-day provisions. Minnesota requires a fee of $1,250 and allows 35 days. The FCC's Broadband Deployment Advisory Committee proposes a $500 fee and 35 days.

Railroad companies in Minnesota and South Dakota also had a voice in the passage of their respective bills. Protections for railroads include:

1) Require a utility to include engineer drawings and proof of insurance specific to that project before the 30-day time limit for railroads to act begins.
2) Provides the opportunity for railroads to deny a permit if it believes the crossing would poses a threat to safe operations or the current use of the railroad right-of-way.

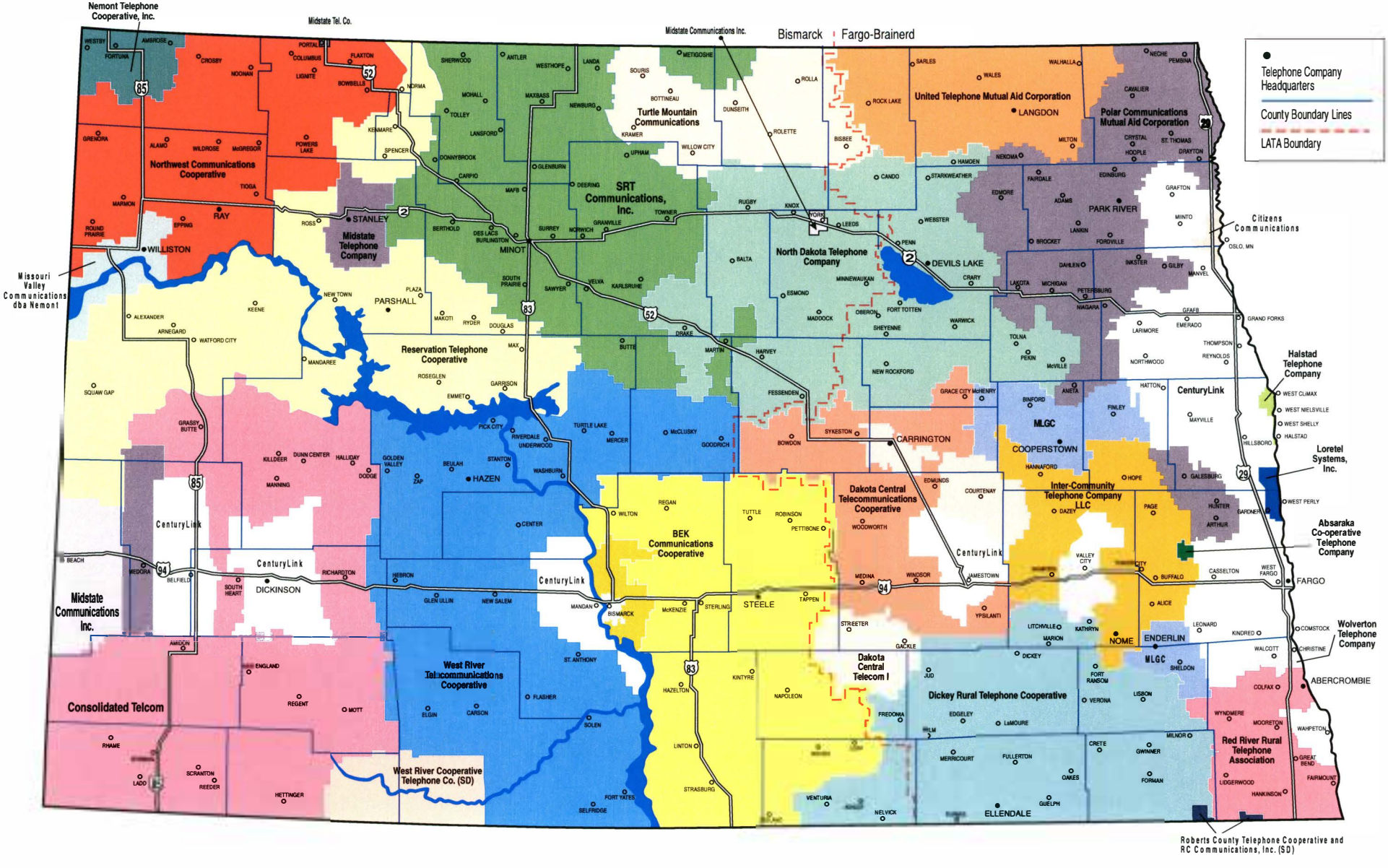
3) Provides the opportunity to go to the Public Service Commission when an agreement cannot be reached with the utilities for resolution of any disputes.
4) Allows railroads to charge utilities additional fees for flagging expenses during the project. The railroad has sole discretion to determine if the additional service is necessary.
5) Protects the railroads by mandating prescribed levels of insurance coverage depending on the type of material or service crossing the property. For example, broadband companies are required to buy a policy with coverage of $2-4 million. Gas and hazardous material providers are required to carry coverages of between $5-10 million.
6) The Association noted earlier that House Bill 1362 was similar to the South Dakota and Minnesota statutes. However, this bill actually expands the protection for railroads by giving them a third option for additional monies from the utilities when they assert a crossing will cause a reduction in the railroad's land value. The Association believes the diminution of value to a railroad associated with a fiber crossing is small, but if a railroad claims that its property value has diminished, it has a right to seek compensation for that value. The addition of this language gives railroads the right to demand additional compensation, but in order to do so, it must provide evidence of the reduced property value because of the boring.

Similarly, in Minnesota, Burlington Northern argued before that State's Court of Appeals the State's statute that this bill is modeled upon was unconstitutional because it permits an uncompensated "taking" and the Minnesota law was preempted by Federal Law (49 USC Section10501). The Court of Appeals struck down both of Burlington Northern's constitutional claims.

Mr. Chairman, members of the committee, the Association believes the interests of both railroads and those seeking to cross railroad property are fairly addressed in House Bill 1362. We further believe that adopting a statute addressing such a critical step in the delivery of services to North Dakota residents is long overdue.

Members of the Broadband Association of North Dakota recommend a "DO PASS" on House Bill 1362.

NORTH DAKOTA TELEPHONE EXCHANGE AREAS



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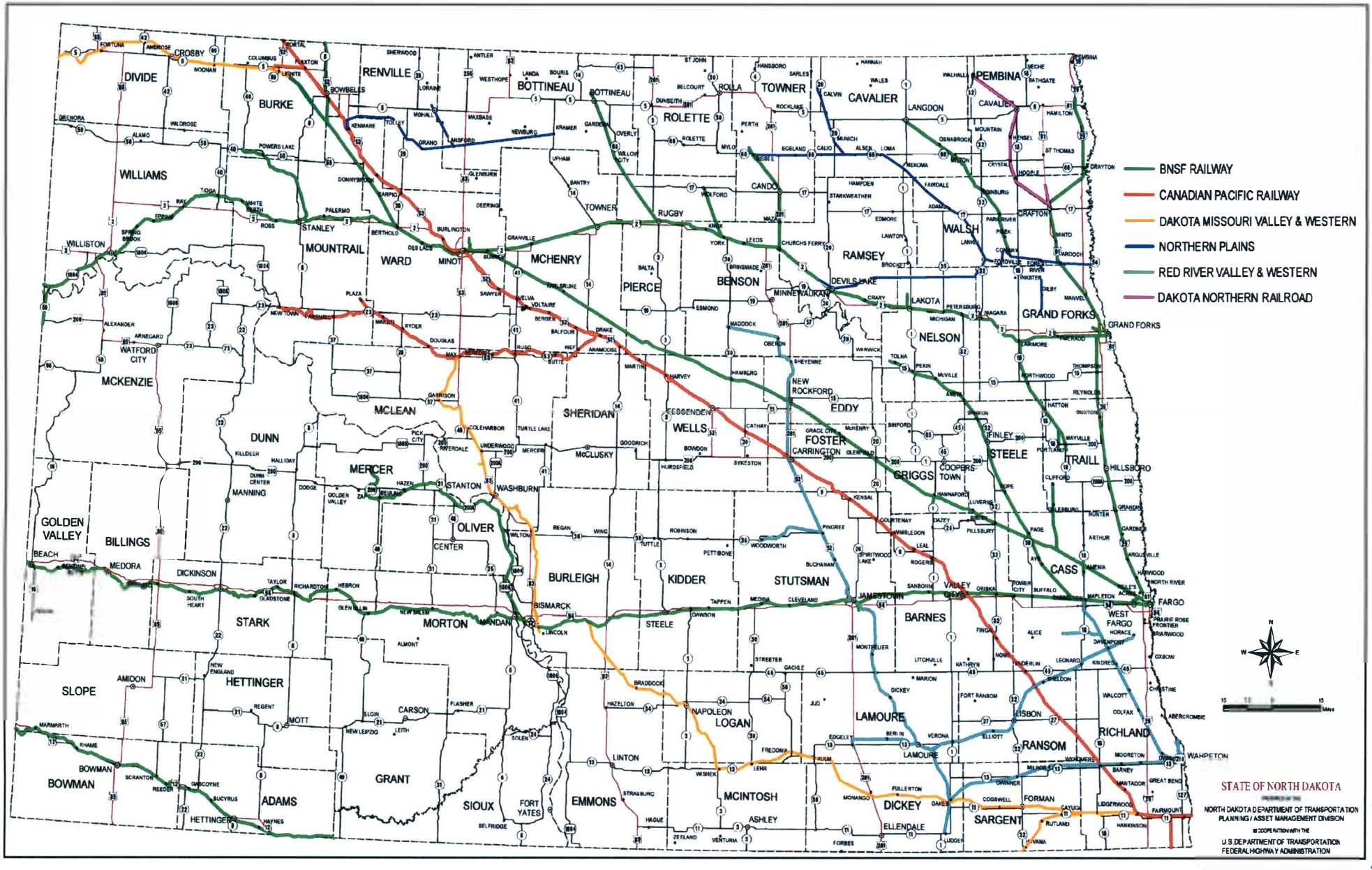

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1 of 6

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November 15, 2018

David Monson
313 Rainbow Road
Osnabrock, ND 58269

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For more information you can call Ross Feil at 256-5156.

If you have any questions, please feel free to contact me.

Sincerely,

SCOTT STEWART

SS:ts

CC: Ross Feil

Enclosure

HB1362 3/13/19 Att #2 p. 9

Date: March 13, 2019

TO: Members of the Senate Industry, Business and Labor Committee

FROM: Kent Schimke, DRN CEO/GM

RE: House Bill 1362

Ladies and Gentlemen,

I am writing you today in support of HB 1362.

Dickey Rural Telephone Cooperative (DRN) is a telecommunications/broadband cooperative that serves over 8,000 members with 4,280 miles of fiber optic cable and provides gigabit broadband throughout its 32 exchanges in southcentral/southeast North Dakota.

DRN deals with four railroad companies, Red River Valley and Western, Dakota Missouri Valley and Western, Canadian Pacific and Burlington Northern Santa Fe, in our respective service area. When DRN is asked to provide new service to a member that requires a fiber optic cable to be placed and/or constructed where a portion of the construction is required to cross below a railroad structure, all the above-mentioned railroad companies require a $750 non-refundable permit fee.

In addition to the permit fee, there is a crossing fee that ranges from $2,000 to $5,000. The additional crossing fee does vary each time and those variances seem to be related to location and length of crossing. These crossing fees have never been clearly defined by the railroad companies.

Policy such as HB 1362 is imperative to the consistency and well-defined utility railroad crossing fee structure and process.

Please give HB 1362 a do-pass recommendation.

Sincerely,

Kent Schimke
CEO/General Manager

SOUTH DAKOTA LEGISLATURE
LEGISLATIVE RESEARCH COUNCIL

CHAPTER 49-16A

INTRASTATE RAILROAD REGULATION

49-16A-100. Utility poles and wires on right-of-way--Commission to regulate. The Public Utilities Commission shall make rules and regulations for the setting of poles on railroad right-of-way, and the stringing or suspending of telephone, telegraph, electric, or other wires over the track of railroads.
Source: SDC 1939, § 52.0258; SDCL, § 49-7-3; SL 1980, ch 322, § 99.

49-16A-100.1. Right of utilities to cross over or under railroad right-of-way--Fee--Regulation and negotiation. Each electric utility, public utility, gas utility, municipal utility, municipal power agency, joint action agency, consumers power district, pipeline company, telecommunications company, and rural water system has the right to cross over or under the railroad right-of-way for the placement of facilities, upon payment of a reasonable fee, subject to reasonable regulation and negotiation in good faith as to location, placement, and compensation, when the placement of facilities is outside the public right-of-way.
Source: SL 2006, ch 232, § 2.

49-16A-100.2. Definitions relating to utility crossing of railroad right-of-way. Terms used in §§ 49-16A-100.2 to 49-16A-100.10, inclusive, mean:

(1) "Railroad," any nonpublic association or corporation, or other entity, engaged in operating a common carrier by rail or any other entity responsible for the management of crossings or collection of fees for the railroad;

(2) "Rural water system," an entity engaged in the treatment, distribution, and sale of water to rural consumers that was created by chapters 34A-5, 46A-3A, or 46A-9 or any nonprofit corporation engaged in such activity;

(3) "Utility," electric utility, public utility, gas utility, municipal utility, municipal power agency, joint action agency, consumers power district, pipeline company, telecommunications company, and rural water system;

(4) "Crossing," the construction, operation, repair, or maintenance of a facility, over, under, or across a railroad right-of-way by a utility. The term does not include longitudinal occupancy of railroad right-of-way;

(5) "Facility," any item of personal property placed over, across, or underground for use in connection with the storage or conveyance of water; sewage; electronic, telephone, or telegraphic communications; fiber optics; cablevision; electric energy; oil; gas; hazardous liquids; or other substances including pipes, sewers, conduits, cables, valves, lines, wires, manholes, or attachments;

(6) "Special circumstances," includes the railroad crossing's relationship to other property, location of the crossing in urban or other developed areas, the existence of unique topography or natural resources, or other dangers inherent in the particular crossing.
Source: SL 2014, ch 217, § 9; SL 2016, ch 223, § 1.

49-16A-100.3. Notice and application for placement of utility facility across railroad right-of-way. Any utility that intends to place a facility across a railroad right-of-way shall provide to the railroad notice of the placement at least thirty days before the placement. The notice shall include a completed crossing application, including a drawing showing the location of the proposed crossing and the railroad's property, tracks, and wires that the utility will cross. The utility shall submit the crossing application on a form provided or approved by the railroad, if available. The crossing application shall be sent to the railroad by certified mail, return receipt requested. The application shall be accompanied by the crossing fee as set forth in § 49-16A-100.5, and a certificate of insurance as required by § 49-16A-100.6.
Source: SL 2014, ch 217, § 1; SL 2016, ch 223, § 2.

49-16A-100.4. Commencement of construction across railroad right-of-way--Exception. Thirty days after the receipt by the railroad of the completed crossing application, the fee, and certificate of insurance, the utility may commence the construction of the crossing, unless the railroad notifies the utility in writing that the proposed crossing is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way. In all other instances the utility shall be deemed to have authorization to commence construction of the facility.
Source: SL 2014, ch 217, § 2; SL 2016, ch 223, § 3.

49-16A-100.5. Standard crossing fee--Flagging expense. Unless otherwise agreed by the parties, a utility that crosses a railroad right-of-way, other than a crossing within the public right-of-way, shall pay the railroad a one-time standard crossing fee of seven hundred fifty dollars for each crossing. The standard crossing fee is in lieu of any license, permit, application, processing fee, or any other fees or charges to reimburse the railroad for the direct expenses incurred by the railroad as a result of the crossing. No other fee may be assessed by the railroad or by any railroad agent, contractor, or assignee to the utility or to any agent or contractor of the utility. The utility shall also reimburse the railroad for any reasonable and necessary flagging expense associated with a crossing, based on the railroad traffic at the crossing, in addition to the standard crossing fee. No crossing fee is required if the crossing is located within a public right-of-way.
Source: SL 2014, ch 217, § 3; SL 2016, ch 223, § 4.

49-16A-100.6. Certificate of insurance or coverage for utilities crossing railroad right-of-way . The certificate of insurance or coverage submitted by a municipality shall include commercial general liability insurance or equivalent form with a limit of not less than one million dollars for each occurrence and an aggregate of not less than two million dollars. The certificate of insurance submitted by any other utility other than a gas or hazardous materials pipeline utility shall include commercial general liability insurance with a combined single limit of a minimum of two million dollars for each occurrence and an aggregate limit of at least four million dollars. The certificate of insurance submitted by a gas or hazardous materials pipeline utility shall include commercial general liability insurance with a combined single limit of a minimum of five million dollars for each occurrence and an aggregate limit of at least ten million dollars. The railroad may require protective liability insurance with a combined single limit of two million dollars for each occurrence and four million dollars aggregate. The coverage may be provided by a blanket railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual crossing. The coverage shall be required only during the period of construction, repair, or replacement of the facility.
Source: SL 2014, ch 217, § 4; SL 2016, ch 223, § 5.

49-16A-100.7. Notice of objection by railroad--Petition for dispute resolution--Appeal. If a railroad objects to the proposed crossing due to the proposal being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad shall provide notice of the objection and the specific basis of the objection to the utility by certified mail, return receipt requested. If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution of the disputed crossing application within thirty days from receipt of the objection. Before filing a petition, the parties shall confer in good faith in an attempt to

resolve the objection. If a petition is filed, the Public Utilities Commission, after notice and opportunity for hearing, must issue an order within sixty days of filing of the petition, during which time the crossing shall be stayed. The order may be appealed pursuant to chapter 1-26. The Public Utilities Commission shall assess its costs associated with a petition equitably against the parties.
Source: SL 2014, ch 217, § 5; SL 2016, ch 223, § 6.

49-16A-100.8. Additional requirements imposed by railroad--Objection by utility--Petition for resolution of objection--Appeal. If a railroad asserts in writing by certified mail return receipt requested that special circumstances exist, or imposes additional requirements upon a utility for crossing its lines, other than the proposed crossing being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the utility may object to one or more of the requirements. In such event, the utility shall provide notice of the objection and the specific basis of the objection to the railroad by certified mail, return receipt requested. If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution of the objection within thirty days from receipt of the objection. Before filing a petition, the parties shall confer in good faith in an attempt to resolve the objection. If a petition is filed, the Public Utilities Commission, within ninety days of filing the petition, shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the crossing. The order may be appealed pursuant to chapter 1-26. The Public Utilities Commission shall assess its costs associated with a petition equitably against the parties.
Source: SL 2014, ch 217, § 6; SL 2016, ch 223, § 7.

49-16A-100.9. Existing agreements--Eminent domain. Nothing in §§ 49-16A-100.2 to 49-16A-100.10, inclusive, prevents a railroad and a utility from continuing under an existing agreement or otherwise negotiating the terms and conditions applicable to a crossing or the resolution of any disputes relating to the crossing. Nothing in §§ 49-16A-100.2 to 49-16A-100.10, inclusive, impairs the authority of a utility to secure crossing rights by easement pursuant to the exercise of the power of eminent domain.
Source: SL 2014, ch 217, § 7.

49-16A-100.10. Application of §§ 49-16A-100.2 to 49-16A-100.9. Sections 49-16A-100.2 to 49-16A-100.9, inclusive, apply to:

(1) Any crossing in existence before July 1, 2014 if an agreement concerning the crossing has expired or is terminated. In such instance, if the collective amount of seven hundred fifty dollars has been paid to the railroad during the existence of the crossing, no additional fee is required; and

(2) Any crossing commenced on or after July 1, 2014.
Source: SL 2014, ch 217, § 8.

237.045 RAILROAD RIGHTS-OF-WAY; CROSSING OR PARALLELING BY UTILITIES.

Subdivision 1. **Definitions.** (a) For the purposes of this section, the following terms have the meanings given them.

(b) "Crossing" means a utility facility constructed over, under, or across a railroad right-of-way. The term does not include longitudinal occupancy of railroad right-of-way.

(c) "Facility" or "utility facility" means any item of personal property placed over, across, or underground for use in connection with the storage or conveyance of:

(1) water;

(2) sewage;

(3) electronic, telephone, or telegraphic communications;

(4) fiber optics;

(5) cable television;

(6) electric energy;

(7) oil;

(8) natural gas; or

(9) hazardous liquids.

Facility includes, but is not limited to, pipes, sewers, conduits, cables, valves, lines, wires, manholes, and attachments.

(d) "Parallel" or "paralleling" means a utility facility that runs adjacent to and alongside the lines of a railroad for no more than one mile, or another distance agreed to by the parties, after which the utility facility crosses the railroad lines, terminates, or exits the railroad right-of-way.

(e) "Railroad" means any association, corporation, or other entity engaged in operating a common carrier by rail, or its agents or assigns, including any entity responsible for the management of crossings or collection of crossing fees.

(f) "Utility" means cooperative electric association, electric utility, public utility, transmission company, gas utility, municipal utility, municipal power agency, municipality, joint action agency, pipeline company, rural water system, or telephone, telegraph, telecommunications, cable, or fiber optic carrier. Utility includes contractors or agents.

Subd. 2. **Application.** (a) This section applies to:

(1) any crossing in existence before July 1, 2016, if an agreement concerning the crossing has expired or has been terminated. In such instance, if the collective amount that equals or exceeds the standard crossing fee under subdivision 6 has been paid to the railroad during the existence of the crossing, no additional fee is required; and

(2) any crossing commenced on or after July 1, 2016.

(b) This section does not apply to a crossing or paralleling of a large energy facility, as defined in section 216B.2421, subdivision 2, regardless of length.

Subd. 3. **Right-of-way crossing; application for permission.** (a) Any utility that intends to place a facility across or upon a railroad right-of-way shall request prior permission from the railroad.

(b) The request must be in the form of a completed crossing application, including an engineering design showing the location of the proposed crossing and the railroad's property, tracks, and wires that the utility will cross. The engineering design must conform with guidelines published in the most recent edition of the (1) National Electric Safety Code, or (2) Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association. The utility must submit the crossing application on a form provided or approved by the railroad, if available.

(c) The application must be accompanied by the standard crossing fee specified in subdivision 6 and evidence of insurance as required in subdivision 7. The utility must send the application to the railroad by certified mail, with return receipt requested.

(d) Within 15 calendar days of receipt of an application that is not complete, the railroad must inform the applicant regarding any additional necessary information and submittals.

Subd. 4. **Inductive interference study.** (a) A railroad may require an electric utility to conduct an inductive interference study if:

(1) the facility is for an electric energy transmission line of at least 125 kilovolts; and

(2) in accordance with guidelines in the National Electric Safety Code and the Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association, the railroad reasonably determines that the proposed facility poses a material possibility of creating induction issues or interference with railroad property.

(b) The utility must arrange and pay for the study, perform and pay for any costs of modifications to the proposed facility, and pay for any costs of modifications to railroad property that are necessary to ensure safe and reliable railroad operations. The study must be performed by a qualified engineer approved by the railroad.

(c) A utility facility for which an inductive interference study has been performed under this subdivision may not be energized until at least 30 calendar days after the railroad receives notice from the utility that the facility is ready to be energized. Within 30 days of receiving notice that the facility is ready to be energized, the railroad shall conduct any appropriate tests to ensure that there will not be any interference with safe operation of the railroad following energization.

Subd. 5. **Right-of-way crossing; construction.** Beginning 35 calendar days after the receipt by the railroad of a completed crossing application, crossing fee, and certificate of insurance, the utility may commence the construction of the crossing unless the railroad notifies the utility in writing that the proposed crossing or paralleling is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way.

Subd. 6. **Standard crossing fee.** (a) Unless otherwise agreed by the parties or determined under section 237.04, a utility that crosses a railroad right-of-way, other than a crossing within a public right-of-way, must pay the railroad a onetime standard crossing fee of $1,250, adjusted as provided in paragraph (e), for each crossing. Except as otherwise provided in this subdivision, the standard crossing fee is paid in lieu of any license, permit, application, processing fee, or any other fee or charge to reimburse the railroad for direct expenses incurred by the railroad as a result of the crossing. No other fee or charge may be assessed to the utility by the railroad.

(b) In addition to the standard crossing fee, the utility shall also reimburse the railroad for any reasonable and necessary flagging expense associated with a crossing, based on the railroad traffic at the crossing.

(c) No crossing fee is required if the crossing is located within a public right-of-way.

(d) The placement of a single conduit and its content is a single facility. No additional fees are payable based on the individual fibers, wires, lines, or other items contained within the conduit.

(e) Annually each May 1, the standard crossing fee under paragraph (a) must be adjusted based on the percentage change in the annual average producer price index for the preceding year compared to the year prior to the preceding year. Each adjustment is effective for applications submitted on or after June 1. The producer price index is final demand, finished consumer energy goods, as prepared by the Bureau of Labor Statistics of the United States Department of Labor.

Subd. 7. **Certificate of insurance; coverage.** (a) The certificate of insurance or coverage submitted by:

(1) a municipal utility or municipality must include commercial general liability insurance or an equivalent form with a limit of at least $1,000,000 for each occurrence and an aggregate of at least $2,000,000;

(2) a utility providing natural gas service must include commercial general liability insurance with a combined single limit of at least $5,000,000 for each occurrence and an aggregate limit of at least $10,000,000; or

(3) a utility not specified in clauses (1) and (2) must include commercial general liability insurance with a combined single limit of at least $2,000,000 for each occurrence and an aggregate limit of at least $6,000,000.

(b) The railroad may require protective liability insurance with a combined single limit of $2,000,000 for each occurrence and $6,000,000 aggregate. The coverage may be provided by a blanket railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual crossing. The coverage is required only during the period of construction, repair, or replacement of the facility.

(c) The insurance coverage under paragraphs (a) and (b) must not contain an exclusion or limitation related to railroads or to activities within 50 feet of railroad property.

(d) The certificate of insurance must be from an insurer of the utility's choosing.

Subd. 8. **Objection to crossing; petition to Public Utilities Commission.** (a) If a railroad objects to the proposed crossing or paralleling due to the proposal being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad must notify the utility of the objection and the specific basis for the objection. The railroad shall send the notice of objection to the utility by certified mail, with return receipt requested.

(b) If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for assistance via mediation or arbitration of the disputed crossing application. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

(c) If a petition is filed, the Public Utilities Commission must issue an order within 120 days of filing of the petition. The order may be appealed under chapter 14 and section 216B.27. The Public Utilities Commission must assess the costs associated with a petition equitably among the parties.

Subd. 9. **Additional requirements; objection and petition to Public Utilities Commission.** (a) If a railroad imposes additional requirements on a utility for crossing its lines, other than the proposed crossing being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the utility may object to one or more of the requirements. If it objects, the utility shall provide notice of the objection and the specific basis for the objection to the railroad by certified mail, with return receipt requested.

(b) If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution or modification of the additional requirements. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

(c) If a petition is filed, the Public Utilities Commission shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the crossing. The Public Utilities Commission must issue an order within 120 days of filing of the petition. The order may be appealed under chapter 14 and section 216B.27. The Public Utilities Commission shall assess the costs associated with a petition equitably among the parties.

Subd. 10. **Operational relocation.** (a) A railroad may require a utility to relocate a facility when the railroad determines that relocation is essential to accommodate railroad operations, and the relocation is not arbitrary or unreasonable. Before agreeing to the relocation, a utility may require a railroad to provide a statement and supporting documentation identifying the operational necessity for requesting the relocation. A utility must perform the relocation within a reasonable period of time following the agreement.

(b) Relocation is at the expense of the small utility. A standard fee under subdivision 6 may not be imposed for relocation.

Subd. 11. **Existing agreements.** Nothing in this section prevents a railroad and a utility from continuing under an existing agreement, or from otherwise negotiating the terms and conditions applicable to a crossing or the resolution of any disputes relating to the crossing. A utility may elect to undertake a crossing or paralleling under this section or section 237.04. Nothing in this section impairs the authority of a utility to secure crossing rights by easement through exercise of the power of eminent domain.

History: *2016 c 180 s 2*

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Draft 7/19/18

Broadband Deployment Advisory Committee

State Model Code for Accelerating Broadband Infrastructure Deployment and Investment

State Model Code for Accelerating Broadband Infrastructure Deployment and Investment

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ARTICLE 6: SPECIAL PROVISIONS FOR RAILROAD CROSSINGS

1. Title of Public Right–of- Way for Railroad Crossings

Notwithstanding any other provisions, when Railroad operations cross on a Public Right-of-Way owned by the relevant Authority, the title or interest held by the Authority in such Public Right-of-Way shall be retained by the Authority for future transportation purposes and such other purposes as are not inconsistent with future transportation purposes; except that such Public Right-of-Way shall not be used by members of the general public without permission of the Authority as managed by the Manager. The Authority shall allow abutting farm operations to use the land over which the Public Right-of-Way passes for agricultural purposes. Unless use and occupancy of Railroad rights-of-way adversely affect Railroad safety, Broadband Facilities and wireless and other telecommunications Facilities that are installed along or within the Railroad right-of-way in compliance with applicable operations and safety standards at the time of installation are consistent with existing and future transportation purposes.

2. Rights of Access to Railroad Crossings

2.1. Application

2.1.1. This Article applies to:

(1) any Crossing in existence before the effective date of this Model Code if an agreement concerning the Crossing has expired or has been terminated. In such instance, if the collective amount that equals or exceeds the standard Crossing fee under subsection 2.4. has been paid to the Railroad during the existence of the Crossing, no additional fee is required; and

(2) any Crossing commenced on or after the effective date of this Article.

2.2. Railroad Right-of-Way Crossing; Application for Permission

2.2.1. Any Communications Provider or Network Support Infrastructure Owner that intends to place a Facility across or upon a Railroad right-of-way shall request prior permission from the Railroad.

2.2.2. The request must be in the form of a completed Crossing Application, including an engineering design showing the location of the proposed Crossing and the Railroad's property, tracks, and wires that the Communications Provider or Network Support

Infrastructure Owner will cross. The engineering design must conform with guidelines published in the most recent edition of the (1) National Electric Safety Code, or (2) Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association. The Communications Provider or Network Support Infrastructure Owner must submit the Crossing Application on a form provided or approved by the Railroad, if available.

2.2.3. The Application must be accompanied by the standard Crossing fee specified in subsection 2.4. and evidence of insurance as required in subsection 2.5. The Communications Provider or Network Support Infrastructure Owner must send the Application to the Railroad by certified mail, with return receipt requested.

2.2.4. Within 15 calendar days of receipt of an Application that is not complete, the Railroad must inform the Applicant regarding any additional necessary information and submittals.

2.3. Railroad Right-of-Way Crossing; Construction

Beginning 35 calendar days after the receipt by the Railroad of a completed Crossing Application, Crossing fee, and certificate of insurance, the Communications Provider or Network Support Infrastructure Owner may commence the construction of the Crossing unless the Railroad notifies the Communications Provider or Network Support Infrastructure Owner in writing that the proposed Crossing or Paralleling is a serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way.

2.4. Standard Crossing Fee

2.4.1. Unless otherwise agreed by the parties, a Communications Provider or Network Support Infrastructure Owner that crosses a Railroad right-of-way, other than a Crossing within a Public Right-of-Way, must pay the Railroad a onetime standard Crossing fee of $500 per Crossing adjusted as provided in Subsection 2.4.5, for each Crossing. Except as otherwise provided in this subdivision, the standard Crossing fee is paid in lieu of any license, permit, Application, processing fee, or any other fee or charge to reimburse the Railroad for direct expenses incurred by the Railroad as a result of the Crossing. No other fee or charge may be assessed to the Communications Provider or Network Support Infrastructure Owner by the Railroad.

2.4.2. In addition to the standard Crossing fee, the Communications Provider or Network Support Infrastructure Owner shall also reimburse the Railroad for any reasonable and necessary flagging expense associated with a Crossing, based on the Railroad traffic at the Crossing.

2.4.3. No Crossing fee is required if the Crossing is located within a Public Right-of-Way.

2.4.4. The placement of a single Conduit and its content is a single Facility. No additional fees are payable based on the individual fibers, wires, lines, or other items contained within the Conduit.

2.4.5. Annually, the standard Crossing fee under Subsection 2.4.1 must be adjusted based on the percentage change in the annual average producer price index for the preceding year compared to the year prior to the preceding year. Each adjustment is effective for Applications submitted on or after July 1. The producer price index is final demand, finished consumer energy goods, as prepared by the Bureau of Labor Statistics of the United States Department of Labor.

2.5. Certificate of Insurance; Coverage

2.5.1. The certificate of insurance or coverage submitted by:

(1) a municipal Utility or municipality must include commercial general liability insurance or an equivalent form with a limit of at least $1,000,000 for each occurrence and an aggregate of at least $2,000,000;

(2) a Utility providing natural gas service must include commercial general liability insurance with a combined single limit of at least $5,000,000 for each occurrence and an aggregate limit of at least $10,000,000; or

(3) a Communications Provider or Network Support Infrastructure Owner not specified in Subsections (1) and (2) must include commercial general liability insurance with a combined single limit of at least $2,000,000 for each occurrence and an aggregate limit of at least $6,000,000.

(4) the Railroad may require protective liability insurance with a combined single limit of $2,000,000 for each occurrence and $6,000,000 aggregate. The coverage may be provided by a

blanket Railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual Crossing. The coverage is required only during the period of construction, repair, or replacement of the Facility.

(5) The insurance coverage under Subsections (1) and (2) of 2.5.1. must not contain an exclusion or limitation related to railroads or to activities within 50 feet of Railroad property.

2.5.2. The certificate of insurance must be from an insurer of the Communications Provider's or Network Support Infrastructure Owner's choosing.

2.6. Objection to Crossing; petition to State Regulatory Authority

2.6.1. If a Railroad objects to the proposed Crossing or Paralleling due to the proposal being a serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way, the Railroad must notify the Communications Provider or Network Support Infrastructure Owner of the objection and the specific basis for the objection. The Railroad shall send the notice of objection to the Communications Provider or Network Support Infrastructure Owner by certified mail, with return receipt requested.

2.6.2. If the parties are unable to resolve the objection, either party may petition the Manager for assistance via mediation or arbitration of the disputed Crossing Application. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

2.6.3. If a petition is filed, the Manager must issue an order within 120 days of filing of the petition. The order may be appealed. The Manager must assess the costs associated with a petition equitably among the parties.

2.7. Additional Requirements; Objection and Petition to Manager

2.7.1. If a Railroad imposes additional requirements on a Communications Provider or Network Support Infrastructure Owner for crossing its lines, other than the proposed Crossing being a serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way, the Communications Provider or Network Support Infrastructure Owner may object to

one or more of the requirements. If it objects, the Communications Provider or Network Support Infrastructure Owner shall provide notice of the objection and the specific basis for the objection to the Railroad by certified mail, with return receipt requested.

2.7.2. If the parties are unable to resolve the objection, either party may petition the Manager for resolution or modification of the additional requirements. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

2.7.3. If a petition is filed, the Manager shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the Crossing. The Manager must issue an order within 120 days of filing of the petition. The order may be appealed. The Manager shall assess the costs associated with a petition equitably among the parties.

2.8. Operational Relocation

2.8.1. A Railroad may require a Communications Provider or Network Support Infrastructure Owner to relocate a Facility when the Railroad determines that relocation is essential to accommodate Railroad operations, and the relocation is not arbitrary or unreasonable. Before agreeing to the relocation, a Communications Provider or Network Support Infrastructure Owner may require a Railroad to provide a statement and supporting documentation identifying the operational necessity for requesting the relocation. A Communications Provider or Network Support Infrastructure Owner must perform the relocation within a reasonable period of time following the agreement.

2.8.2. Relocation is at the expense of the Communications Provider or Network Support Infrastructure Owner. A standard fee under subsection 2.4 may not be imposed for relocation.

2.9. Existing Agreements

Nothing in this Article prevents a Railroad and Communications Provider or Network Support Infrastructure Owner from continuing under an existing agreement, or from otherwise negotiating the terms and conditions applicable to a Crossing or the resolution of any disputes relating to the Crossing. A Communications Provider or Network Support Infrastructure Owner may elect to undertake a Crossing or

Paralleling under this Article. Nothing in this Article impairs the authority of a Communications Provider or Network Support Infrastructure Owner to secure crossing rights by easement through exercise of the power of eminent domain.

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p. 1

Testimony of James Walter

President/CEO, 702 Communications

In Support of HB1362

March 13, 2019

Senate Industry, Business and Labor Committee:

My name is James Walter, and I am the President/CEO of 702 Communications. Our company is located in Fargo, ND, and we provide telecommunication services throughout the West Fargo, Fargo, and Wahpeton areas including some properties in Minnesota.

When you think of telecommunications and video services; internet access, dial tone, long distance, Ethernet circuits, and cable TV might pop into your head. 702 provides all of these. We have approximately 200 miles of fiber cable in the previously mentioned cities and we place approximately one million five hundred thousand (1,500,000) dollars of facility each year in just the Fargo area.

In 2016, 702 Communications won a project to provide a national wireless company with a fiber network in Fargo and West Fargo. It required us to utilize fiber in our existing network, but also needed to construct more than twenty (20) miles of additional fiber. Included in these new fiber lines were five (5) BNSF railroad crossings. We started the permitting process in early April to allow for plenty of time to receive approval. Yet we didn't receive approved permits until July 17 – well into the construction phase of the project. Our first attempt to process permits resulted in permit fees of $750/crossing. However, before we received official approved permits, BNSF provided notification the rates they required for the permit fee would be changed to $3,700 and up to as much as $17,218/crossing. We were told that because we weren't a specific type of company we didn't qualify for the $750/permit rate. Our total bill for

the five permits would now be $37,597. A substantial increase. During the course of almost three months and threatened litigation we finally reduced our costs back to the original $750/crossing. This encounter just proves the need for approval of House Bill #1362.

House Bill #1362 will provide for a consistent time frame of 30 days to process a permit allowing utility companies assurance of obtaining permits to construct in a timely manner. It requires a consistent and reasonable fee to process permits where the utility is on private railroad property. Reasonable insurance coverage is required by the bill with the flexibility to obtain it as necessary. Which is actually beneficial to all parties. Yet on the other side, it allows the railroad companies to obtain reimbursement of flagging expenses, requires insurance coverage and most important of all, a safe construction process by the utility companies. This bill is modeled after laws in effect in both Minnesota and South Dakota. Our experience on Minnesota construction projects shows that it works very well.

House Bill #1362 strives to solve the issues our company faced during this experience. It seeks to reduce the permit timeframe, stop excessive costs, and keep pricing consistent for all utilities which puts us all on the same footing. The bill not only addresses utility company concerns, but also those of the railroad companies: documentation of utility crossings, insurance requirements, safety concerns, and a dispute resolution process. Overall, if passed, this bill would put to rest many issues the railroad companies and utility companies have in working with one another.

Again, We urge the committee's support of HB1362 as it allows for safe and timely utility crossings necessary to provide crucial services to the residents of North Dakota.

HB1362 3/13/19 Att#4
P.1

Red River COMMUNICATIONS

Testimony of Deb Syvertsen
Red River Communications

IN SUPPORT OF HOUSE BILL NO. 1362

March 13, 2019

Mr. Chairman and members of the Senate Industry, Business and Labor Committee:

My name is Deb Syvertsen and I am the Plant Maintenance Manager at Red River Communications. I am here today to support House Bill No. 1362 on behalf of Red River Communications. Red River Communications is a member-owned cooperative in southeast ND, that was incorporated in 1951. We are headquartered in Abercrombie, ND and we serve 4,000 customers with 2,700 miles of fiber optic cable.

I would like to speak to you today about the rights of utilities needing to cross under the railroad rights-of-way. Our Cooperative has fiber optic cable and other communications infrastructure that crosses property owned and operated by CP Rail, Soo Line, BNSF, Red River Valley & Western, and Dakota Missouri Valley & Western railroads.

While we do not argue that there are costs involved and processes that need to be completed in the permitting process, we have had multiple documented issues with getting permits and licenses to cross the railroads' property and rights-of-way. The issues specifically are the length of time it takes to get a license or permit, the insurance requirements and the fees that we are charged. I have examples I would like to share with you today.

We have a project planned to install three new fiber optic routes connecting four of our exchange offices as part of a maintenance plan to upgrade our critical infrastructure. We will

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need to cross the Soo Line Railroad (doing business as CP Rail) in the cities of Lidgerwood, ND and Wyndmere, ND. Our engineering company Vantage Point Solutions submitted applications to Soo Line Railroad Company on August 24, 2018, with one thousand dollars ($1,000) in application fees, five hundred dollars ($500) for each application. On January 14th, 2019 we received the applications from the Soo Line Railroad. We waited four and a half months for the application to be processed through their Engineering and Real Estate Departments. We are expecting to pay at least one thousand dollars ($1,000) and up to ten thousand dollars ($10,000) more for two license fees. We don't know for sure what the additional fees will be, however. The last time we acquired licenses from Soo Line Railroad in 2015, they were five thousand dollars ($5,000) for each license.

The insurance requirements that we are required to purchase before we will receive a "Utility Occupancy License" are listed in detail within the application for a crossing license. The insurance requirements in our latest application are far greater than the requirements in previous licenses.

In this recent application the insurance requirements have doubled, and an additional policy is required. The Contractor's Pollution Liability Insurance is the policy that has not been a requirement in previous license applications. I have spoken to our insurance agent and he has never written this type of policy for a communications company crossing a railroad. At this time, I don't know what the contractor's Pollution Liability Policy will cost.

Because the limits of the insurances are so much higher than in the past, I tried to contact the Real Estate Department at CP Rail/Soo Line Railroad. After 6 weeks of calling, leaving messages and sending emails, I finally was able to speak to a representative. I was told that the only option we have is to send a proposal to the Risk Department and they could re-evaluate the insurance requirements.

We waited four and a half months for the applications to be processed and the choice we have now, is to pay the higher costs for the higher limit policies or request a review from the Risk Department. Our contractor is ready to go to work the first week of May, so we have run out of time and will be required to purchase the elevated insurance policies. This licensing process will have taken 9 months to complete.

The lack of clear and consistent processes in the permitting process has directly impacted our Cooperative's ability to maintain its network. Of note with this crossing is the fact that we were unable to place the much-needed fiber optic cable in 2018 due to the delays I have mentioned.

On January 30, 2019, we had crews working out in -35 temperature repairing a stretch of the old fiber optic cable due to a failure in the cable. Had we gotten the required permits in a timely manner in 2018, this route would have been replaced and we would not have been in the position to put our technicians at risk by having to repair the cable in life threatening conditions. The railroads' inability to issue permits in a timely manner has prevented us from doing crucial upgrades to critical infrastructure. While multiple redundant routes are in place throughout our network, a failure of this infrastructure has the potential to put public safety at risk due to an inability to place phone calls and carry other important network traffic.

In 2015 we had a need to cross CP Rail/Soo Line Railroad in Hankinson. In that crossing there was one active rail line and one that had been abandoned and the rail had been removed. We were required to have a license to cross the abandoned bed and were still required to use a 10" steel casing. The additional cost to install the 10" steel casing was sixteen thousand four hundred dollars ($16,400). The cost of the license was five thousand dollars ($5,000) plus the required insurance which was one thousand eight hundred dollars ($1,800). In total we paid twenty-three thousand two hundred dollars ($23,200) to cross property that the Soo Line Railroad owned where the rail had been removed.

Ultimately, we are looking for three things: reasonable timelines, standardized insurance requirements and standardized costs for crossing.

Four to six or more months is not a reasonable timeframe. The construction season is typically May through October in North Dakota. If we get a request for service that requires a railroad crossing, we would need to start the application before July 1st to be able to expect to get our permit completed in time to do the work in the same year. That is not reasonable.

We need standard insurance requirements. If the insurance limits were standardized, we could save time by starting the insurance quote and railroad crossing application at the same time. The cost of these policies with the increased limits is a big factor. The difference in the cost of the Railroad Protective Policies was two thousand seven hundred dollars ($2,700) when the limits were increased.

We need standardized fees. We need to be able to budget for these crossings accurately. We need to be able give accurate quotes to our customers who are waiting to get service from us. When you factor in all the fees needed to cross a railroad, it could be anywhere from one thousand five hundred dollars ($1,500) to five thousand five hundred dollars ($5,500), plus the cost of insurance.

It should be noted that our neighbors in Minnesota and South Dakota have already passed legislation on this matter. It came to my attention in speaking with a railroad representative that because our state does not have legislation in place, our applications will wait while they process the applications for crossings in states that do have laws in place limiting the timeframe they have to process applications.

I encourage the committee to recommend DO PASS on House Bill No. 1362.

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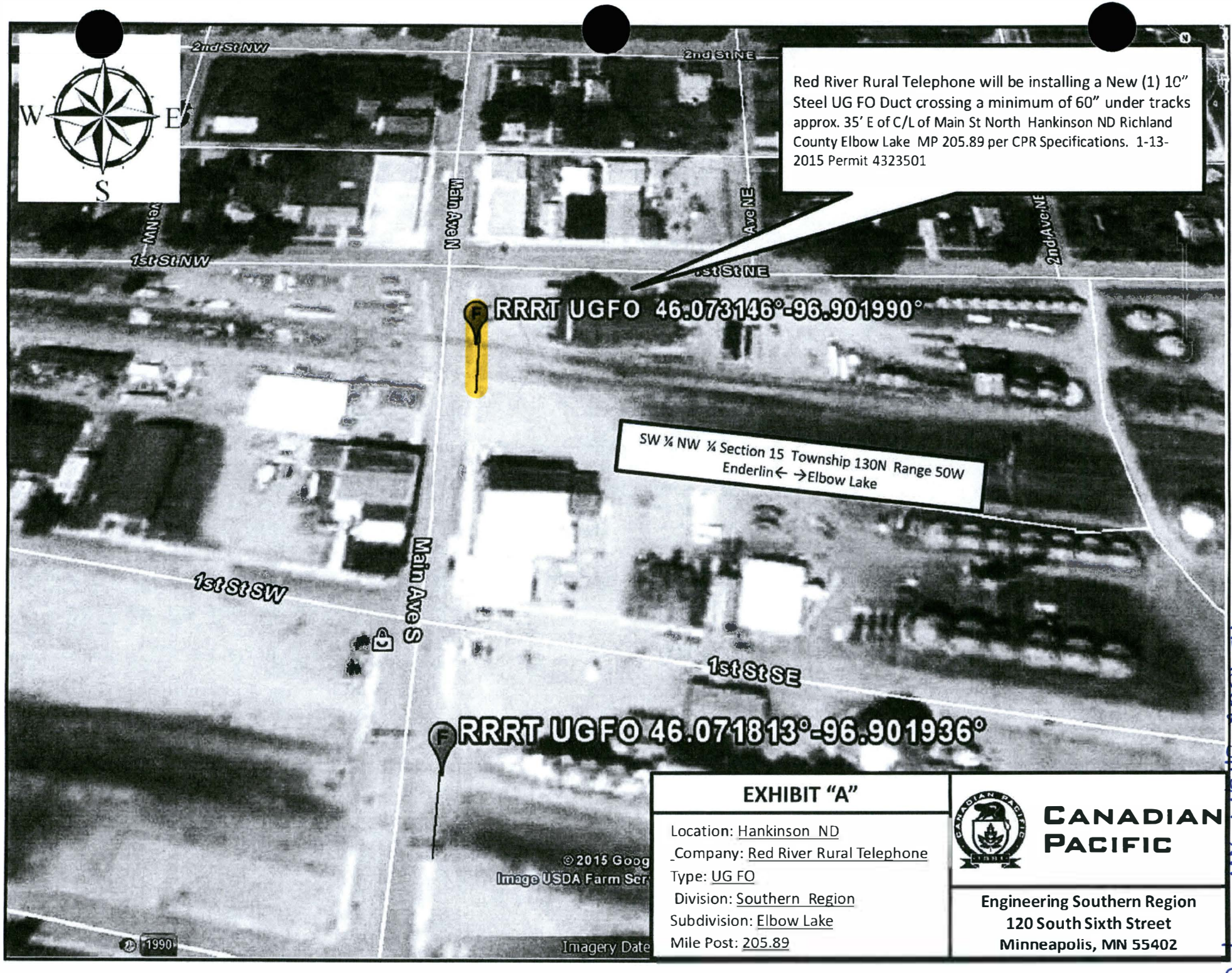

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HOUSE BILL 1362

SENATE INDUSTRY, BUSINESS AND LABOR COMMITTEE

March 13, 2019

Mr. Chairman and members of the Senate Industry, Business and Labor Committee:

My name is Brooks Goodall and I am the Chief Operations Officer of Reservation Telephone Cooperative or RTC as we are more widely known. RTC is headquartered in Parshall, ND and we serve over 6,000 square miles, connecting 10,000 customers with over 5,000 miles of fiber optics. RTC's area includes large portions of Mclean, Mountrail and McKenzie Counties, including the communities of Garrison, Max, Parshall, New Town and Watford City along with 12 other communities in those areas.

CP Rail and BNSF are the 2 railroad companies whose tracks run through RTC's service area. Historically, CP Rail and BNSF have charged RTC a $750 application fee. If the application is approved, RTC must then submit a permit fee (up to $5,000 determined by the railroad) to cross the railroad's property. Flagging fees (if required by the railroad) are additional to the permit fee. RTC's fiber build-out has required us to cross railroad tracks anywhere from 1 to 10 times each year during the last 10 years. I will share one example of this which happened in October 2016 when RTC needed to plow fiber optic cable to a Verizon Cell Tower which required crossing a CP Rail track. RTC's contractor bored under the railroad bed at the railroad's required depth of 10' and exited 75 feet on each side of the railroad tracks. CP Rail charged RTC a $5,000 permit fee along with the $750 application fee to cross underneath the tracks, which seemed excessive when no railroad property on the surface was touched.

In discussion with my colleagues at the other rural telecom cooperatives, the application and permit fees seem to be all over the board.

I am here to ask you to vote yes on HB 1362 to mandate a clear and fair process for all.

Thank you.

Brooks Goodall

COO
Reservation Telephone Cooperative.

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p.1

DCN
Dakota Carrier
NETWORK

House Bill 1362
Senate Industry, Business and Labor Committee
March 13, 2019

Chairman Klein and Members of the Senate Industry, Business and Labor Committee

My name is Seth Arndorfer. I am the chief executive officer of Dakota Carrier Network, a statewide fiber optic network that serves North Dakota state government, commercial businesses, and cellular providers. Most in the State know us simply as "DCN". DCN is a limited liability corporation formed by the 14 independent rural broadband service providers that deliver internet, television, and other technology solutions to North Dakotans in nearly every community in our state. In partnership with our Owners, DCN provides internet and Ethernet connectivity to the majority of North Dakota's anchor institutions, including over 160 bank locations, all 54 hospitals in the state, as well as many other commercial entities. DCN also connects wireless towers to fiber so people can use their cell phones. Through competitive contracts, DCN was chosen by the State of North Dakota to provide internet connectivity for all K-12 schools, state colleges and universities, county and state government buildings, national guard armories, and 911 public safety answering points. DCN has delivered these services to the state since 2000.

DCN's fiber optic backbone network is truly critical infrastructure, providing North Dakotans access to connect with fellow North Dakotans, as well as to the rest of the world.

I am here today to support House Bill 1362 and give the measure a "Do Pass" recommendation.

The property crossing fees charged by railroads are inconsistent and frequently outrageous. No two crossing "permits" or "fees" or "contracts" - the charges go by a variety of names - are ever the same. Nor do they appear to be based on any rational premise. The railroads appear to simply pick a number.

In the last six years, the railroads have told us that we would have to pay a property crossing fee as high as $41,913 to build underneath their tracks in Mandan; for most crossings, the fees are generally between $10,000 to $15,000. When DCN objected to their quote of almost $42,000, they reduced it to $13,971. We did not alter our route, and we did not shorten the span of railroad property we would be crossing; however, DCN had to pay additional attorney fees and incurred additional hours from our network engineers and design team to pursue this price reduction. There is no rational explanation for the prices. Every dollar of these costs is passed on to our customers, and DCN is operating in a highly-competitive transport and broadband market, and these fees impact DCN's ability to offer affordable broadband access.

DCN

We also strongly support the language in House Bill 1362 that requires railroads to reject our permit applications within 30 days of receiving them. In North Dakota, we have extremely short construction seasons and delays of three months or longer before receiving approval frequently means that projects to expand broadband are pushed into the next year. We don't own equipment for boring fiber into the ground because it would be inefficient and needlessly expensive. We work with professional contractors to perform this work, and they are under tremendous pressure to complete it before weather conditions stop them. We ask that a reasonable time limit be adopted in North Dakota, similar to those in South Dakota and Minnesota, to avoid the very same problem.

Mr. Chairman and members of the committee, Dakota Carrier Network asks you to give House Bill 1362 a "Do Pass" recommendation and the Senate adopt it because of the needless costs the current system forces upon North Dakota consumers and the delays our State's residents and businesses face in getting the high speed broadband they want and need to compete globally/on a global scale. These needs are very real. Broadband connections give people the opportunity receive medical treatment from world-class doctors without leaving their living room; it gives K-12 students the ability to seamlessly access online assignments and materials; it gives rural community residents the option to work from home for themselves or remotely for a larger company. Having the ability to access high-speed Internet and broadband services is no longer an option; it is a necessity for North Dakotans, whether they live in our biggest cities or most rural areas of the State. Passage of House Bill 1362 will greatly enhance Dakota Carrier Network and our Owners ability to do that in a more affordable and timely way.

Thank you, Mr. Chairman. I would be pleased to answer any questions.

Seth Arndorfer, CEO

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NDARECs
North Dakota Association of Rural Electric Cooperatives
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March 13, 2019

To: Senate Industry, Business and Labor Committee – Senator Jerry Klein, chairman

RE: Support for HB 1362

From: Zac Smith, communications and government relations director, NDAREC

Chairman Klein and members of the Senate Industry, Business and Labor committee, my name is Zac Smith, and I am testifying on behalf of the North Dakota Association of Rural Electric Cooperatives ("NDAREC") in support of House Bill 1362. We support this bill as it will provide economic certainty and efficient delivery of services for all North Dakota utilities.

The North Dakota Association of Rural Electric Cooperatives represents sixteen electric distribution cooperatives and five generation and transmission cooperatives providing the generation and distribution of electricity all across the state of North Dakota. Collectively, our member cooperatives provide more than half of all the retail electric power sold in the state. As you can imagine, such service requires going over and under a lot of railroad right of ways. Currently, the state has no policy in place, thus each railroad operating in the state has separate agreements with each member cooperative and sometimes for each individual crossing. This complexity leads to inefficient, disparate, and arbitrary fees, insurance coverages, and wait times.

House Bill establishes 1) a uniform crossing fee of $750 for going through a railroad right of way, 2) gives railroads a 30 day window to object to a utilities application before a utility can proceed with the work, 3) prohibits railroads from charging for use of a public right of way, and

4) protects the railroads by mandating prescribed levels of insurance coverage depending on the type of material or service crossing the property. These clear rules will prevent the current undue delays and expenses faced when crossing a railroad right of way.

In preparation for today's hearing I asked my members about their experience crossing railroad right of ways. Those experiences varied from small, inexpensive annual fees for crossing an abandoned right of way to nearly $10,000 each in costs for a permitted crossing. There was also a great disparity in the level, type and availability of the insurance required by the railroad for a crossing. Finding the insurance can prove not only costly but time consuming. Finally, House Bill 1362 provides a reasonable timeline for the permitting process that will allow utilities to complete construction within the short North Dakota construction season. This piece is critical, as even a two month permitting process can jeopardize a project's timeline. Without House Bill 1362, lengthy approval times of up to a year can occur.

House Bill 1362 will provide protections to the railroads operating in North Dakota while providing much needed consistency and a measure of certainty to the North Dakota electric cooperatives who must cross railroad rights of way in providing service to their member owners. It will also protect any customer who pays a water, electric, internet or phone bill from undue costs if railroad rights of way were crossed in providing that service. NDAREC urges a Do Pass on House Bill 1362.

That concludes my testimony. Thank you and I would be happy to try to answer any questions you may have.

HB 1362 3/13/19 Att #8

NORTH DAKOTA PETROLEUM COUNCIL
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Engrossed House Bill 1362

Testimony of Brady Pelton

Senate Industry, Business, and Labor Committee

March 13, 2019

Chairman Klein and members of the Senate Industry, Business, and Labor Committee, my name is Brady Pelton, government affairs manager of the North Dakota Petroleum Council. The North Dakota Petroleum Council represents more than 500 companies involved in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in support of Engrossed House Bill 1362.

In December 2018, crude oil and natural gas production reached record levels in North Dakota at over 1.4 million barrels of oil and over 2.65 billion cubic feet of natural gas per day. With over 99% of drilling within the state targeting the high-producing Bakken and Three Forks formations, this high rate of production is expected to continue. As a result of such high production, large-scale capital investments have been committed to building out both oil transmission pipelines and the vast network of natural gas capture infrastructure necessary to direct those petrochemicals to market. Inevitably, those pipelines conveying oil and natural gas will cross rights of way held by various railroad companies.

Engrossed HB 1362 serves to provide a consistent, standardized, and efficient process by which pipeline companies may cross those rights of way without unnecessary delay. It does so in a way that compensates railroads fairly and provides a method by which disputes may be resolved with timely due process.

In conclusion, the North Dakota Petroleum Council urges your support of **Engrossed HB 1362** and respectfully requests a favorable **Do Pass** recommendation on the bill. Thank you, and I would be happy to answer any questions.

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p. 1

HB 1362 Testimony of BNSF Railway
Lydia Bjorge
March 13, 2019

I. Introduction

My name is Lydia Bjorge and I am the Executive Director of State Government Affairs for BNSF Railway.

I will walk through our current process for utility permits, address safety and operational concerns with the bill as-written, address constitutional concerns with the bill as written, and touch briefly on how we feel we could move forward.

II. Current Process

Just to touch briefly on the current process, which I think helps tee up the discussion.

The requirements/specifications for accessing and installing utilities on our property is publicly available online in our BNSF Utility Accommodation Policy. The policy was developed in the interest of safety, protection, utilization, and the accommodation of future BNSF development to allow us to grow with our North Dakota customers.

Generally, the existing procedure is as follows:

1. First, the utility applies for the permit. That begins the process and the application fee covers the time and expense for 3rd party real estate firm to check the proposed utility location against existing property ownership and utility maps, prepare maps for exhibits, and confirm the location of the proposed utility is available, that it is a safe option, and not disruptive to the current or future use of the right of way.
2. Next, if the utility location is found reasonable, the permit manager assembles the full permit application file. The costs for that process covers:
    a. the costs of our 3rd party real estate team to keep systems and mapping up to date;
    b. legal and environmental review if necessary;
    c. reviewing insurance;
    d. correspondence with the applicant; and
    e. a final and full engineering review, which is conducted for the safety of the track, substructure of the track, construction workers during installation, and BNSF employees.
3. In a survey of permits from 2017-2018 – so 24 months - the average time of a utility permit from the time BNSF received a completed application to the time BNSF turned around a contract was 22 days. In certain circumstances where there was additional engineering, legal or environmental review, that time was longer. The longest circumstances from start to finish were when the utilities themselves had redlines to our contract provisions.

III. Concerns with the Bill

1. **Safety Concerns**
    a. The bill limits the railroads ability to require additional engineering review by limiting the amount of time we have to review the application to 30 days. In certain circumstances, this does not allow for adequate review of those utilities.
        i. This is especially true for high-risk utilities included in the bill, like oil, gas, electric energy and hazardous liquids.
        ii. Those utilities carry additional risk during construction and during the life of the utility under BNSF property.
        iii. It's unclear whether the safety exception included in the bill could be raised here, since a full review would need to take place before raising that exception.
    b. The bill also limits the railroads ability to require additional review and inspection during and after construction by limiting what the railroad is able to charge the utility.
        i. Occasionally, the railroad will require additional on-the-job inspection of a project to ensure the utility is properly installed and using the right materials.
        ii. Likewise, the railroad will sometimes double-check a utilities work to ensure correct installation of the project.
        iii. Again, it's unclear whether the safety exception included in the bill could be raised here, since a full review would need to take place before raising that exception.
        iv. Here are some examples of what can happen when construction is not done properly.
            1. AT&T cut a signal line during installation that provided control to crossing devices at a public crossing next to a school.
            2. During a bore, the track embankment subsided that could have caused a derailment had a flagger not been present. Result required shutting the track down, which interrupted rail service.
            3. Water line installation in the wrong location blocked access to a rail customer's property and interrupted service.
    c. The bill also allows utilities to enter railroad property without safety protections such as training and a flagman after thirty days. This is a major safety concern for the railroad and for the utility, contractor and railroad employees. No one should enter railroad property without proper protections.

2. **Inhibits Growth to our Network**

The bill as drafted could harm our ability to expand to meet the needs of North Dakota customers. Right now, part of what we consider during utility installation permits is future potential use for that right of way. In our current process, we can often accommodate for that future potential use by simply working with the utility.

3. **Increases Cost of Rail Transportation**

The bill puts railroads in a situation where it's losing money for every permit application.

IV. Legal Concerns

Our first set of legal issues revolve around North Dakota and the US Constitution's entitlement to just compensation for any taking of property.

A taking of property happens when there's a permanent physical occupation of property, **no matter how minimal the impact on the owner.** The physical occupation of a railroad right-of-way by a utility, as contemplated in this bill, **is a taking** under the takings clause of the North Dakota and federal constitutions.

As such, there are three constitutional issues with the bill:

1. **The first constitutional issue is that HB 1362 Sets a Flat Fee for Any Taking instead of providing just compensation.**
    a. Property owners are entitled to receive just compensation for a taking of property under the US and North Dakota Constitutions' takings clause.
    b. The bill sets a flat fee and expressly states the payment is in lieu of the loss of land value as a result of the taking, regardless of any facts and circumstances related to the taking. **49-09.1-05**
    c. The bill later addresses a situation where a railroad alleges a loss of value. In that section, it places the sole burden on the railroad to pay for a certified appraisal. This further violates the longstanding US Supreme Court ruling that it is unconstitutional for the legislature to determine the amount of compensation for a taking.
    d. Other similar state statutes have faced constitutional scrutiny on the issue of a single, flat fee.
        i. **In Minnesota**, the Court of Appeals found the standard crossing fee does not represent a determination of just compensation for any taking, and that the issue can be addressed in condemnation proceedings if necessary.
        ii. **In Iowa and Wisconsin**, the courts heard the issue of constitutionality for similar flat fee crossing statutes, but the cases were decided on other grounds. In Wisconsin, the court noted that railroads possessed a colorable claim for constitutional deprivation of just compensation.
        iii. **North Dakota** has even stronger protections for landowners facing takings of private property baked into its constitution. In my final two constitutional points, you'll see that the North Dakota Constitution and state court precedence have unique provisions whereby HB 1362 would face even more judicial scrutiny than the other states.

So the utility is a taking of railroad property, and there isn't just compensation for the taking.

2. **The second constitutional issue is that even if there is just compensation for the property, the compensation itself is decided by an administrative agency, not a jury. This is a direct violation of the North Dakota Constitution, state rulings and ND Century Code.**
    a. The North Dakota Constitution Article 1, Section 16 states compensation [for any taking of private property] "shall be ascertained by a jury, unless a jury be waived."
    b. ND is one of a few states in the nation that require the issue of just compensation for a taking of property to be determined by a jury directly in its constitution. The other states where similar bills recently passed do not have this jury requirement provision in their constitutions.

c. North Dakota case law and Century Code affirm these rights, and expressly require that any taking of private property be decided by a North Dakota district court and the issue of damages be decided by a jury.
d. Instead, the bill before you proposes the PSC adjudicate the takings issues, including damages. Administrative agency decisions have limited court review and would not allow a jury to determine the issue of damages.
e. By stripping the railroad of these private property owner protections, the bill is in direct violation of the North Dakota Constitution.

So the utility is taking railroad property; there isn't just compensation; and if the amount of compensation is challenged by the railroad, it's determined at an agency level instead of in front of a jury, as required by the North Dakota constitution.

3. **The third constitutional issue is that HB 1362 Proposes a Non-Governmental Quick-Take of Private Property.**
   a. As many of you know, North Dakota law protects property owners from potential abuses by non-governmental entities that seek to use the great power of condemnation by expressly prohibiting them from using a quick-take condemnation procedure.
   b. The North Dakota Constitution grants quick-take authority only to the state or any of its departments, agencies or political subdivisions.
   c. North Dakota courts have found that utilities are not permitted to condemn property via North Dakota's quick-take procedure under eminent domain statutes.
   d. In HB 1362, the bill sets-up a quick-take procedure by allowing a utility to simply file a application, pay $750 and provide proof of insurance, and then take possession of railroad property and commence construction within 30 days. The issue of inadequate compensation for the property is not an allowable objection to stop the utility from commencing construction.
   e. This taking occurs before all proceedings are completed by the public services commission.

So, the utility is a taking of railroad property, there isn't just compensation; and if the amount of compensation is challenged by the railroads, it's determined at an agency level instead of in front of a jury; and the bill allows for a quick-take by a non-governmental entity, which is prohibited. These unique provisions in the North Dakota constitution mean this legislation would face even greater judicial scrutiny than other states.

We also have a fourth legal concern, HB 1362 is Preempted by ICCTA

Those are the constitutional concerns with the bill, but we also believe the bill is federally preempt by the Interstate Commerce Commission Termination Act (ICCTA).

ICCTA grants the Surface Transportation Board exclusive jurisdiction over railroad regulation throughout the United States. The purpose of ICCTA was to centralize railroad regulation to prevent fragmented legislation state-by-state. Under the Supremacy Clause, state laws that are inconsistent with federal agency or Congressional policy reflected in ICCTA are preempted. ICCTA attempts to regulate property rights, such as adverse possession and condemnation. There are two substantive preemption issues in this bill:

1. First, the bill allows parallel, adjacent sometimes called longitudinal crossings or longitudinal occupancies. While the bill *attempts* to exclude longitudinal occupancies, allowing an

adjacent facility that's one mile in length is the same as allowing a longitudinal occupancy. Courts have found longitudinal occupancies have more impact on railroad operations, and are therefore are of interest to the federal Surface Transportation Board, and preempted by ICCTA.

2. Second, the bill mandates important decisions such as the amount of insurance required, when a relocation of a utility is "essential to accommodate railroad operations", and when "special circumstances" exist that necessitate additional requirements for the utility. This type of piecemeal state regulation is what Congress sought to preempt when it passed ICCTA.

V. Conclusion

We have heard the feedback from the proponents of the bill and would welcome the opportunity to sit-down and discuss a constitutional solution that addresses their concerns on timing, fees and having a third-party authority if agreement cannot be reached.

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March 12, 2019

Senator Jerry Klein
Chairman, Industry, Business and Labor Committee
North Dakota Senate
P.O. Box 265
Fessenden, ND 58438-0265

Dear Chairman Klein,

Soo Line Railroad Company d/b/a Canadian Pacific ("CP") strongly recommends voting "No" on HB 1362. The Bill places constraints on CP that increase safety risks on CP property and to the public, while decreasing CP's ability to mitigate those risks.

CP has experienced the following safety issues as a direct result of utility installations without proper engineering review and supervision or that lacked appropriate licensing authorization to access railroad property:

- Pipes that were not constructed to specification have burst with the water collecting underneath the railroad right-of-way, which caused an uneven track surface, a break in the rail, and ultimately, a train derailment.
- A utility boring for an electric wire in an unapproved location cut a signal wire to a public street crossing, causing the signals to malfunction.
- The lack of a crossing license agreement with the utility prevented CP from requiring the utility company depower or bury a cable under a bridge, which not only delayed a necessary bridge repair but also compromised the bridge inspector's safety.

CP needs adequate time to review, approve, and inspect utility installations in coordination with its other safety commitments to its employees and to the public. The Bill's restrictive timeframe, however, would not provide CP an adequate opportunity to review and approve a proposed utility installation. HB 1362 provides no ability for CP to ensure that the utility and its installation methods do not damage railroad property, cause drainage issues, or compromise the integrity of CP's track infrastructure. Allowing utility contractors to enter railroad operating property without proper safety protocols or approval would severely hamper CP's ability to determine if the installation of the utility complies with railroad industry safety requirements and to protect the public.

The Bill requires CP, at its own expense, to provide real property, personnel and materials to support the utilities' business activities. HB 1362 does not adequately account for the costs of necessary engineering review, documenting each utility location, considering that location when installing or maintaining CP's own infrastructure, providing notification to local CP personnel, or storing the related information for the vast number of utilities along CP's operating rail

corridors. The proposed $750 fee fails to cover the above-referenced costs, nor does it adequately compensate CP for the diminution in value of its property caused by the utility installation.

Sincerely,

Arielle Giordano

Arielle Giordano
Director, Federal and State Government Affairs

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p. 1

JIM CHASE
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Transportation Division
North Dakota Legislative Board

Testimony of Jim Chase
Before the Senate Industry, Business and Labor Committee
In Opposition of HB 1362
March 13, 2019

Chairman Klein and members of the Senate Industry, Business and Labor Committee, my name is Jim Chase. I represent SMART-Transportation Division of the International Association of Sheet Metal, Air, Rail, and Transportation employees. SMART is the largest rail labor union in North America. Our membership includes conductors, engineers, switchmen, trainmen and yardmasters; I am a locomotive engineer for BNSF Railway at Mandan.

This written statement is in opposition to House Bill 1362 as written due to serious safety concerns with language contained in this bill.

Section 49-09.1-04 states that after 30 days of the receipt of the application by the railroad the utility may commence the construction of the crossing unless the railroad notifies the utility in writing that the proposed crossing is a serious threat to the safe operations of the railroad or the current use of the railroad right of way.

The railroads hire engineering and maintenance professionals who are tasked with keeping the tracks safe for the operations of trains. As you can imagine, railroads are inundated with utility crossing requests from all over the country and the 30-day notification period may not be realistic. In the event of a clerical error or if the railroad could not respond in time, the utility could commence work with no review as to the safety of the proposed utility crossing by the owner of the property.

It is important to bear in mind that there are federal requirements regarding roadbed, track gauge (width), alignment and track surface, any of which could be impacted by boring underneath the tracks. We need to insure that proposed crossings are reviewed and approved by the appropriate staff engineers in all cases to protect the track integrity.

Please refer to the excerpt below, taken from Page 3 of HB 1362. I recommend that the language in 49-09.1-04 be revised to remove the adjective "serious" from the phrase "serious threat" as ANY threat to the safe operations of the railroad should be sufficient cause for thorough review by the railroad prior to allowing the utility to commence construction.

I urge you to vote "Do Not Pass" on HB 1362 as written.

Excerpt from HB 1362, Page 3:

Sixty-sixth Legislative Assembly

49-09.1-04. Commencement of construction across railroad right of way.

Thirty days after the receipt by the railroad of the completed crossing application, crossing fee, and certificate of insurance, the utility may commence the construction of the crossing, unless the railroad notifies the utility in writing that the proposed crossing is a **serious** threat to the safe operations of the railroad or to the current use of the railroad right of way. In all other instances, the utility is deemed to have authorization to commence construction of the facility.

HB 1362 3/15/19 Att # 11

PSC Draft Amendment
13 March 2019

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1362

Page 5, line 3, replace "after" with "shall issue a"

Page 5, line 3, after "notice" replace "and" with "of hearing or notice of"

Page 5, line 3, remove "shall"

Page 5, line 4, remove "issue an order"

Page 5, line 4, replace "sixty" with "fifteen"

Page 5, line 4, after "petition," insert "and shall issue an order within thirty days after the hearing or, if no hearing is held, after the expiration of the period during which a hearing could be requested,"

Page 5, line 7, after "parties." Insert "The parties shall pay the costs within thirty days after receipt of a bill for payment from the commission. Amounts collected by the commission under this subsection must be deposited in a special account within the public service commission."

Page 5, line 21, after "shall" insert "issue a notice of hearing or notice of opportunity for hearing within fifteen days after the filing of the petition, and shall"

Page 5, line 21, replace "ninety" with "thirty"

Page 5, line 21, replace "of filing the" with "after the hearing or, if no hearing is held, after the expiration of the period during which a hearing could be requested

Page 5, line 22, remove "petition, after notice and opportunity for hearing"

Page 5, line 25, after "parties." Insert "The parties shall pay the costs within thirty days after receipt of a bill for payment from the commission. Amounts collected by the commission under this subsection must be deposited in a special account within the public service commission."

Renumber accordingly