Sixty-sixth Legislative Assembly of North Dakota
In Regular Session Commencing Thursday, January 3, 2019

HOUSE BILL NO. 1362
(Representatives Monson, Headland, Mitskog)
(Senators Bekkedahl, Burckhard, Robinson)

AN ACT to create and enact chapter 49-09.1 of the North Dakota Century Code, relating to the right of utilities to cross over or under a railroad right of way; and to provide for application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 49-09.1 of the North Dakota Century Code is created and enacted as follows:

49-09.1-01. Definitions.

As used in this chapter:

1. "Crossing" means the construction, operation, repair, or maintenance of a facility over, under, or across a railroad right of way by a utility. The term includes the construction, operation, repair, or maintenance of a 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 facility crosses the railroad lines, terminates, or exits the railroad right of way. The term does not include longitudinal occupancy of a railroad right of way.

2. "Facility" means any item of personal property placed over, across, or under a railroad right of way for use in connection with the storage or conveyance of:

   a. Water;

   b. Sewage;

   c. Electronic, telephone, data, or telegraphic communications;

   d. Fiber optics;

   e. Cablevision;

   f. Electric energy;

   g. Liquid hydrocarbons;

   h. Gas;

   i. Hazardous liquids; or

   j. Other substances, including pipes, sewers, conduits, cables, valves, lines, wires, manholes, or attachments.

3. "Railroad" means any 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 crossing fees.

4. "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.

5. "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. The term includes contractors and agents.

49-09.1-02. Right of utilities to cross over or under railroad right of way.

A utility may cross over or under the railroad right of way for the placement of facilities, subject to payment of the crossing fee in section 49-09.1-05 and 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.

49-09.1-03. Notice and application for placement.

1. A utility that intends to place a facility across a railroad right of way shall provide notice of the placement to the railroad at least thirty days before the placement.

2. The notice must include a completed crossing application, including a drawing showing the location of the proposed crossing and the railroad's property, tracks, and wires the utility will cross.

3. The utility shall submit the crossing application on a form provided or approved by the railroad, if available.

4. The crossing application must be sent to the railroad by registered mail.

5. The application must be accompanied by the crossing fee in section 49-09.1-05, and a certificate of insurance as required in section 49-09.1-06.

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

Thirty-five 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.

49-09.1-05. Crossing fee - Flagging expense.

1. 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.

2. The 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 or diminution of land value incurred by the railroad as a result of the crossing.

3. 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.

4. A crossing fee is not required if the crossing is located within a public right of way.

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

6. If the railroad alleges a crossing will cause a diminution in land value in an amount greater than the crossing fee provided in subsection 1, the railroad shall notify the utility and provide a certified appraisal demonstrating the diminution in value of the entire parcel of railroad

property caused by the crossing before the date for commencement of construction provided in section 49-09.1-04.

7. If the parties are unable to resolve the issue of compensation under subsection 6, the dispute must be resolved in accordance with section 49-09.1-08.

8. 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.

49-09.1-06. Certificate of insurance or coverage.

1. The certificate of insurance or coverage submitted by a municipality must 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.

2. The certificate of insurance or coverage submitted by any other utility other than a gas and hazardous materials pipeline utility must include commercial general liability insurance or an equivalent form with a limit of not less than two million dollars for each occurrence and an aggregate limit of not less than five million dollars.

3. The certificate of insurance submitted by a gas or hazardous materials pipeline utility must 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.

4. The railroad may require protective liability insurance with a combined single limit of not less than two million dollars for each occurrence and an aggregate limit of not less than five million dollars. 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.

5. The coverage is required only during the period of construction, repair, or replacement of the facility.

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

49-09.1-07. Notice of objection by railroad - Appeal.

1. 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 registered mail.

2. If the parties are unable to resolve the objection, either party may petition the commission for resolution of the disputed crossing application within thirty days from receipt of the objection.

3. Before filing a petition, the parties shall confer in good faith in an attempt to resolve the objection.

4. If a petition is filed, the commission shall issue a notice of hearing or notice of opportunity for hearing within fifteen days of filing of the petition, 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, during which time the crossing must be stayed. The order may be appealed in accordance with chapter 28-32. The commission shall assess its costs associated with a petition equitably against the parties. 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.

49-09.1-08. Additional requirements imposed by railroad - Objection and petition to commission.

1. If, in writing by registered mail, a railroad asserts special circumstances exist, 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, or imposes additional requirements on a utility for crossing its lines, the utility may object to one or more of the requirements.

2. If a utility objects under subsection 1, the utility shall provide notice of the objection and the specific basis of the objection to the railroad by registered mail.

3. If the parties are unable to resolve the objection, either party may petition the commission for resolution of the objection within thirty days from receipt of the objection.

4. Before filing a petition, the parties shall confer in good faith in an attempt to resolve the objection.

5. If a petition is filed, the commission shall issue a notice of hearing or notice of opportunity for hearing within fifteen days after the filing of the petition, and shall determine, 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, whether special circumstances exist which necessitate additional requirements for the placement of the crossing. The order may be appealed in accordance with chapter 28-32. The commission shall assess its costs associated with a petition equitably against the parties. 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.

49-09.1-09. Operational relocation.

1. A railroad may require a utility to relocate a facility if the railroad determines 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 shall perform the relocation within a reasonable period of time following the agreement.

2. The relocation must be to a location mutually agreed upon by the railroad and utility, within the railroad right of way.

3. Relocation is at the expense of the utility. The crossing fee under section 49-09.1-05 may not be imposed for relocation.

49-09.1-10. Removal of equipment.

Upon completion of any facility, the utility shall remove, or cause to be removed, all tools, equipment, or other property used in the construction of the facility and, if railroad property was moved or disturbed, restore that property to the condition of the property before being moved or disturbed.

49-09.1-11. Assignment.

1. A utility may assign or otherwise transfer any rights to cross a railroad right of way to any financially responsible entity controlled by, controlling, or under common control of the utility or to any entity into or with which the utility is merged or consolidated or which acquires ownership or control of all or substantially all of the transmission assets of the utility.

2. Notice of the assignment or transfer must be given to the railroad within thirty days. Any other transfer or assignment may not take place without the written permission of the railroad, which permission may not be unreasonably withheld.

49-09.1-12. Prohibition against mechanic's liens.

1. A utility may not create, permit, or cause a mechanic's lien or other lien to be created or enforced against the railroad's property for any work performed by the utility in connection with the utility's facilities located in the railroad's right of way.

2. A railroad may not create, permit, or suffer a mechanic's lien or other lien of any kind or any nature to be created or enforced against a utility's property located in the railroad's right of way for any work performed by the railroad in connection with the railroad's facilities.

49-09.1-13. Taxes.

A utility promptly shall pay or discharge all taxes and charges levied upon the utility's facilities located in the railroad's right of way. If any taxes or charges can not be separately made or assessed to the utility, but are included in the taxes or charges assessed to the railroad, the utility shall pay to the railroad an equitable portion of the taxes, determined by the value of the utility's facilities located on railroad right of way as compared with the entire value of the railroad property.

49-09.1-14. Existing agreements - Eminent domain.

1. This chapter does not prevent 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.

2. This chapter does not impair the authority of a utility to secure crossing rights by easement pursuant to the exercise of the power of eminent domain.

SECTION 2. APPLICATION. This Act applies to any:

1. Crossing existing before August 1, 2019, 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 fees are required; and

2. Crossing commenced after July 31, 2019.

Speaker of the House

President of the Senate

Chief Clerk of the House

Secretary of the Senate

This certifies that the within bill originated in the House of Representatives of the Sixty-sixth Legislative Assembly of North Dakota and is known on the records of that body as House Bill No. 1362.

House Vote:	Yeas 79	Nays 8	Absent 7
Senate Vote:	Yeas 46	Nays 0	Absent 0

Chief Clerk of the House

Received by the Governor at 10:20 AM. on April 5, 2019.

Approved at 7:43 PM. on April 10, 2019.

Governor

Filed in this office this 11th day of April, 2019,

at 10:08 o'clock A. M.

Secretary of State