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PUBLIC UTILITY CROSSINGS AND THE MODEL UTILITY STATUTE

Railroads Are Facing Increases in Applications to Cross Their Rights-of-Way

2020's COVID-19 lockdowns, quarantines, and isolation orders ushered in new eras of education, employment, and entertainment. From e-learning, to zoom meetings, to streaming service binge watching, the "new normal" promises an increased reliance on fast, dependable internet connections to learn, work, and play. The past several years already had seen record installation of fiber facilities for 5G service, wireless networks, and direct broadband connections to homes, businesses, and other institutions, and there are no signs deployment will slow in the near future. Billions of dollars have been spent and billions more have been pledged to support broadband expansion. Even as COVID-19 restrictions subside, one of the pandemic's lasting effects will be an increased reliance on the internet.

What does this mean for the rail industry? Railroads face a dramatic increase in public utilities, such as telecommunications companies and cable television providers, seeking to cross railroad rights-of-way. This is driven in large part by the push to expand broadband service and to introduce 5G service, especially into underserved and rural areas. To serve these areas, the broadband industry is aggressively installing new fiber optic cables that often have to cross or laterally occupy a railroad's right-of-way, creating a conflict between the railroad's property interest and the provider's need to expand its service.

Providers seek to install cables quickly and cheaply – and railroads and their rights-of-way often are in the path of proposed cable installations. Some states, like Illinois, have statutes that mandate procedures that must be followed before a provider installs facilities over or under railroad rights-of-way. But broadband industry groups and lobbyists have encouraged states to enact model crossing legislation developed by the Federal Communications Commission's Broadband Deployment Advisory Committee ("FCC" and "BDAC") – without input from the rail industry – that prioritizes speedy fiber rollouts over railroad property rights, costs, and safety.

Railroads' Rights at Proposed Crossings in Illinois

Some states have established statutes and/or regulations that set out requirements for a broadband provider to enter or cross the railroad's right-of-way. An Illinois statute, for example, requires that service providers send a written notice of intent to a railroad's registered agent containing:

- The date of the proposed installation and the time required to complete the work;
- Detailed drawings that conform to American Railway Engineering and Maintenance-of-Way Association ("AREMA") and railroad standards;
- The location of the proposed entry and path of cable television facilities proposed to be placed upon the real estate or right of way;
- The provider's written agreement to indemnify and hold harmless the railroad from the costs of any damages directly or indirectly caused by the installation and proof of insurance; and

- A statement that the proposed installation does not create a dangerous condition or adversely impact railroad operations.

The Illinois statute pertains to crossings in public rights-of-way. At private crossings in Illinois, railroads and providers generally remain free to condition crossing on terms they agree to. While this law is not ideal for railroads, it makes clear that providers may not surreptitiously install facilities, that railroads can require drawings that conform to AREMA standards and require providers to indemnify railroads for damages caused by installation, and it delivers some predictability to railroads and providers alike.

The Broadband Deployment Advisory Committee

But the BDAC doesn't believe that laws like these go far enough to advance its interests. Created by the FCC in 2017, the BDAC is a collection of broadband industry advisors and officials. Its stated "mission" is to "make recommendations for the [FCC] on how to accelerate the deployment of high-speed Internet access, or 'broadband,' by reducing and/or removing regulatory barriers to infrastructure investment."

Rather than cooperate with railroads to safely and efficiently cross rights-of-way, the BDAC and others have branded railroads one of those barriers to broadband expansion. In the words of one broadband industry group leader, "[o]ne of the most vexing problems" for broadband providers "is getting the right to cross railroad tracks." Of course, many states, like Illinois, have statutes that prescribe the method for doing just that. Providers' quarrels, then, are not just with railroads; they are also with laws that require adherence to pre-crossing procedures and that provide reasonable protections for railroads, including drawings conforming to AREMA standards and indemnification, and railroad property rights.

Accordingly, in late 2018, as part of its broadband push, the BDAC released a model crossing statute, the *State Model Code for Accelerating Broadband Infrastructure Deployment and Investment*, ("Model Utility Statute").

The Model Utility Statute and Broadband Industry Efforts to Erode Railroads' Rights

Despite devoting an entire article to "Special Provisions for Railroad Crossings" in the Model Utility Statute, the BDAC did not engage the rail industry to help draft it. As a result, its provisions are unrealistic, unsafe, and unfavorable to railroads.

To start, it applies to *all* crossings, public and private. While providers must submit a "standard Crossing fee" and complete a crossing application for permission to place facilities upon or across a railroad right-of-way, design drawings need *not* conform to AREMA standards. The timeframe for initial railroad review is just 15 calendar days. This timeframe often will be too short to confirm that proposed installations meet safety and engineering standards. But, unless the railroad determines that the proposed installation is a "serious threat to the safe operations of the Railroad or to the current use of the Railroad right-of-way," a phrase left undefined, the provider can commence installation in 35 calendar days, seemingly irrespective of whether the railroad can secure flagging to ensure the integrity of the tracks and railroad facilities and the safety of train crews, workers, and others during installation.

Further, while a provider must submit evidence of insurance with its application, it need not indemnify a railroad in the event that it or a contractor damages railroad property during installation. The railroad would have to chase down the insurer or file suit to recover for any damages arising out of installation.

The Model Utility Statute allows for reimbursement of reasonable and necessary flagging costs, but the “standard Crossing fee” is a onetime, all-inclusive payment of \$500.00 that applies *only* to private crossings. *No fees may be charged by the railroad if the crossing is located within a public right of way.* The fees permitted to be charged, either \$0.00 or \$500.00 depending on the crossing location, almost certainly will be insufficient to cover the costs to process a provider’s application, review design drawings and insurance information, and greenlight a proposed installation.

The Model Utility Statute, effectively, would strip railroads of rights at their rights-of-way and have railroads subsidize the BDAC’s rapid broadband expansion mission.

The drafting of the Model Utility Statute was not an academic exercise. The BDAC actively recommends that states enact the Model Utility Statute and similar measures. Other groups have gone further and asked the FCC to use its authority to preempt state and local property laws and common law property rights that protect railroads’ interests at rights-of-way. Providers also continue to enlist self-styled “consultants” who insist that providers do not have to pay engineering review fees, do not have to provide insurance or indemnify the railroads, and do not have to pay for flagging. These efforts are sure to increase in 2021 and beyond as broadband and 5G expansion accelerate across the country.

RAILROADS STILL HAVE REMEDIES!

Despite these broadband industry efforts, state laws and the Model Utility Statute do provide various remedies. In Illinois, for example, should a railroad determine that a proposed installation would pose a danger, that railroad determination bars the provider from railroad property unless and until a ruling by the Illinois Commerce Commission overturns the railroad determination and approves the proposed crossing.

Similarly, if a provider is unwilling to negotiate the terms of a crossing or is unreasonable in its requests, a railroad can seek to define the terms for crossing its right-of-way through petitions to state courts, federal courts, or regulatory bodies. Courts have broad discretion to fashion injunctive remedies to fit the exigencies of the situation and have the authority to preclude self-help, require advance notice of proposed crossings, require service providers to comply with railroad application processes, and require service providers to pay for the cost of flaggers.

Where it is too late for negotiation or injunctive relief, complaints may be filed in state and federal court to recover damages caused by providers that resort to self-help. Complaints also may be filed against those providers that cause damages by failing to adhere to drawings, standards, and other terms.

Please join Matthew Hammer and Laura Platt for an in-depth presentation and Q&A session on this timely topic at the ARDA Executive Committee Forum on February 2-3, 2021.

In the meantime, Daley Mohan Groble attorneys handle crossing disputes of all shapes and sizes and have experience protecting railroad rights with each of these remedies. Contact Matt or Laura to discuss your options if a broadband provider or consultant has sent to you a notice of intent to install cables over or under your right of way, if you suspect a broadband provider intends to install cables over or under your right of way, or to learn more about the rights and remedies available to your railroad at utility crossings.