

Introduced by

Representatives Monson, Headland, Mitskog

Senators Bekkedahl, Burckhard, Robinson

1 A BILL for an Act to create and enact chapter 49-09.1 of the North Dakota Century Code,
2 relating to the right of utilities to cross over or under a railroad right of way; and to provide for
3 application.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

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

7 **49-09.1-01. Definitions.**

8 As used in this chapter:

9 1. "Crossing" means the construction, operation, repair, or maintenance of a facility over,
10 under, or across a railroad right of way by a utility. The term includes the construction,
11 operation, repair, or maintenance of a facility that runs adjacent to and alongside the
12 lines of a railroad for no more than one mile, or another distance agreed to by the
13 parties, after which the facility crosses the railroad lines, terminates, or exits the
14 railroad right of way. The term does not include longitudinal occupancy of a railroad
15 right of way.

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

18 a. Water;

19 b. Sewage;

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

21 d. Fiber optics;

22 e. Cablevision;

23 f. Electric energy;

24 g. Oil liquid hydrocarbons;

- 1 h. Gas;
2 i. Hazardous liquids; or
3 j. Other substances, including pipes, sewers, conduits, cables, valves, lines, wires,
4 manholes, or attachments.
- 5 3. "Railroad" means any association or corporation or other entity engaged in operating a
6 common carrier by rail or any other entity responsible for the management of
7 crossings or collection of crossing fees.
- 8 4. "Special circumstances" includes the railroad crossing's relationship to other property,
9 location of the crossing in urban or other developed areas, the existence of unique
10 topography or natural resources, or other dangers inherent in the particular crossing.
- 11 5. "Utility" means cooperative electric association, electric utility, public utility,
12 transmission company, gas utility, municipal utility, municipal power agency,
13 municipality, joint action agency, pipeline company, rural water system, or telephone,
14 telegraph, telecommunications, cable, or fiber optic carrier. The term includes
15 contractors and agents.

16 **49-09.1-02. Right of utilities to cross over or under railroad right of way.**

17 A utility may cross over or under the railroad right of way for the placement of facilities,
18 subject to payment of the crossing fee in section 49-09.1-05 and reasonable regulation and
19 negotiation in good faith as to location, placement, and compensation, when the placement of
20 facilities is outside the public right of way.

21 **49-09.1-03. Notice and application for placement.**

- 22 1. A utility that intends to place a facility across a railroad right of way shall provide notice
23 of the placement to the railroad at least thirty days before the placement.
- 24 2. The notice must include a completed crossing application, including a drawing
25 showing the location of the proposed crossing and the railroad's property, tracks, and
26 wires the utility will cross.
- 27 3. The utility shall submit the crossing application on a form provided or approved by the
28 railroad, if available.
- 29 4. The crossing application must be sent to the railroad by registered mail.
- 30 5. The application must be accompanied by the crossing fee in section 49-09.1-05, and a
31 certificate of insurance as required in section 49-09.1-06.

1 **49-09.1-04. Commencement of construction across railroad right of way.**

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

7 **49-09.1-05. Crossing fee - Flagging expense.**

- 8 1. Unless otherwise agreed by the parties, a utility that crosses a railroad right of way,
9 other than a crossing within the public right of way, shall pay the railroad a one-time
10 standard crossing fee of seven hundred fifty dollars for each crossing.
- 11 2. The crossing fee is in lieu of any license, permit, application, processing fee, or any
12 other fees or charges to reimburse the railroad for the direct expenses or diminution of
13 land value incurred by the railroad as a result of the crossing.
- 14 3. No other fee may be assessed by the railroad or by any railroad agent, contractor, or
15 assignee to the utility or to any agent or contractor of the utility.
- 16 4. A crossing fee is not required if the crossing is located within a public right of way.
- 17 5. In addition to the standard crossing fee and based on the railroad traffic at the
18 crossing, a utility shall reimburse the railroad for any reasonable and necessary
19 flagging expense associated with a crossing.
- 20 6. If the railroad alleges a crossing will cause a diminution in land value in an amount
21 greater than the crossing fee provided in subsection 1, the railroad shall notify the
22 utility and provide a certified appraisal demonstrating the diminution in value of the
23 entire parcel of railroad property caused by the crossing before the date for
24 commencement of construction provided in section 49-09.1-04.
- 25 7. If the parties are unable to resolve the issue of compensation under subsection 6, the
26 dispute must be resolved in accordance with section 49-09.1-08.
- 27 8. The placement of a single conduit and its content is a single facility. No additional fees
28 are payable based on the individual fibers, wires, lines, or other items contained within
29 the conduit.

1 **49-09.1-06. Certificate of insurance or coverage.**

- 2 1. The certificate of insurance or coverage submitted by a municipality must include
3 commercial general liability insurance or equivalent form with a limit of not less than
4 one million dollars for each occurrence and an aggregate of not less than two million
5 dollars.
- 6 2. The certificate of insurance or coverage submitted by any other utility other than a gas
7 and hazardous materials pipeline utility must include commercial general liability
8 insurance or an equivalent form with a limit of not less than two million dollars for each
9 occurrence and an aggregate limit of not less than five million dollars.
- 10 3. The certificate of insurance submitted by a gas or hazardous materials pipeline utility
11 must include commercial general liability insurance with a combined single limit of a
12 minimum of five million dollars for each occurrence and an aggregate limit of at least
13 ten million dollars.
- 14 4. The railroad may require protective liability insurance with a combined single limit of
15 not less than two million dollars for each occurrence and an aggregate limit of not less
16 than five million dollars. The coverage may be provided by a blanket railroad
17 protective liability insurance policy if the coverage, including the coverage limits,
18 applies separately to each individual crossing.
- 19 5. The coverage is required only during the period of construction, repair, or replacement
20 of the facility.
- 21 6. The insurance obligations required under this section may be satisfied by the utility
22 using any combination of primary, excess, or self insurance.

23 **49-09.1-07. Notice of objection by railroad - Appeal.**

- 24 1. If a railroad objects to the proposed crossing due to the proposal being a serious
25 threat to the safe operations of the railroad or to the current use of the railroad right of
26 way, the railroad shall provide notice of the objection and the specific basis of the
27 objection to the utility by registered mail.
- 28 2. If the parties are unable to resolve the objection, either party may petition the
29 commission for resolution of the disputed crossing application within thirty days from
30 receipt of the objection.

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

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

8 **49-09.1-08. Additional requirements imposed by railroad - Objection and petition to**
9 **commission.**

10 1. If, in writing by registered mail, a railroad asserts special circumstances exist, other
11 than the proposed crossing being a serious threat to the safe operations of the railroad
12 or to the current use of the railroad right of way, or imposes additional requirements on
13 a utility for crossing its lines, the utility may object to one or more of the requirements.

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

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

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

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

26 **49-09.1-09. Operational relocation.**

27 1. A railroad may require a utility to relocate a facility if the railroad determines relocation
28 is essential to accommodate railroad operations, and the relocation is not arbitrary or
29 unreasonable. Before agreeing to the relocation, a utility may require a railroad to
30 provide a statement and supporting documentation identifying the operational

1 necessity for requesting the relocation. A utility shall perform the relocation within a
2 reasonable period of time following the agreement.

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

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

7 **49-09.1-10. Removal of equipment.**

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

12 **49-09.1-11. Assignment.**

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

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

21 **49-09.1-12. Prohibition against mechanic's liens.**

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

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

29 **49-09.1-13. Taxes.**

30 A utility promptly shall pay or discharge all taxes and charges levied upon the utility's
31 facilities located in the railroad's right of way. If any taxes or charges can not be separately

1 made or assessed to the utility, but are included in the taxes or charges assessed to the
2 railroad, the utility shall pay to the railroad an equitable portion of the taxes, determined by the
3 value of the utility's facilities located on railroad right of way as compared with the entire value
4 of the railroad property.

5 **49-09.1-14. Existing agreements - Eminent domain.**

6 1. This chapter does not prevent a railroad and a utility from continuing under an existing
7 agreement or otherwise negotiating the terms and conditions applicable to a crossing
8 or the resolution of any disputes relating to the crossing.

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

11 **SECTION 2. APPLICATION.** This Act applies to any:

12 1. Crossing existing before August 1, 2019, if an agreement concerning the crossing has
13 expired or is terminated. In such instance, if the collective amount of seven hundred
14 fifty dollars has been paid to the railroad during the existence of the crossing, no
15 additional fees are required; and

16 2. Crossing commenced after July 31, 2019.