



PUBLIC UTILITY CROSSING ISSUES

Railroads are facing 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, especially into underserved rural and semi-rural areas, and to introduce 5G services. 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.

Many of these broadband providers are small companies and are not familiar with the regulations and procedures for crossing railroad rights-of-way. This opens the door to self-styled "consultants" that promise easy solutions to crossing railroad rights-of-way. These consultants often rely on questionable "legal" arguments to claim that the providers do not have pay engineering review fees, do not have to provide insurance or indemnify the railroads, and do not have to pay for flagging. Further, broadband providers may believe that the license or authorization issued for their installation project includes access to railroad property. When the railroad requests compliance with its policies, the broadband providers or their installation contractors sometimes resort to self-help and surreptitiously install cables over and under railroad tracks, especially at road crossings, with little or no notice to the railroads and no regard for safety. These unauthorized crossing of railroad rights-of-way have resulted in damage to trains from utility equipment left near tracks, damage to railroad facilities, and have cost railroads time and money.

THE RAILROADS' RIGHTS

Despite the position sometimes taken by broadband providers and their consultants, railroads do have the right to exercise reasonable control over how the rights-of-way are crossed. In general, railroads have the right to request engineering drawings and insurance, as well as flagging if the railroad deems it necessary. In many cases railroads may also be able to obtain an indemnity agreement and charge a reasonable fee, but this varies state by state.

Some states have specific statutes 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 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 service 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, upon the railroad's request; and
- A statement that the proposed installation does not create a dangerous condition nor adversely impact railroad operations.

Some states have similar statutes and in other states the procedures are governed by common law property rights. As part of its broadband push, the FCC has drafted a model statute regarding public utility crossings and recommended that states enact its provisions, some of which are unfavorable to railroads.

RAILROADS HAVE REMEDIES

State laws and the FCC model statute often provide remedies as well. In the case of the Illinois statute governing crossings, should the railroad determine that the proposed installation would create a dangerous condition, the railroad's determination bars the broadband provider from railroad property until a ruling by the Illinois Commerce Commission ("ICC").

Similarly, if a broadband provider is unwilling to negotiate the terms of a crossing or is unreasonable in its requests, railroads 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, 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 service providers that resort to self-help. Complaints also may be filed against those service providers that cause damages by failing to adhere to drawings, standards, and other terms.

Contact your Daley Mohan Groble attorney 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 real estate or right of way, or to learn more about the rights and remedies available to the railroad at utility crossings.