

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

IN THE MATTER OF THE NEBRASKA
PUBLIC SERVICE COMMISSION, TO
INVESTIGATE STANDARD CROSSING
FEES CHARGED FOR
TELECOMMUNICATIONS COMPANIES
TO ACCESS RIGHTS-OF-WAY
CONTROLLED BY RAILROAD
CARRIERS.

APPLICATION No. C-5685/PI-259

**COMMENTS OF BLACK HILLS NEBRASKA GAS, LLC
D/B/A BLACK HILLS ENERGY**

I. INTRODUCTION

On December 16, 2025, the Nebraska Public Service Commission (“Commission”), on its own motion, issued an Order opening an investigation in the above-captioned docket for the purpose of investigating the standard crossing fees charged for telecommunications companies to access rights-of-way controlled by railroad carriers. The Commission seeks to determine whether the standard crossing fees being charged by BNSF, and its agents, are in violation of Neb. Rev. Stat. § 86-164 by overcharging telecommunications companies for the standard crossing fees.

On November 5, 2025, BNSF filed a response stating it is in compliance with Neb. Rev. Stat. § 86-184 as its flagging charges are “actual expenses associated with the placement of the line, wire, or cable” within the meaning of Neb. Rev. Stat. § 86-164(3)(a). Additionally, BNSF alleges its interpretation of the statute allows it to charge an application fee plus a license fee for each line, wire, or cable across a railroad right-of-way.

Pursuant to the Commission’s Order, the Commission is soliciting written comments from interested parties to provide context to the issues raised in the investigative order. Black Hills Nebraska Gas, LLC d/b/a Black Hills Energy (“BH Nebraska Gas”) operates within the State of Nebraska as a Jurisdictional Utility pursuant to the State Natural Gas Regulation Act (“Act”). *Neb.*

Rev. Stats. §§ 66-1801, et. seq. BH Nebraska Gas conducts business in Nebraska as “Black Hills Energy” and has been charged railroad right-of-way standard crossing fees and flagging expenses in connection with its business as a natural gas public utility and has an interest in these proceedings. BH Nebraska Gas provides comments on the challenges faced in obtaining wire-crossing agreements as set forth below.

II. COMMUNICATIONS

Further communication regarding these comments may be directed to the following BH Nebraska Gas representatives:

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III. SCOPE OF COMMENTS

BH Nebraska Gas appreciates the Commission’s action in this proceeding to review and investigate the compliance of BNSF with Neb. Rev. Stat. § 86-164. BH Nebraska Gas understands and appreciates that it is not currently included under the protection of Neb. Rev. Stat. § 85-164, but Black Hills does believe that its experience with railroad crossings as a Jurisdictional Utility under the State Natural Gas Regulation Act will further assist the Commission in addressing the

concerns raised by the NTA in this proceeding. Accordingly, BH Nebraska Gas provides the following comments:

a. How quickly are applications processed to determine whether they are complete? How are the fees quoted in response to applications?

COMMENTS: The timeframe for determining whether an application is complete can vary significantly. On average, from the date of submission, it can often take 35 days or more for the railroad representative to give the applicant its first response—even when the applicant pays an additional expedited review fee on top of the railroad’s standard application fee. Application-related fees such as the standard application fee, expedited review fee, and flagger/inspector day rates are generally consistent within each railroad but the fees differ between railroad companies. However, certain costs—such as the License Agreement Fee and other miscellaneous fees (e.g., convenience, review, or administrative handling fees)—are not quoted upfront. In fact, these fees are often only disclosed once the railroad representative approves the crossing application and issues the agreement for execution along with an invoice – which is the applicant’s first time seeing to examine all the fees.

BH Nebraska Gas frequently advocates for reasonable fees by emphasizing that BH Nebraska Gas is a public utility and that the proposed crossing involves a small-diameter, low-pressure service pipeline, not a high-pressure distribution or transmission line. This approach occasionally results in a reduction of the License Agreement Fee, but the final amount often remains significantly higher than the market value of the land, impact or detriment to the land’s use, or time of railroad personnel in the processing of the application or monitoring of the related field activities. This

concern about the lack of transparency in the fees was raised during the 2009 legislative hearing on LB 181.

Of note, in the last two years of all applications submitted to railroads for pipeline crossings, there have been multiple applications submitted by BH Nebraska Gas that have taken more than 100 days from the time of the initial application submission through license agreement execution. In one instance, an application took over 140 days until the license was executed – and in that case, a \$7,000 expedited fee was paid. It is important to understand that Utility Providers cannot schedule flaggers/inspectors until a license is fully executed. Furthermore, the railroad is not generally willing to negotiate or refund these fees.

b. What has been the most common disagreement BH Nebraska confronts with railroads in comparison to the requirements set forth in Neb. Rev. Stat. § 86-164?

COMMENTS: Neb Rev. Stat § 86-164 applies specifically to telecommunications facilities and does not govern gas pipeline crossings. However, in the experience of BH Nebraska Gas, the most common point of disagreement between the railroad and BH Nebraska Gas is with designing the gas pipeline crossings of the railroads. This disagreement usually arises from the lack of published engineering guidelines or specifications by many railroads. Typically, railroads require submission of a crossing plan for review but do not provide clear standards upfront, leaving approval entirely at the railroad's discretion. This absence of documented expectations makes it challenging for BH Nebraska Gas to meet design specifications without receiving some form of rejection to the initial submission. The railroad's rejection of the BH Nebraska Gas proposed crossing design creates extended delays to the planned construction timeline. For example, the railroad's design reviewers often take each rejected design

and then places that design back into its workflow – i.e., to the end of the reviewing queue. It may take additional time to determine how to correct the design to the satisfaction of the railroad’s crossing design team before the railroad will review it again. This is sometimes true for even for the simplest of reasons for the rejection e.g., “design depth not sufficient.” One of the frustrations to BH Nebraska Gas is that in several instances, a rejection is received but no additional information is shared on “what depth” would make the pipeline sufficient to be acceptable to the railroad.

To its credit, BNSF Railway publishes a Utility Accommodation Policy, which is updated regularly and includes detailed specifications. Based on the experience of our Right of Way Director, BNSF is the only railroad that consistently provides such guidance. However, BNSF does practice the same process of review as other pipelines- ie., if originally rejection of a proposed crossing design is received, a response submission curing the rejection issue often means moving the crossing proposed plan back to the end of the review line where it sits until the reviewer gets back to it in their workload. Again, this rejection and handling of a crossing design creates extended delays to the applicant’s planned construction timeline.

For BH Nebraska Gas, all pipeline crossing installations are completed using Horizontal Directional Drilling (HDD). The pipe wall thickness meets or exceeds American Railway Engineering and Maintenance-of-Way Association (“AREMA”) engineering standards, and the pipeline is installed at a depth of 15 feet or more below the railroad track bed. Additionally, in general, the bore pits are located outside the railroad right-of-way to ensure minimal to zero impact to the railroad property or right-of-way (“ROW”). Even though BH Nebraska Gas meets these standards, the crossing

plan is often still met with 45 days or more of review time by the railroad even with the payment of expedited fees, if available.

c. Is there a specific point of contact for negotiations? How often has that point of contact changed?

COMMENTS: In the experience of BH Nebraska Gas, there usually is no single, consistent point of contact for negotiations. Many railroads outsource the processing of crossing applications to third-party contractors, which makes it challenging to identify and reach an individual who can address specific questions. In almost all cases, railroads do not permit applicants to communicate directly with the reviewing engineer. This lack of direct access often results in applicants having to infer the reasons an application is rejected and guess what design modifications are necessary to obtain approval.

d. What sort of factors or special circumstances have led to fees above the standard crossing fee?

COMMENTS: Fees exceeding the actual costs of time, material, or land value are common and appear to be standard feature of the railroad's fee structure. The railroad often deems its property valuation significantly higher than fair market value (perhaps due to improvements and usage), but this valuation is disproportionate to the actual time, materials, or effort required to review, monitor, and inspect the crossing of a natural gas pipeline installation. In many cases, the fees appear to serve as a revenue-generating mechanism for the railroad or its third-party contractor, rather than reflecting the true cost of the time and work involved. This is particularly concerning given that these crossings are essential for delivering reliable energy services at reasonable costs to the customers and communities we serve.

- e. **Are insurance fees and flagging costs standardized for all railroad carriers or do they differ among railroad carriers? How are actual flagging expenses determined? Do they differ by location or contractor? Are they different for aerial versus buried fiber? Are these standard fees charged in all states or are they specific by state, railroad carrier, or project?**

COMMENTS: Both insurance requirements and flagger/inspector costs vary by railroad company, though they tend to be consistent across state lines when working with that company. Insurance fees are typically manageable. For example, BNSF Railway offers a convenient option to include Railroad Protective Liability (RPL) insurance directly within the license agreement for a one-time fee of \$1,266. Other railroads, however, do not provide this option, requiring contractors or the applicant to secure RPL coverage through their own insurers or seek other providers—a process that can be challenging, as this type of insurance is considered a specialty product.

Based on experience, railroad flaggers, and engineering inspectors—both of whom are often required to be on-site from the start to the completion of work on railroad property—typically cost between \$750 and \$1,500 per day per position. Fees above \$800 per day are generally considered excessive by the applicant, but the railroad and the flagger/inspector parties will not negotiate rates. Additional charges for travel time, mileage, and per diem are common, and overtime rates apply for workdays exceeding eight hours are understandable.

- f. **Are flagging fees charged based on installation, or are they separately charged based on the number of lines, wires or cables being installed?**

COMMENTS: Flagging and inspection fees are charged on a per-day basis, not by the number of lines, wires, or cables being installed. Railroads require these personnel to be scheduled prior to any work on railroad property, which is reasonable from a safety perspective. However, scheduling can be challenging during high-demand

periods, as availability within a 30-day notice is often limited. And as previously stated, flaggers and inspectors cannot be scheduled until the license agreement has been fully executed by both parties.

For BH Nebraska Gas, the last two significant railroad crossing applications suffered delays that impacted project timelines, customer commitments, and contractor schedules. These delays often result in increased costs. For example, a project last year experienced an approximately 60-day delay after the license agreement was executed, due to the inability to schedule flaggers/inspectors as BH Nebraska Gas was told they were booked and unavailable. This delay resulted in BH Nebraska Gas having to pay \$113,084 in standby costs to the construction contractor as the project was critical to complete and allowing them to leave would put the project's completion at risk. The railroad and its third parties were unwilling to entertain or provide options to avoid this large, unplanned expense.

g. If special circumstances leading to requests for fees above the standard crossing fee have impeded negotiations, why has that not resulted in a petition being filed with the Commission?

COMMENTS: BH Nebraska Gas has regulated gas and electric utility affiliates in seven different states. BH Nebraska Gas has experience in crossing a railroad from working with several different railroad companies across its regional service territory located in in those states of utility operations. To that end, an option of a natural gas or electric utility company to file a petition with the state Commission or other governmental authority is generally unknown or unavailable to many utilities and pipeline companies. The larger pipeline operators often plan for the delays and can absorb higher fees (i.e., fee totals well above \$100k) into project capital costs with

minimal impact on large-scale projects. However, for smaller projects or time-sensitive projects for natural gas utility companies, pursuing a Commission-petition may require significant additional time, cost, or political support, which cannot always be prioritized due to competing policy objectives. In addition, legal or other Commission action may invoke negative relationship implications and could also lead to significant costs in legal fees. Filing a complaint with the Commission could, and it would still create significant impact/delays anyway, thus applicants are left to a business decision in determining the path of least risk/impact/cost. The actions of the railroad, whether intentional or otherwise - often lead either BH Nebraska Gas or its natural gas customer to acquiesce to the railroad fee demand due to having little recourse or alternative options.

As noted above, Black Hills Nebraska Gas has not filed a petition or complaint with the Commission regarding the railroad crossing fees because BH Nebraska Gas is not a covered utility under Neb. Rev. Stat. § 86-164. When the Legislature was considering the changes made through the enactment of LB 181 (2009), the lobbyist for BH Nebraska Gas testified in a neutral capacity, telling the Transportation and Telecommunications Committee, at that time, that the utility was interested in being included in the statute if the committee wanted to extend the scope of the original legislation.

To provide the Commission with some idea of the significance of the fees that BH Nebraska Gas has paid for railroad crossings, the company evaluated the fees paid in 2024-2025. Thirteen railroad crossing agreements were executed. At least five agreements have experienced issues with scheduling flaggers and/or inspectors. The

lowest total amount (inclusive of all fees) was \$1,500. The second lowest was \$10,751. The highest total amount paid was \$57,906. The average total amount paid per railroad crossing was \$23,752.

In contrast, Black Hills is also a natural gas public utility in Iowa, of which the State does have a statute that covers natural gas utilities. For Black Hills/Iowa Gas Utility Company, d/b/a Black Hills Energy, its average railroad crossing is \$5,000 or less and the crossing designs are often allowed to proceed with construction after 30 days of submitting a Notice to the railroad with an engineered plan & profile crossing design exhibit that follows industry engineering and construction standards.

h. Is there a need to have the Legislature clarify or modify Neb. Rev. Stat. § 86-164?

COMMENTS: Yes. At a minimum, the statute should be changed to add BH Nebraska Gas and other public utilities to the statute as it is currently written for telecommunications providers.

Other changes to the crossing design review and approval process for the Legislature to consider are as follows:

- The statute could be clarified to establish a maximum review period of 30 business days by the railroad, i.e., if the proposed design plans meet published railroad guidelines. If a railroad does not maintain written guidelines, then recognized industry standards should apply.
- The standard application fee of \$1,250 should be included at the time of submission to cover railroad administrative and review personnel time, and after the 30-day review period, the applicant may schedule flaggers/inspectors. If a railroad rejects an application within the 30-day

timeframe due to safety concerns of the application plan submitted, then the railroad should be required to provide specific engineering or design changes necessary for the application to address those safety concerns or cite specific written guidance, referencing AREMA standards.

- In cases where parties cannot reach agreement on the crossing plans, the applicant should have the option to file a petition with the Public Service Commission (PSC).
- A standard review process and timeline should be available for crossing plans. It should include an expedited review option, with reasonable additional fees for faster processing with a 7-business day limitation for review by the railroad. BH Nebraska Gas recommends the fee for the expedited review be capped at \$5000. This additional fee is intended to cover inconvenience and staff time to review any applications for crossings.

a. Would a mediation or arbitration process be helpful?

COMMENTS: Yes, a mediation or arbitration process could be helpful, provided it needs to include strict timeline requirements, with resolution occurring within 30 days or less. Without defined time limits, such processes risk adding further delays and costs rather than improving efficiency.

b. Would a standardized complaint process be helpful?

COMMENTS: Yes, a standardized complaint process could be helpful, provided it includes strict timelines and clear resolution guidelines. Without defined timeframes, such a process would risk adding delays and costs rather than improving efficiency.

IV. CONCLUSION

WHEREFORE, for the reasons stated above, BH Nebraska Gas respectfully submits the comments provided herein.

Respectfully,

BLACK HILLS NEBRASKA GAS, LLC
d/b/a BLACK HILLS ENERGY

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Dated: January 21, 2026

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing was served electronically on this 21st day of January, 2026, upon the following:

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