

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Nebraska Public) Application No. C-5685/PI-259
Service Commission, to investigate)
standard crossing fees charged for)
telecommunications companies to access) REPLY COMMENTS OF BNSF
rights-of-way controlled by railroad) RAILWAY COMPANY
carriers.)

BNSF Railway Company (“BNSF”) submits these Reply Comments pursuant to the Order of the Nebraska Public Service Commission (“Commission”) dated December 16, 2025. BNSF reiterates the comments it made in its November 5, 2025 letter to the Commission. BNSF feels it necessary to submit these Reply Comments to respond to certain additional arguments submitted in Comments by several entities.

Opening Statement

BNSF respectfully submits that Nebraska’s existing statute governing telecommunications carriers’ crossings of railroad right-of-way is already functioning as the Legislature intended: it safeguards rail operations, protects the public, and provides a clear, uniform process for the telecommunications carriers. The record contains no meaningful evidence that the statute is unclear or in need of revision. The delays or costs cited by telecommunications carriers stem largely from their own failure to follow established procedures, furnish required information, or coordinate work in a timely manner. Moreover, the statute already provides a formal complaint mechanism which, to the best of BNSF’s knowledge, the telecommunications carriers have never used--underscoring that the framework is sound and that further investigation is unwarranted.

Discussion

First and foremost, this proceeding involves Nebraska law, specifically Neb. Rev. Stat. § 86-164, which codified LB181 after its passage by the Nebraska legislature in 2010. Accordingly, all Comments submitted by entities regarding events that occurred decades or even a century ago, long before this statute was enacted, are irrelevant and unpersuasive. Neb. Rev. Stat. § 86-164, enacted in 2010, is the current law in Nebraska, and it governs the procedure for telecommunications carriers seeking to cross railroad right-of-way. Therefore,

events, laws, or practices that may have existed or occurred prior to the passage of the statute have no application to this proceeding.

Similarly, all Comments regarding alleged events in foreign states and jurisdictions are irrelevant to this proceeding. Again, Neb. Rev. Stat. § 86-164, a Nebraska statute, is the law that governs telecommunications carriers seeking to cross railroad right-of-way in Nebraska. Accordingly, Comments discussing alleged events that occurred in Minnesota, Illinois, or other unidentified jurisdictions, under whatever laws or practices that may exist in those respective jurisdictions, are irrelevant and have no application to this proceeding. Nebraska law governs this proceeding. Indeed, the Commission's Order expressly states its purpose in opening this docket is to seek comments regarding the "provisions of Neb. Rev. Stat. § 86-164." (Commission Order, Dec. 16, 2025).

Most of the Comments submitted consist of generalized arguments, lacking specificity and omitting necessary details that would permit investigation to provide full and meaningful responses. Comments frequently refer to alleged events that occurred at some unknown, distant time in the past, with no identification of the telecommunications carrier, the specific location of the intended crossing, permit numbers, an itemized chronology of events, or other detailed information to permit a meaningful analysis.

It must be recalled that during the January 12, 2026, telephonic meeting with the Commission and entities, it was expressly requested that any entity making a complaint provide specific details. Entities were advised that generalized arguments about alleged prior events that lack the requisite detail make it impossible to investigate those events and provide meaningful responses. That request was largely ignored.

Eagle 1 Resources, LLC and David Thomas

One entity in particular, Eagle 1 Resources, LLC through its owner David Thomas, submitted Comments that are so particularly generalized and argumentative, along with an array of attachments that are so completely lacking in foundation, credibility, and relevancy, that the entire submission should be summarily rejected. David Thomas markets his company Eagle 1 Resources, LLC claiming he has particularized knowledge and expertise in crossing railroad rights-of-way. Mr. Thomas does not claim he made the submission on behalf of a particular Nebraska entity, but rather he appears more focused on attempting to market his services in Nebraska.

Mr. Thomas, in his letter, claims “I do not provide legal advice to our customers.... Similarly, I am not an engineer, and I do not provide engineering design services.” (David Thomas Letter, Jan. 29, 2026, p.1). But yet, Mr. Thomas submitted Comments attempting to do precisely that, offering legal advice and his interpretations of the law, despite that he is not authorized to practice law, nor licensed as an engineer. Mr. Thomas fails to advise this Committee that he has been the subject of disciplinary proceedings by several state licensing agencies for the unauthorized practice of law and improperly holding himself out as an engineer.

For example, The North Carolina State Bar Authorized Practice Committee (“Bar”) issued a Letter of Caution to David Thomas finding probable cause that Mr. Thomas violated the North Carolina unauthorized practice of law statutes. *See David L. Thomas Eagle 1 Resources, LLC*, File number: 15AP0051, North Carolina State Bar Authorized Practice Committee (Nov. 2, 2015). The Bar reasoned Mr. Thomas, on behalf of his client Time Warner Cable in North Carolina, “asserts or attempts to assert the legal rights of others on their behalf and cites laws to this end”. *Id.* The Bar stated Mr. Thomas was “asserting the rights of others in your communications with the railroad companies and advising the utilities to defy the railroad’s demands for licenses or easements and begin construction without agreement from the railroad. As a result, the utilities are sued.” *Id.* It found: “This is the unauthorized practice of law.” *Id.* Mr. Thomas was instructed to “stop engaging in these activities that violate the unauthorized practice of law statutes...” *Id.*

In another jurisdiction, the State of Alabama Board of Licensure For Professional Engineers and Land Surveyors (“Board”), issued a Final Order that adopted a Consent Order executed by David Thomas stipulating he had violated the Alabama rules and statutes and was subject to disciplinary action. *See In re: The Matter of David L. Thomas Eagle 1 Resources*, Case No. 09-294-C and 09-298-C, State of Alabama Board of Licensure for Professional Engineers and Land Surveyors (Mar. 10, 2010). The Board stated it received complaints that Mr. Thomas and his firm Eagle 1 Resources was practicing or offering to practice engineering services without a valid Certificate of Authorization from the Board. The Board’s Order states Mr. Thomas and Eagle 1 “shall not in the future violate” the Alabama code regarding providing engineering services. *Id.* Mr. Thomas and Eagle 1 Resources were ordered to pay expenses and a civil penalty, and the Board stated the Consent Order and Final Order would “become a matter of public record.” *Id.*

Despite the foregoing, David Thomas submitted Comments to this Commission containing his legal analyses, arguments, and legal interpretations of the law. Not only is it improper, his submission is essentially nothing more than generalized hearsay comments, along with a proffered series of attachments that are so incomplete and lacking in foundation and relevance that they would be summarily rejected under the Rules of Evidence by most Courts in the State of Nebraska. *See* Neb. Rev. Stat. § 27-801 *et seq.* But yet, Mr. Thomas submits them here, making improper, unfounded arguments, with no recourse available to interested parties to object and properly exclude such arguments and attachments from consideration by the Commission.

David Thomas offers attachments 1 and 2 which are incomplete, extensively photocopied, and barely discernable documents, purportedly referencing the Interstate Commerce Commission and events occurring in 1913-14, despite no foundation or relevance to this proceeding. He offers a purported letter from 1998 as attachment 3, which lacks foundation, context, and gives no indication the author was speaking from other than his personal opinion at the time, much less ignoring the fact it is irrelevant as it was 12 years before Neb. Rev. Stat. § 86-184 was enacted. Attachment 4 appears to be a marketing promotion that David Thomas created to send unidentified recipients, wherein Mr. Thomas purports to copy portions of an unidentified email he claims was sent to an unknown recipient named “Carl”, all of which is a self-serving promotion lacking in foundation, relevancy, and improper hearsay. Attachments 5 and 6 discuss an unknown event occurring in Minnesota, which is irrelevant as the law in Nebraska applies to this proceeding. Similarly, attachments 7 and 8 discuss Norfolk Southern and a flagging issue that purportedly occurred in the city of Chicago, again irrelevant to this proceeding. Attachments 10 and 11 are rambling and incoherent “questions”, arguments, and legal opinions and advice by David Thomas, all of which lack foundation, credibility, and relevance to this proceeding, and instead appear to be more in the nature of marketing and promotional materials for his company. The only relevant attachment submitted by David Thomas and Eagle 1 Resources is Exhibit 9, which is the statute at issue, Neb. Rev. Stat § 86-164, although the Commission already possesses the same.

Black Hills Energy

Black Hills Energy submitted Comments, although it is not governed by the statute at issue, Neb. Rev. Stat § 86-184. Black Hills Energy states it is a Jurisdictional Utility under the State Natural Gas Regulation Act. Accordingly,

whatever experiences it may or may not have had under that Act are not relevant to the statute at issue governing telecommunications carriers. The installation of natural gas lines in railroad rights-of-way provide their own unique safety and other issues that do not necessarily apply to installations by telecommunications carriers. To the extent Black Hills Energy argues the provisions of Neb. Rev. Stat. § 86-184, BNSF generally refers the Commission to its earlier November 5, 2025, submission and to these Reply Comments.

Arapahoe Telephone Company

Arapahoe Telephone Company submitted Comments stating that its event was previously detailed in the October 6, 2025 submission from the Nebraska Telecommunications Association (“NTA”). BNSF already provided its response to the NTA’s submission in its letter dated November 5, 2025, and BNSF respectfully refers the Commission to the same.

The Nebraska Rural Independent Companies

The Nebraska Rural Independent Companies (“RIC”) submitted Comments that generally lack the required specificity to enable interested entities to investigate and provide meaningful responses. For example, RIC repeatedly refer to “one of RIC’s member companies”, but fails to identify the company, the specific location of the intended crossing, the permit number, the date, a chronology of events, or other details including whether there were any unforeseen or unanticipated events to enable investigation and a meaningful response.

Additional Comments Applicable To Neb. Rev. Stat. § 86-164

In general, many of the Comments submitted by the entities make similar arguments regarding Neb. Rev. Stat. § 86-164. BNSF therefore provides the following additional Comments that are applicable to the same.

The circumstances of telecommunications carriers seeking to cross railroad rights-of-way can vary significantly between events. Most commonly, any perceived delays are caused by the actions of the telecommunications carriers themselves. For example, telecommunications carriers frequently fail to follow BNSF’s standardized procedures and timely provide required information. This is generally more common with small companies not familiar with BNSF’s procedures, whereas larger telecommunications carriers know and understand the process. In many instances, telecommunications carriers delay in responding to

BNSF's requests for information, or they may ignore requests not realizing the significance of providing the requested information, thereby requiring time consuming follow-up and resulting in delay.

BNSF adopted an on-line system that enables utilities to submit applications and provide required information, such as engineering specifications. Telecommunications carriers can determine the status of their applications at any time, simply by logging onto BNSF's system. BNSF welcomes the opportunity to work with the telecommunications carriers and explain its processes and procedures if they need assistance with the same.

BNSF utilizes an independent company Wilson & Co. to arrange for flagging services. BNSF is forced to hire Wilson & Co. to provide flagging and inspection services to ensure safety after a telecommunications carrier seeks to cross its right-of-way. Frequently, higher than expected flagging costs result from the failure of the telecommunications carrier to properly plan, coordinate, and complete its own work. Scheduling flagging services in advance can reduce costs. For example, flagging costs can increase if requests for scheduling are made less than 30 days in advance. Therefore, proper planning and advanced coordination will help control the telecommunications carriers' expenses. Those variables are beyond BNSF's control. But whatever the actual charges are that BNSF receives from Wilson & Co. to provide flagging and inspection services, BNSF forwards those charges to the telecommunications carriers for payment, without any markup, commission, or profit component to BNSF. They are the "actual flagging expenses" for those services. Under the plain language of the statute, Neb. Rev. Stat. § 86-164(3)(a), the telecommunications carriers are required to pay the same: "In addition to the standard crossing fee, the telecommunications carrier shall reimburse the railroad carrier for any additional flagging expenses associated with the placement of the line, wire, or cable." *Id.* And it must be emphasized that it is the actions of the telecommunications carriers in seeking to cross a railroad right-of-way that results in these expenses; not the actions of the railroad. The railroad simply seeks reimbursement for the actual charges it receives.

Neb. Rev. Stat. § 86-164 requires the payment of a \$1,250 standard crossing fee by telecommunications carriers seeking "to place a line, wire, or cable across a railroad right-of-way." *Id.* Some entities that submitted Comments ignore the plain language of the statute, arguing that the standard crossing fee should only be charged for each "conduit" placed. That argument ignores the operational and safety issues that can be created if telecommunications carriers

are only required to follow the statutory procedure when placing an initial conduit, but nothing else.

To protect a railroad's operations and ensure public safety, telecommunications carriers must comply with Neb. Rev. Stat. § 86-164 with each intended crossing. For example, if a telecommunications carrier places an electrified cable or a line that transmits electromagnetic interferences that affects BNSF's signals and communications systems, it could potentially result in a catastrophic event, including derailment, injury, or loss. This is precisely why Neb. Rev. Stat § 86-164(1)(a) requires any telecommunications carrier that "intends to place a line, wire, or cable across a railroad right-of-way shall request permission for such placement from the railroad carrier. The request shall be in the form of a completed crossing application, including engineering specifications." *Id.* Once BNSF receives an application, along with the engineering specifications, BNSF's engineering department will conduct a thorough review and analyze whether the requested crossing will create safety issues or interference with railroad operations. This investigation requires time, effort, and expense on BNSF's part, which is why the statute requires a \$1,250 standard crossing fee for each placement of a line, wire, or cable. If a telecommunications carrier is only required to comply with the statute for the placement of the first "conduit", and then have the ability to enter BNSF's right-of-way and place any number of additional items in the conduit, without proper investigation and engineering analysis, and without appropriate flagging, it can create a significant public risk and impact railroad operations.

Contrary to several Comments, BNSF does not charge more than the authorized \$1,250 standard crossing fee. While BNSF may separately itemize that amount for accounting purposes as an \$800 application fee and a \$450 licensing fee, the total remains at \$1,250. If BNSF combined those together, identifying them as a \$1,250 "crossing fee", the net result is the same. The telecommunications carrier pays no more than the required \$1,250.

The provision of insurance is a common, standard industry practice. Neb. Rev. Stat § 86-164(6) expressly contemplates telecommunications carriers providing appropriate Railroad Protective Liability Insurance (RPLI): "Nothing in this section shall affect a provision, clause, covenant, or agreement in which the telecommunications carrier indemnifies, defends, or holds harmless a railroad carrier against liability for loss or damage ..." *Id.* The purpose of such insurance is to ensure that adequate funds are available to pay injury, damage and loss caused by the telecommunications carrier and its employees and contractors when

engaged in such activities that are unique in the railroad industry. Safety and financial responsibility is a vital, significant public interest. BNSF allows utilities to purchase RPLI insurance at BNSF's cost, which is a significant benefit to the telecommunications carrier. BNSF can provide RPLI at a reduced cost given its purchasing power, and it passes those savings to the telecommunications carrier at its cost, well below the amount the telecommunications carrier would otherwise typically pay.

Finally, the Comments include arguments about convenience fees for credit card processing charges. Credit card processing charges can simply be avoided by mailing a check and not paying with a credit card.

Telecommunications carriers are informed of the convenience fee should they choose to pay by credit card, and it is completely up to that entity whether it wishes to incur the same.

Conclusion

BNSF appreciates the opportunity to submit these Reply Comments regarding Neb. Rev. Stat § 86-164. The statute governing telecommunications carriers crossing railroad rights-of-way in Nebraska is clear and unambiguous. It helps protect against telecommunications carriers inadvertently or improperly interfering with railroad operations that could create a risk of derailment, injury, or loss, and it promotes public safety for the residents and citizens of the State of Nebraska.

The telecommunications carriers presented insufficient evidence to demonstrate the statute requires clarification or modification. To the contrary, the statute provides a clearly defined procedure for telecommunications carriers seeking to cross railroad rights-of-way. It provides uniformity and consistency that is designed to reduce unnecessary delay and cost. If telecommunications carriers are permitted to ignore provisions of the statute, it will create unnecessary risk to railroad operations and the public. In reality, any perceived delays or increased costs are typically the result of the actions of the telecommunications carriers themselves by failing to expressly comply with the statutory procedures, failing to timely furnish required information, or by failing to timely schedule and properly coordinate work.

Finally, the statute provides an existing procedure for telecommunications carriers to seek relief with any complaints regarding crossing railroad rights-of-way in Nebraska. To the best of BNSF's knowledge, that complaint process has never been used by any telecommunications carriers seeking to cross its rights-of-

way. Given the foregoing, the only logical conclusion is for the Commission to find there is insufficient evidence to warrant further investigation of the statute and to close this docket.

Dated this 3rd day of February, 2026.

BNSF RAILWAY COMPANY,

By: /s/ David J. Schmitt

David J. Schmitt, #19123

SMITH PAULEY LLP

3555 Farnam Street, Suite 1000

Omaha, NE 68131

Tel: (402) 392-0101

dschmitt@smithpauley.com

ATTORNEYS FOR BNSF RAILWAY
COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2026, the foregoing document was filed with the Nebraska Public Service Commission at psc.telecom@nebraska.gov and served via email on the following:

Andy Pollock
Rembolt Ludtke, LLP
1128 Lincoln Mall, No. 300
Lincoln, NE 68508
apollock@remboltlawfirm.com

Jean Herman
Kutak Rock LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102
Jean.herman@kutakrock.com

Edward Fox, II
Kutak Rock LLP

The Omaha Building
1650 Farnam Street
Omaha, NE 68102
Edward.foxii@kutakrock.com

Paul M. Schudel
Woods, Aitken, LLP
301 S. 13th Street, Suite 500
Lincoln, NE 68508
Pschudel@woodsaitken.com

Kevin Saltzman
Kutak Rock, LLP
The Omaha Building
1650 Farnam Street
Omaha, NE 68102
Kevin.salzman@kutakrock.com

David Thomas
Eagle 1 Resources, LLC
242 Bridgewater Blvd
Auburn, AL 36830
dthomas@eagle1resources.com

Shawn Lanka
Union Pacific Railroad Company
1400 Douglas Street
Omaha, NE 68179
Sdlanka@up.com

Deonne Bruning, P.C., L.L.O.
Attorney at Law
2901 Bonacum Drive
Lincoln, NE 68502
deonnebruning@nebb.rr.com

Kevin Jarosz
Vice President of Operations (NE & IA)
Black Hills Energy
1731 Windhoek Drive
Lincoln, NE 68512

Kevin.jarosz@blackhillscorp.com

Douglas J. Law, #19436
Associate General Counsel
Black Hills Energy
1731 Windhoek Drive
Lincoln, NE 68512
Douglas.law@blackhillscorp.com

Jill Becker
Senior Manager of Government Affairs
Black Hills Energy
1731 Windhoek Drive
Lincoln, NE 68512
Jill.becker@blackhillscorp.com

Brooke Bassell-Herman
Director of Regulatory (NE and IA)
1205 SW 37th Street
Grimes, IA 50111
Brooke.bassellherman@blackhillscorp.com

Brad Quimby
Manager of Regulatory
Black Hills Energy
1731 Windhoek Drive
Lincoln, NE 68512
Brad.quimby@blackhillscorp.com

Christina Fleming, ACP, Sr. Paralegal
Black Hills Energy
1731 Windhoek Drive
Lincoln, NE 68512
Christina.fleming@blackhillscorp.com

/s/ David J. Schmitt