BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission, on its own motion, seeking to amend Title 291, Chapter 7, Transmission Lines Rules and Regulations, to adopt rules regarding wires crossing any railroad track at public highway crossings in the State of Nebraska in accordance with Neb. Rev. Stat. §§ 75-702 to 75-724.	)	Rule and Regulation #170

COMMENTS OF AT&T

Pursuant to the Commission's Order Opening this docket, entered October 10, 2007, AT&T Communications of the Midwest, Inc. and TCG Omaha, (collectively "AT&T") submit these comments on the Nebraska Public Service Commission's proposed amendment to Title 291, Chapter 7, Transmission Lines Rules and Regulations (the "Proposed Rules").

COMMENTS

The Commission's Proposed Rules are offered under authority of Neb. Rev. Stat. § 75-702 *et seq*. Generally, §§ 702 through 704 grant the Commission broad general jurisdiction to promulgate rules that control the interaction between a given railroad and an entity wishing to place "any wires whatsoever"[1] under or over railroad tracks at public highway crossings. It is not clear how this statute incorporates or contemplates Neb. Rev. Stat. § 86-704 *et seq*. For example, § 86-704 applies to telecommunications rights-of-way and appears to create contradictory standards when read together with § 75-702; that is, § 86-704 states in pertinent part:

[1] Neb. Rev. Stat. § 75-702.

> Any telecommunications company … is granted the right to construct, operate, and maintain telecommunications lines and related facilities along, upon, across, and under public highways of this state, and upon and under lands in this state, whether state or privately owned, except that (a) such lines and related facilities shall be so constructed and maintained as not to interfere with the ordinary use of such lands or of such highways by the public and (b) all aerial wires and cables shall be placed at a height of not less than eighteen feet above all highway crossings.

This statute imposes no obligation upon telecommunications carriers to negotiate contracts with railroad companies for purpose of placing "wires and cables" along, across, over or under public highways. Thus, AT&T requests some clarification from the Commission on whether it intends for its newly Proposed Rules to apply to telecommunications "wires" or whether the "wires" referenced in the rules and statutes under Chapter 75 apply only to various types of electric company wires.

Assuming, without waiving any arguments to the contrary, that the Commission intends for the Proposed Rules to apply to telecommunications "wires," AT&T offers the following observations about the Proposed Rules.

Generally, efficient and timely access to rights-of-way for the placement of wire, cable and other telecommunications equipment is extremely important to AT&T and other carriers. As the Commission knows, telecommunications carriers today face rapid consumption of "bandwidth" creating a continuing need to deploy additional "wires" or fiber optic cable to accommodate the demand. The Proposed Rules here seem to impose upon carriers and their customers an arduous process when they seek to cross railroad tracks in what are otherwise public rights-of-way at public highways. Consequently, to the extent the Proposed Rules apply to telecommunications carriers' "wires," AT&T recommends that the Commission make the changes suggested below.

1. Proposed Rule 003.02 – Procedure for Negotiation

Proposed Rule 003.02 assumes that all crossings must be accomplished via contract and the rules that follow 003.02 set out the process and timeline for pursuing these contracts. Absent some form of proof that the railway owns a "fee" (property interest) above and below the tracks, those wishing to simply employ a public right-of-way should not be forced into a lengthy contract process with the relevant railroad entity. Rather, there ought to be a notice requirement such that the railway personnel and the telecommunications personnel can work jointly to ensure that all codes, clearances and safety concerns are addressed prior to installation. Consequently, AT&T recommends that the Commission modify Proposed Rule 003.02 as follows:

> 003.02 Procedures for **Notice** or Negotiation and Approval of Agreements: Where the relevant railroad track employs public rights-of-way to cross a public highway, the crossing entity shall provide written notice to the railroad and the Commission that it desires to place wires either under or over the tracks on a date certain, which may not be sooner than thirty (30) days from the date of the notice. The railroad and the crossing entity shall cooperate to ensure that public safety, personnel safety and property safety are protected during and after installation of the wires. If the Commission does not suspend the notice of proposed installation five (5) business days prior to the installation date, the proposal shall be deemed approved.
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> Where the railroad maintains an ownership interest in the relevant portion of a crossing, the crossing entity and railroad shall enter into a written agreement defining the terms and conditions of the wire crossing. Upon receiving a request to place any wire across any railroad track at a public highway, a railroad and the entity requesting crossing may negotiate and enter into a binding wire crossing agreement. The railroad and the crossing entity shall have ~~sixty (60)~~ thirty (30) days from the receipt of the request for crossing to voluntarily negotiate a binding agreement. The agreement shall include a detailed schedule of terms, conditions and charges. The agreement shall be submitted to the Commission pursuant to Section 003.05.

2. Proposed Rules 003.04 to 003.05 – Failure to Reach Agreement & Submission to Commission

While AT&T does not object to the general process outlined in the Proposed Rules for dealing with railroad interests in crossings, it is concerned with the potential length of time required to complete the process. It appears from the Proposed Rules that it could take nearly a year to obtain a contract before any physical crossing work could even start (*e.g.*, 60 days of failed negotiations + 15 days to respond to a petition + potentially 6 months (approx. 186 days) to hearing + 30 days for Commission order = 291 days). These kinds of delays in the telecommunications industry, at least, are not practical particularly if customers are awaiting wire installation or upgrades. The length of time involved to obtain the right to cross a railroad could put a project in serious jeopardy and may not be in the public interest, particularly if that project involves a customer that is a hospital, government facility or business enterprise. Consequently, AT&T proposes that the time frames in the Proposed Rules be shortened to accomplish a negotiation and any potential hearing in less than three months.

CONCLUSION

AT&T appreciates the opportunity to offer its comments to the Commission and requests that the Commission make express that the Proposed Rules do not apply to telecommunications carriers; alternatively, AT&T requests that the Commission modify the Proposed Rules as proposed herein.

Respectfully submitted this 14th day of November, 2007.

AT&T COMMUNICATIONS OF THE MIDWEST, INC., and TCG OMAHA

By_____

Loel P. Brooks, #15352
BROOKS, PANSING BROOKS, PC, LLO
1248 "O" Street, Suite 984
Lincoln, NE 68508-1424

and

Letty S.D. Friesen
Senior Attorney
AT&T Services, Inc.
2535 E. 40th Avenue, Suite B1200
Denver, Colorado 80205
(303) 299-5708

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 14th day of November, 2007, an original, eight copies and an electronic copy of the Comments of AT&T in Rule and Regulation #170 were hand delivered to:

Mike Hybl
Executive Director
Nebraska Public Service Commission
1200 "N" Street, Suite 300
Lincoln, NE 68509-4927

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Loel P. Brooks