

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 713

An Act to amend the Code of Virginia by adding a section numbered 56-16.3, relating to public utilities; fiber optic broadband lines crossing railroads.

[H 1752]

Approved March 27, 2023

Be it enacted by the General Assembly of Virginia:

1. That the Code of Virginia is amended by adding a section numbered 56-16.3 as follows:

§ 56-16.3. Fiber optic broadband lines crossing railroads.

A. For the purposes of this section:

"Actual flagging expenses" means expenses directly attributable to the cost of maintaining flaggers at the point of the crossing during the period of time construction is actually occurring. "Actual flagging expenses" shall be considered pass-through expenses and shall not exceed the expense incurred by the railroad company.

"Broadband service provider" means (i) an entity that provides broadband service through the utilization of a fiber optic broadband line, coaxial cable, or other wireline system or (ii) a Phase I or Phase II Utility, as those terms are defined in subdivision A 1 of § 56-585.1, or a cooperative, as defined in § 56-231.15, that provides middle-mile infrastructure to Internet service providers.

"Direct expenses" includes (i) the cost of inspecting and monitoring the crossing site; (ii) administrative and engineering costs for review of specifications and for entering a crossing on the railroad's books, maps, and property records, and other reasonable administrative and engineering costs incurred as a result of the crossing; (iii) document and preparation fees associated with a crossing and any engineering specifications related to the crossing; and (iv) actual flagging expenses associated with the crossing.

"Fiber optic broadband line" means (i) a fiber optic cable consisting of one or more thin flexible fibers with a glass core through which light signals can transmit data as pulses, a coaxial cable, or other wireline system of technology used for broadband distribution or (ii) the middle-mile infrastructure to Internet service providers.

"License fee" means the fee to be paid by the broadband service provider to the railroad company for the crossing, including all occupancy or real property rights.

"Railroad company" includes any company, trustee, or other person that owns, leases, or operates a railroad or owns or leases the land upon which a railroad is operated, and any company, trustee, or other person to which a railroad company has granted rights to collect or retain all or a portion of any revenue stream owed by a third party for use of or access to such railroad company's facilities or property.

B. If a broadband service provider deems it necessary in the construction of its systems to cross the works of a railroad company, including its tracks, bridges, facilities, and all railroad company rights of way or easements, then the broadband service provider shall submit an application for such crossing to the railroad company.

C. The procedure for a crossing shall be as follows:

1. The broadband service provider's application shall include (i) the license fee described in subsection G; (ii) engineering design plans, construction plans, bore plans, fraction mitigation plans, dewatering plans, rigging and lifting plans, and any other pertinent plans deemed necessary and prepared by a registered professional engineer; (iii) the location of the crossing, including whether it is located in a public right-of-way; (iv) the proposed date of commencement of work; (v) the anticipated duration of the work in the crossing; (vi) the areas in which the project personnel will work; and (vii) the contact information of the broadband service provider's point of contact. Notice shall also be provided to the electric utility in whose certificated service territory the crossing is proposed to be located.

2. Upon receipt of the broadband service provider's crossing application, the railroad company shall acknowledge receipt of such application.

3. The railroad company shall review the application and may request additional information or clarification from the broadband service provider within 15 days from receipt of the application. If additional information or clarification is requested, the broadband service provider shall respond within 10 days from the receipt of the request.

4. The railroad company shall approve the broadband service provider's crossing application within 35 days after the application is received unless the railroad company petitions the Commission pursuant to subsection H.

D. Any proposed crossing shall be (i) located, constructed, and operated so as not to impair, impede,

or obstruct, in any material degree, the works and operations of the railroad to be crossed; (ii) supported by permanent and proper structures and fixtures; and (iii) controlled by customary and approved appliances, methods, and regulations to prevent damage to the works of the railroad and ensure the safety of its passengers.

E. The railroad company and the broadband service provider shall coordinate to schedule the crossing date, which shall be within 30 days of the approval of the crossing application, or such later date as indicated in the application or mutually agreed upon.

F. The broadband service provider shall be responsible for all aspects of the implementation of the physical crossing, including the construction and installation of the fiber optic broadband lines and all related equipment, conduit, wire masts, poles, towers, attachments, and infrastructure. The railroad company shall be responsible for flagging operations and other protective measures that it deems appropriate during the actual construction of fiber optic broadband lines. The broadband service provider shall be responsible for ensuring that the crossing is constructed and operated in accordance with accepted industry standards, including standards established by the National Electrical Safety Code, good utility practice, and industry-standard joint use processes of electric utilities.

G. The cost of any such crossing shall be borne by the broadband service provider. A broadband service provider that locates its fiber optic broadband line within a railroad right-of-way shall pay the railroad company for the right to make a crossing of the railroad company's works a license fee of \$2,000 for each crossing unless (i) otherwise agreed to by the broadband service provider and the railroad company or (ii) the railroad company has petitioned the Commission as described in subsection H and the Commission has issued a subsequent order so stating. The broadband service provider shall reimburse the railroad company for direct expenses in addition to the license fee. Direct expenses shall not exceed \$5,000 unless (a) otherwise agreed to by the broadband service provider and the railroad company or (b) the railroad company petitions the Commission for additional reimbursement and the Commission has issued a subsequent order so stating. The railroad company shall substantiate with documentation and other direct evidence of the direct expenses incurred to qualify for reimbursement. The establishment of a license fee cap by the Commonwealth is an exercise of its stated policy to promote the rapid deployment of broadband throughout the Commonwealth.

H. If the railroad company asserts that (i) the license fee is not adequate compensation for the proposed crossing, (ii) the proposed crossing will cause undue hardship on the railroad company, or (iii) the proposed crossing will create the imminent likelihood of danger to public health or safety, then the railroad company may petition the Commission for relief and provide simultaneous notice to the broadband service provider within 35 days from the date of the broadband service provider's application. The Commission may make any necessary findings of fact and determinations related to the adequacy of compensation, the existence of undue hardship on the railroad company, or the imminent likelihood of danger to public health or safety, as well as any relief to be granted, including any amount to which the railroad company is entitled in excess of the license fee prescribed in subsection G. If the railroad company asserts only that the license fee is not adequate compensation for the specified crossing, then the issue of compensation may be considered by the Commission after the commencement or completion of the work. The broadband service provider may petition the Commission for relief if the railroad company does not comply with this section or has otherwise wrongfully rejected or delayed its application. The Commission may, in its discretion, employ expert engineers, to be paid equally by both companies, to advise the Commission or a representative of the Commission in (a) examining the location, plans, specifications, and descriptions of appliances and the methods proposed to be employed; (b) hearing any objections and considering any modifications that the railroad company desires to offer; and (c) within such time as the Commission may determine, rejecting, approving, or modifying such plans and specifications. The Commission shall adjudicate any petition by the railroad company or broadband service provider and issue a final order within 90 days of the petition's initial filing. The Commission shall have sole jurisdiction to hear and resolve claims between railroad companies and broadband service providers concerning crossings and this section.

I. Notwithstanding the provisions of subsection G, if the broadband service provider submits an application to the railroad company to cross a section of track that has been legally abandoned pursuant to an order of a federal or state agency having jurisdiction over the track and is not being used for railroad service, then the license fee shall not exceed \$1,000.

J. The Commonwealth shall grant a right-of-way to any broadband service provider seeking to use the right-of-way for broadband deployment to the extent that the Commonwealth owns any interest in any real property crossed by a railroad or manages any real property not owned by the Commonwealth that is crossed by a railroad.

K. Notwithstanding the provisions of subsection G, in no case shall a broadband service provider be required to pay a license fee for the right to make a crossing of the railroad company's works within a public right-of-way.

L. The broadband service provider shall maintain a commercial general liability insurance policy or railroad protective liability insurance policy that (i) does not exclude work within 50 feet of a railroad right-of-way, (ii) includes the railroad company as an additional insured, and (iii) remains in effect

during the period of time construction is actually occurring.

M. The provisions of this section shall apply notwithstanding any contrary or other provision of law.

N. The provisions of this section shall be liberally construed and shall be construed in favor of broadband expansion.