

Oppose Proposals That Threaten Safety by Enabling Broadband Companies to Unlawfully Encroach on Railroad Right-of-Way

Goal

Lawmakers should oppose proposals that threaten safety by enabling broadband companies to unlawfully encroach on railroad operating corridors.

Background

Multiple states have recently pursued legislation that threatens public safety by enabling "immediate" access for various entities (e.g., telecom providers, electric utilities) to railroad property outside of standard contract negotiations and sometimes without consent. Many of these bills pertain to broadband Internet buildout, following model legislation recommended by the "Broadband Deployment Advisory Committee" (BDAC), a group of advisors, heavily weighted with broadband industry officials and excluding many stakeholders like railroads, to the Federal Communications Commission (FCC).

Railroads currently enter contractual relationships with entities seeking access to railroad property for installing equipment under, over or parallel to railroad rights-of-way and tracks. Railroads and broadband companies are both privately owned. Railroads support broadband expansion that is done in a reasonable manner. As private property owners, railroads oppose laws that seek to circumvent safety, intervene in private party contracts, give the broadband companies a "super" taking authority exceeding that of governmental entities (despite the fact these companies do not have condemnation authority), deny the railroads just compensation, and further, limit due process. A railroad, like any landowner, has a constitutional right to be fairly compensated for use of its property.

Railroads logically require entities to complete a permit application that ensures they possess adequate insurance, address operational issues and comply with sensible national safety codes and standards. Railroads ensure that projects meet safety regulations (49 CFR Part 214) and engineering standards (49 CFR Part 213) by conducting a prior engineering and design review with qualified employees on site during the project. In addition to the crossing review, the Federal Railroad Administration requires the presence of a flagman during construction to inspect for disturbed track. This is a person designated to protect workers near the tracks who can communicate directly with train crews and dispatchers. Their sole responsibility, per FRA regulations (49 CFR Part 214), is to protect railroad employee safety, protect railroad infrastructure, and ensure the safety of those performing work near the tracks. These flagmen provide immediate protection to railroad operations should federal regulations 49 CFR Part 213 Subpart C — Track Geometry and/or 49 CFR Part 213 Subpart D — Track Structure become compromised.

Facts

Policymakers should be aware of several key points beyond the critical issue of rail safety.

- **Railroads are reliable partners and do not seek excessive compensation.** Broadband providers should help cover costs and should not expect railroads to subsidize their business.
- **Fees should be market based and reasonable.** BDAC's model legislation caps the permit fees at \$500, which is expected to cover the costs of processing, engineering review and licensing. Standard consulting fees, generally conducted by external engineering companies certified on railroad procedures, far outpace this cap.
- **Railroads spend billions of dollars annually to maintain their infrastructure and pay millions of dollars in taxes on their land assets.** Likewise, they have a right to recoup costs incurred for reviewing and completing permit applications and for use of their land.
- **Should legislation pass that allows broadband companies to unduly encroach on rail property, railroads will be essentially forced to underwrite broadband deployment.** Telecommunication companies are highly profitable and do not need preferential treatment to gain unrestricted access to another company's infrastructure or force railroads to absorb the day-to-day business costs for their commercial ventures.

Rail safety is paramount among the nation's railroads, underscored by the fact that recent years have been the safest on record. Per FRA, since 2009 the track-caused accident rate is down 26%. The industry demands the same thoroughness from companies seeking access to railroad infrastructure.

Problem

Extreme precaution is necessary across the rail network. "Model" legislation recommended by BDAC ignores this reality by minimizing the time and standards for review. Without appropriate engineering review and construction oversight, installations within active rail corridors can create risks to railroad employees, customers, communities and the public. Incorrect installations can hinder rail service by interfering with rail signals and communications, or even cause derailments.

With billions invested by railroads in accordance with the Rail Safety Improvement Act for Positive Train Control (PTC) — a wireless-based system to stop certain accidents caused by human error — any activity with the potential to interfere with railroad operations that is not coordinated with railroads could jeopardize the control systems that operate PTC.

BDAC-like legislation forces policymakers to intervene into contractual negotiations between private parties. The private market has facilitated thousands of agreements for railroad property access for nearly two centuries and is not in need of a top-down policy fix. Proponents of the BDAC model legislation and similar measures have never engaged the rail industry to inform the policy. The result is a proposal that endangers the very communities it is intended to help.

Solution

Railroads, as the expert and property owner, are best equipped to establish engineering standards and conduct the review. This will ensure a thorough process that accounts for all standards that were developed for the permitting process, including federal regulations.

The permit review process should be thorough and not subject to an arbitrary time frame. BDAC recommends 15 days for application review and 35 days from complete application submission to construction, both of which are unrealistic to ensure full safety and compliance.

Giving Broadband and Internet companies eminent domain authority will provide a legal process to obtain rights when contractual negotiations between parties break down. This was similar to the expansion of the telegraph and telephone communications industry across the country. This has worked successfully for over a century.

Lawmakers should **OPPOSE** BDAC-like legislation that threatens public safety around rail infrastructure and let railroads and entities seeking railroad access to continue to privately **NEGOTIATE** agreements.