HOUSE BILL NO. 34

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BY REQUEST OF THE ENERGY AND TECHNOLOGY INTERIM COMMITTEE

A BILL FOR AN ACT ENTITLED: “AN ACT ALLOWING UTILITIES TO CROSS OR PLACE INFRASTRUCTURE WITHIN A RAILROAD'S RIGHT-OF-WAY AND ADJACENT RAILROAD LAND; ESTABLISHING REQUIREMENTS AND FEES RELATED TO THE RIGHT OF UTILITIES TO CROSS AND PLACE INFRASTRUCTURE WITHIN A RAILROAD RIGHT-OF-WAY AND ADJACENT RAILROAD LAND; REQUIRING APPLICATIONS FOR CROSSINGS AND INFRASTRUCTURE; ESTABLISHING CROSSING FEES AND INSURANCE COVERAGE; PROHIBITING AGISTER'S LIENS; PROVIDING DEFINITIONS; AND PROVIDING AN APPLICABILITY DATE.”

WHEREAS, utilities must frequently cross railroad rights-of-way to deliver essential water, sewer, gas, electric, and communication services to Montana communities; and

WHEREAS, predictable standards, fees, and timelines for those crossings serve the public interest; and

WHEREAS, the purpose of this act is to govern fees, terms, and timelines associated with accessing railroad land and is not intended to regulate rail transportation or to interfere with the safe operation of railroads.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 15] may be cited as the "Montana Railroad Crossing Clarity Act".

NEW SECTION. **Section 2. Definitions.** As used in [sections 1 through 15], unless the context clearly indicates otherwise, the following definitions apply:

(1) (a) "Annual fee" means an exact and specific price established in an annual fee agreement that

the utility agrees to pay annually to the railroad as consideration for a crossing of the railroad right-of-way or railroad land.

(b) Existing annual fees are limited to the first annual fee in the original executed agreement between the railroad and utility.

(c) If a railroad requests an annual fee, the annual fee is $750.

(d) The annual fee may not include:

(i) any increases to the exact and specific price established in the annual fee agreement, unless the exact and specific amount or percentage of increase is established in the annual fee agreement; or

(ii) increases that are at the railroad's discretion.

(2) "Annual fee agreement" means a signed, written agreement that establishes an annual fee.

(3) (a) "Crossing" means all activities associated with the construction, operation, repair, or maintenance of a new or existing facility over, under, or across a railroad right-of-way.

(b) The term includes the construction, operation, repair, or maintenance of a new or existing facility that runs adjacent to and alongside the lines of a railroad without disturbing railroad lines or operations, after which the facility crosses the railroad lines, terminates, or exits the railroad right-of-way. Longitudinal occupancy of a railroad right-of-way is governed by [section 11] and is not subject to the crossing fee or annual fee under [section 7].

(4) "Crossing fee" is a one-time payment from a utility to a railroad for the railroad right-of-way occupied by a utility.

(5) "Facility" includes but is not limited to pipes, sewers, conduits, cables, valves, lines, wires, manholes, attachments, or any item of personal property placed over, across, or underground for use in connection with the storage or conveyance of:

(a) water;

(b) sewage;

(c) electronic, telephone, or telegraphic communications;

(d) fiber optics;

(e) cable television;

(f) electric energy;

(g) oil;

(h) natural gas; or

(i) hazardous liquids.

(6) "Public right-of-way" means the area adjacent to, along, and on any public roads, streets, or highways as defined in the terms "public highways" and "right-of-way" in 60-1-103.

(7) "Railroad" has the same meaning as provided in 69-14-102, including any agents or assigns or any other entity responsible for the management of crossings or the collection of crossing fees.

(8) "Railroad land" means land adjacent to railroad lines and owned or controlled, in whole or in part, by a railroad, its subsidiaries, affiliated businesses, lessees, or other entity controlled in whole or in part by the railroad or the railroad's parent company.

(9) (a) "Utility" means a public utility, rural telephone cooperative, rural electric cooperative, transmission company, gas utility, municipal utility, municipal power utility, municipality, pipeline company, rural water system, or telephone, telegraph, telecommunications, cable, or fiber optic provider.

(b) The term includes contractors and agents hired by a utility.

NEW SECTION. **Section 3. Construction -- effect on federal law.** (1) [Sections 1 through 15] do not authorize a crossing that would unreasonably interfere with rail transportation.

(2) [Sections 1 through 15] must be construed consistently with 49 U.S.C. 10501(b) and other applicable federal law.

(3) If a provision of [sections 1 through 15] would, as applied, be preempted by federal law, it must be applied in the manner, if any, that avoids preemption.

NEW SECTION. **Section 4. Existing agreements.** (1) [Sections 1 through 15] do not impair the existing authority of a utility to secure crossing rights by easement through the power of eminent domain provided in Title 70, chapter 30.

(2) A utility is not required to undertake a crossing in accordance with [sections 1 through 15].

(3) [Sections 1 through 15] are subordinate to a written agreement between a railroad and a utility. If a railroad and a utility enter into a written agreement governing a crossing, the agreement governs and

supersedes any conflicting provisions of [sections 1 through 15]. If a railroad and a utility do not reach an agreement or if either party would like to modify an agreement, [sections 1 through 15] apply.

(4) A nondisclosure or confidentiality term in an agreement between a railroad and a city, town, or county relating to a crossing is void and unenforceable and is subject to the public's right to know.

NEW SECTION. **Section 5. Rights of utilities -- crossings -- public right-of-way.** (1) A utility may place a crossing without complying with [sections 1 through 15] when the placement of facilities is outside the railroad right-of-way.

(2) (a) Before construction of a crossing within a public right-of-way, the utility shall provide the railroad written notice. The written notice must:

(i) include a description of the proposed construction;

(ii) include a drawing of the location of the proposed construction; and

(iii) be provided to the railroad at least 15 business days in advance of construction.

(b) A railroad may object to the crossing only if the crossing poses a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way.

(c) If a railroad does not object to the crossing within 15 business days after receiving the written notice, the utility may proceed without a crossing fee.

(d) If a railroad objects in writing that the crossing may be a serious threat to the safe operations of the current use of the railroad right-of-way, the crossing objection is subject to and must be resolved as provided in [section 10]. The utility may not proceed with the affected work until the objection is resolved.

(3) A city, town, or county retains its authority to permit and manage work within the public-right-way it controls, and the railroad's objection under this section is limited to the serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way.

(4) A railroad may not require, as a condition of a crossing or of any agreement with a city, town or county, a nondisclosure or confidentiality term and may not otherwise restrict a city, town, or county from disclosing the agreement or its terms.

NEW SECTION. **Section 6. Application for crossing.** (1) A utility that intends to place a crossing

shall submit a crossing application, including a drawing showing the location of the proposed crossing and the railroad's property, tracks, and wires in relation to where the utility will cross.

(2) The utility shall submit the crossing application on a form provided or approved by the railroad.

(3) The crossing application must be sent to the railroad or its designated contractor or agent by registered or certified mail or by electronic means that provides electronic confirmation of receipt to the utility.

(4) A crossing application is considered received on the date the application is delivered to the reviewing agent or agency by registered or certified mail or by electronic means, accompanied by the review fee.

(5) The crossing application must be accompanied by a certificate of insurance and the crossing fee, if the crossing fee is required under [section 7].

(6) (a) The railroad has 20 business days to determine whether the application contains all of the information and materials necessary to complete the review of the application.

(b) The railroad may review subsequent submissions of the application only for information found to be deficient during the original review of the application submitted under subsection (2).

(7) (a) After accepting a complete application proposing a crossing across, under, or along a railroad right-of-way, the railroad shall approve the crossing within 45 business days unless the railroad notifies the utility in writing that the proposed crossing is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way. In all other instances, the utility has authorization to commence construction of the facility.

(b) If a railroad objects to a utility's proposed crossing, the railroad shall notify the utility of the objection and the specific basis for the objection to the utility in writing within 15 business days after accepting a complete application proposing a crossing.

(c) If a utility and a railroad are unable to agree on a resolution to a railroad's objection pursuant to this section, the dispute must be resolved as provided in [section 10] prior to construction.

NEW SECTION. **Section 7. Permissible fees -- crossing, flagging, and annual fees -- decrease in value.** (1) Unless otherwise agreed to by the parties or as set forth in this section, a utility that obtains an approval to cross a railroad right-of-way, other than a crossing within the public right-of-way, shall pay the

railroad a one-time standard crossing fee of $3,000 for each crossing.

(2) A crossing fee takes the place of any license, permit, application, or processing fee or any other fees or charges to reimburse the railroad for the direct expenses or decrease in land value incurred by the railroad as a result of the crossing, except for flagging expenses reimbursed under subsection 6(c).

(3) Other fees may not be assessed to the utility or to any agent or contractor of the utility by the railroad or by any railroad agent, contractor, or assignee.

(4) A crossing fee may not be imposed for:

(a) an extension of utility service to buildings or other facilities owned or operated by the railroad;

(b) an extension of utility service at the request of the railroad or other occupants of railroad land; or

(c) any crossing for which the railroad or its predecessor in the affected right-of-way has agreed, in writing, to provide, at no cost to the utility, easements, licenses, or other authorization to place crossings or facilities or related improvements or systems.

(5) A crossing fee does not expire for the duration of the crossing.

(6) (a) If a railroad seeks to collect an annual fee pursuant to the terms of an agreement already in existence as of [the effective date of this act], a utility may request a copy of the agreement from the railroad. If the railroad cannot produce a copy of the original, signed agreement that provides for an annual fee within 180 days after the request, the railroad may not continue to collect the annual fee until the agreement is provided. Any amounts accrued before the request must be paid to the railroad.

(b) If an agreement pursuant to this section was executed prior to [the effective date of this act] and remains in effect, the railroad may assess and collect only a fee equal to the amount collected in 2027 for an annual fee and only for the timeframe that the annual fee agreement remains in effect.

(c) In addition to the standard crossing fee, and based on the railroad traffic at the crossing, a utility shall reimburse for any reasonable and necessary flagging expense associated with the crossing.

(d) A railroad that assesses flagging expenses under subsection(6)(c) shall make its flagging rates publicly available. The railroad shall provide the utility with a written estimate of the anticipated flagging expenses, including the anticipated hours, the rate, and the basis for the flagging requirements, with the approval of the crossing application and shall provide the utility an itemized invoice showing the hours actually

worked and the rate applied. A utility is not accountable for flagging expenses that are greater than the published rate that was provided by the railroad, unless the railroad documents the changes in circumstances requiring it.

(e) The railroad may not place additional or duplicative flagging requirements on a utility for activities related to facility work in a railroad right-of-way associated with a crossing.

(f) A flagger fee is not applicable to underground crossings when surface activity is more than 50 feet outside of a railroad right-of-way.

(g) A dispute regarding flagging expenses under this subsection (6) must be resolved as provided in [section 9].

(7) (a) If the railroad alleges that a proposed crossing will cause a decrease in land value in an amount greater than the crossing fee provided in subsection (1), within 15 days after accepting a complete application, the railroad shall notify the utility in writing and provide a certified appraisal demonstrating the decrease in value of that portion of the railroad property occupied or impacted by the crossing.

(b) The appraisal of the land must be conducted by one of the following methods:

(i) Appraise the value of the land based on its highest and best use, considering all legally permissible, physically possible, financially feasible, and maximally productive uses of the land. Any existing or proposed use of the property for utility purposes is considered a secondary use of the land to the use of the land for either a railroad corridor or another highest and best use.

(ii) Appraise the value of the land based on adjacent land across the fence from each segment of the railroad right-of-way. The appraisal may not include any factor for corridor enhancement.

(c) In either type of appraisal method, land in excess of the minimum active railroad corridor must be considered excess right-of-way that does not add to the value of the land.

(8) If parties are unable to resolve the issue of compensation pursuant to this section, the dispute must be resolved as provided in [section 10].

(9) The placement of one or more pipes or conduits and their contents in the same location is a single facility. Additional fees are not payable based on the individual fibers, wires, lines, or other items contained within the pipes or conduits.

(10) A utility is not obligated to pay the railroad any other fees, charges, assessments, or other

terms beyond the fees and reimbursements established in this section.

(11) The standard crossing fee established in subsection (1) is a minimum. Any railroad may seek greater compensation than the standard crossing fee for a crossing by providing a certified appraisal of the fair market value of the property interest affected under subsection (7). [Sections 1 through 15] may not require a crossing without just compensation when state or federal law requires just compensation.

(12) The crossing fee and the annual fee established in this section do not apply to longitudinal occupancy of a railroad right-of-way.

NEW SECTION. **Section 8. Certificate of insurance or coverage.** (1) (a) The certificate of insurance or coverage submitted by a government entity must include commercial general liability insurance or an equivalent form of insurance with a limit of at least $2 million for each occurrence and an aggregate of at least $5 million or as established by statutory tort limits of $750,000 for each claim and $1.5 million for each occurrence as provided by a self-insurance pool authorized under Title 2, chapter 9, part 2.

(b) The certificate of insurance or coverage submitted by a facility owner that provides natural gas service must include commercial general liability insurance with a combined single limit of at least $5 million for each occurrence and an aggregate limit of at least $10 million.

(c) The certificate of insurance or coverage submitted by a facility owner not included in subsection (1)(a) or (1)(b) must include commercial general liability insurance with a combined single limit of at least $2 million for each occurrence and an aggregate limit of at least $5 million.

(2) The railroad may require protective liability insurance with a combined single limit of $2 million for each occurrence and a $5 million aggregate limit. The coverage may be provided by a blanket railroad protective liability insurance policy if the coverage, including the coverage limits, applies separately to each individual crossing. The coverage is required only during the period of construction, repair, or replacement of the facility.

(3) The insurance coverage under subsections (1) and (2) may be satisfied by the utility using a combination of primary insurance, excess insurance, or self-insurance. The insurance may not contain an exclusion or limitation related to railroads or to activities within 50 feet of railroad property.

NEW SECTION. **Section 9. Relocation -- objection to relocation -- termination of crossing approval.** (1) (a) Except as provided in subsections (3) and (4), a railroad may require a utility to relocate a facility when:

(i) the relocation is mutually agreed to by the railroad and the utility within the railroad right-of-way;

(ii) the railroad determines that relocation is essential to accommodate railroad operations; and

(iii) the relocation is not arbitrary or unreasonable.

(b) Before agreeing to a relocation, a utility may request and the railroad shall provide a statement and supporting documentation identifying the operational necessity for requesting the relocation.

(c) A utility shall perform the relocation within a reasonable period of time following the agreement between the parties.

(2) Relocation is at the expense of the utility. Additional crossing fees, flagger fees, safety inspector fees, or any other fee or charges for the relocation may not be assessed by the railroad.

(3) If a utility objects to the need for relocation, after reviewing the statement and supporting documentation, the utility shall, within 15 days after receipt of the statement and supporting documentation, provide notice of the objection and the specific basis of the objection to the railroad by registered or certified mail or by a mutually agreed upon electronic means with confirmation of receipt.

(4) (a) If the parties are unable to resolve the objection, parties may submit to arbitration as provided in Title 27, chapter 5, for resolution of the objection within 30 calendar days from receipt of the objection.

(b) Before submitting to arbitration, the parties shall confer in good faith in an attempt to resolve the objection within 30 days after having provided a notice of objection as required in subsection (3).

(5) If a railroad orders the removal of a crossing with good cause, as outlined in this section, the railroad shall allow for the relocation of the crossing in accordance with this section.

(6) (a) If a railroad can demonstrate good cause, the railroad may terminate an annual fee agreement or crossing agreement or order removal of a crossing.

(b) Good cause exists if a crossing:

(i) damages or is likely to damage the railroad or its structures or any other property on the premises of the railroad;

(ii) endangers the safety of the railroad's operation; or

(iii) is likely to cause injury or death to a person.

(7) If a railroad terminates a crossing agreement or orders removal of an existing crossing without good cause, the utility may elect to maintain and use the crossing in accordance with the original agreement or other approval.

NEW SECTION. **Section 10. Notice of objection by railroad or utility -- appeals.** (1) (a) If a railroad objects to a utility's proposed crossing because the proposal is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad shall notify the utility of the objection and the specific basis for the objection within 15 days after receipt of the utility's application.

(b) If a railroad imposes additional conditions on a utility for approval of a crossing application, other than the proposed crossing being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the utility may object to one or more of the conditions.

(c) Notice of objections must be sent by registered or certified mail or by a mutually agreed upon electronic means with confirmation of receipt.

(2) If the parties are unable to resolve an objection made under subsection (1), the parties may submit to arbitration as provided in Title 27, chapter 5, for resolution of the disputed crossing application within 30 calendar days after receipt of the objection.

(3) Before submitting to arbitration, the parties shall confer in good faith in an attempt to resolve the objection.

(4) (a) If arbitration is sought, the arbitrators shall issue a notice of hearing or notice of opportunity for hearing within 15 calendar days after filing for arbitration and issue an order within 30 calendar days after the hearing.

(b) A utility may not proceed with construction of a crossing during the 45-calendar-day period for which notice of a hearing is issued or until expiration of the period during which a hearing may be requested.

(c) The arbitrators shall assess costs associated with arbitration equitably against the parties. The parties shall pay the costs within 30 calendar days after receipt of a bill for payment for the arbitrators.

(d) The order may be appealed as provided in Title 25.

(5) [Sections 1 through 15] do not limit a railroad's authority to protect the safe operations of the railroad or to object to a crossing that is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way.

NEW SECTION. **Section 11. Longitudinal occupancy.** (1) A utility may occupy a railroad right-of-way longitudinally if:

(a) longitudinal occupancy does not displace active or reasonably foreseeable rail use and remains subject to relocation at the utility's expense if the railroad later requires the space to accommodate rail operations. Before requiring relocation, the railroad shall provide a statement and supporting documentation of the operational necessity, and the relocation may not be arbitrary or unreasonable.

(b) the utility and railroad negotiate in good faith the distance, location, and terms of the longitudinal occupancy; and

(c) compensation for longitudinal occupancy is the fair market value of the property interest occupied, determined by a certified appraisal. A utility may not commence longitudinal occupancy until compensation is paid or secured or agreed upon by the railroad.

(2) If the railroad and utility are unable to agree on the distance or the compensation, either party may submit the disputed issue to arbitration as provided in [section 9(4)]. The arbitrators shall determine the distance and the fair market value compensation, considering the operational and safety needs of the railroad, the availability and cost of feasible alternative routes outside the railroad right-of-way, the public necessity, the cost of the utility service, and the degree of interference with rail operations.

(3) This section does not limit a railroad's authority to object to longitudinal occupancy that is a serious threat to the safe operations of the railroad and does not authorize longitudinal occupancy that would unreasonably interfere with rail transportation.

NEW SECTION. **Section 12. Removal of equipment.** Upon completion of a crossing, the utility shall remove all tools, equipment, or other property used in the construction of the crossing and, if railroad property was moved or disturbed, restore that property to the condition of the property before being moved or disturbed.

NEW SECTION. **Section 13. Assignment.** (1) (a) Except as provided in subsection (1)(b), a utility may assign or otherwise transfer any rights to cross a railroad right-of-way to:

(i) a financially responsible entity controlled by, controlling, or under common control of the utility;

(ii) an entity the utility is merged or consolidated with; or

(iii) an entity that acquires ownership or control of all or substantially all of the transmission assets of the utility.

(b) A transfer or assignment not included under subsection (1)(a) may not take place without the written permission of the railroad. Written permission may not be unreasonably withheld.

(2) The utility shall notify the railroad of an assignment made under subsection (1)(a) within 30 calendar days.

NEW SECTION. **Section 14. Prohibition against agister's lien.** (1) A utility may not create, permit, or cause an agister's lien under Title 71, chapter 3, part 12, or any other lien to be created or enforced against the railroad's property for any work performed by the utility in connection with the utility's facilities located in the railroad's right-of-way.

(2) A railroad may not create, permit, or suffer an agister's lien or any other lien of any kind or any nature to be created or enforced against a utility's property located in the railroad's right-of-way for any work performed by the railroad in connection with the railroad's facilities.

NEW SECTION. **Section 15. Taxes.** (1) A utility shall promptly pay or discharge all taxes and charges levied on a utility's facilities located in the railroad's right-of-way.

(2) If any taxes or charges cannot be separately made or assessed to the utility but are included in the taxes or charges assessed to the railroad, the utility shall pay to the railroad an equitable portion of the taxes, determined by the value of the utility's facilities located on the railroad right-of-way, as compared to the entire value of the railroad property.

NEW SECTION. **Section 16. Codification instruction.** [Sections 1 through 15] are intended to be codified as an integral part of Title 69, chapter 14, and the provisions of Title 69, chapter 14, apply to [sections

1 through 15].

NEW SECTION. **Section 17. Saving clause.** [This act] does not affect rights and duties that matured, penalties that were incurred, or proceedings that were begun before [the effective date of this act].

NEW SECTION. **Section 18. Severability.** If a part of [this act] is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

NEW SECTION. **Section 19. Applicability.** (1) [This act] applies to crossings commenced on or after [the effective date of this act].

(2) A crossing in existence before [the effective date of this act] continues to be governed by the existing agreement until that agreement expires, is renewed, or the utility submits a new application, at which point [this act] applies.

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