

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF SOUTH DAKOTA**

DOCKET NUMBER TC18-059

IN THE MATER OF THE )  
PETITION OF RC TECHNOLOGIES )  
FOR RESOLUTION OF DISPUTED )  
SUNFLOUR CROSSING )  
APPLICATION )  
)  
)  
)

**ANSWER**

---

Sunflour Railroad (“Sunflour”) by and through its counsel of record, hereby answers RC Technologies’ (“Utility”) Petition for Disputed Sunflour Crossing Application (“Petition”), which was filed with this Commission on November 2, 2018.

**PRELIMINARY STATEMENT**

In this petition, Utility is attempting to secure approval for a crossing to install fiber optic cables underneath private property owned by Sunflour. Utility contends that because a public right-of-way intersects Sunflour’s trackage, SDCL § 49-16A authorizes it to proceed with the crossing without paying a fee or agreeing to the terms of Sunflour’s crossing agreement. Which, among other things, imposes certain safety, construction, and maintenance requirements upon Utility. SDCL § 49-16A does not provide Utility with unfettered authority to initiate and install crossings according to their own terms.

**ANSWERS TO SPECIFIC ALLEGATIONS**

1. Unless specifically and expressly admitted herein, Sunflour denies each and every allegation within the Petition.
2. Sunflour does not have enough information or knowledge regarding Utility’s operations to admit or deny the statements in paragraph 1.

3. With respect to paragraph 2, Sunflour admits that it is a corporation formed under the laws of Kansas and that its principal office is located at 3400 E 56<sup>th</sup> Ave., Commerce City, Co 80022. Sunflour also admits that it is authorized to do business in South Dakota and owns trackage in Roberts and Marshall County, South Dakota. The amount of trackage owned by Sunflour is irrelevant.

4. The date of purchase and use of Sunflour's trackage is irrelevant. Sunflour denies all other allegations in paragraph 3.

5. With respect to paragraph 4, Sunflour admits that Utility seeks to cross its trackage in New Effington and Claire City. Sunflour does not have enough information or knowledge regarding Utility's operations to admit or deny the remaining assertions in this paragraph.

6. The assertions in paragraphs 5, 6, & 7 are admitted.

7. With respect to paragraph 8, Sunflour admits that a public right-of-way intersects its trackage, however, the property is still privately owned by Sunflour. Sunflour also admits that Utility's original crossing request was for seven crossings. Sunflour does not have enough information or knowledge regarding Utility's operations to admit or deny the remaining assertions in this paragraph.

8. Paragraph 9 is admitted. The crossing agreement also imposes certain safety, construction, and maintenance requirements upon Utility as well as an indemnification clause that safeguards Sunflour from losses due to Utility's negligence.

9. With respect to paragraph 10, Sunflour admits that a public right-of-way intersects its trackage, however, the property is still privately owned by Sunflour.

10. The assertions in paragraph 11 are admitted. However, SDCL § 49-16A does not provide Utility with unfettered authority to initiate and install crossings on their own terms.

11. The assertions in paragraph 12 & 13 are admitted. The letter speaks for itself.
12. With respect to paragraph 14, Sunflour qualifiedly admits that Utility has conferred in good faith to resolve this dispute. Specifically, Utility refuses to pay Sunflour a fee for the crossing or agree to its crossing agreement and has not set forth specific objections to the proposed crossing agreement. However, Utility asserts a right to construct without an agreement, requiring the Commission to determine issues contested in good faith.
13. With respect to paragraph 15, Sunflour denies that Utility has complied with all of the provisions of SDCL § 49-16A-100.3. Utility has not agreed to or executed Sunflour's crossing agreement, it has not paid a crossing fee, and has not agreed to provide alternative terms or protections. Alternatively, Utility has not complied with SDCL §§ 49-16A-100.7 and 49-16A-100.8.
14. The assertions in paragraph 16 do not require a response.
15. Paragraph 17 is denied to the extent that Utility has not complied with the statutory requirements for crossings and therefore does not have statutory authority to proceed with construction of the crossings.
16. The assertions in paragraph 18 do not require a response.
17. With respect to paragraph 19, Sunflour denies that Utility's certificate of insurance complies with the coverages specified in SDCL § 46-16A-100.6. However, since filing the Petition, Sunflour admits Utility has provided acceptable insurance certificates which include railroad protective insurance as requested by Sunflour. The remaining assertions in this paragraph are admitted.
18. With respect to paragraph 20, Sunflour admits that a public right-of-way intersects its trackage, but the property is still privately owned by Sunflour.

19. Sunflour denies the allegations in paragraph 21 to the extent that its crossing agreement fails to comply with South Dakota law.

20. With respect to paragraph 22, Sunflour admits that SDCL § 49-16A-100.4 authorizes a utility to commence construction of a crossing 30 days after its requirements are met but denies that Utility has complied with the statute. Specifically, Sunflour's objections served by certified mail on November 2, 2018 negate any authority to construct until issues are decided by this Commission.

21. Sunflour's use of its trackage is irrelevant. Sunflour operates as a common carrier in interstate commerce pursuant to federal and state authority. Sunflour denies all other allegations in paragraph 23.

23. Sunflour denies the allegations in paragraph 24. On November 2, 2018, Utility was sent a certified letter outlining Sunflour's objections. The letter speaks for itself. See attached Exhibit 1.

24. With respect to paragraph 25, Sunflour admits that a public right-of-way intersects its trackage, however, the property is still privately owned by Sunflour. All other assertions in this paragraph are denied.

25. Sunflour does not have enough information or knowledge regarding Utility's customers to admit or deny the statements in paragraphs 26 & 27.

26. The assertions in paragraphs 28, 29, 30, 31 and 32 do not require a response except to affirm that Sunflour opposes all relief sought by Utility.

#### **AFFIRMATIVE DEFENSES**

For its Affirmative Defenses, Sunflour asserts the following:

27. Utility has failed, in whole or in part, to state a claim upon which relief may be granted.

28. Utility has failed to object and address specific concerns or inability to perform the terms requested by Sunflour in the proposed Sunflour crossing agreement and have failed to comply with the requirements of SDCL § 49-16A-100.8, including notice by certified mail.

29. SDCL § 49-16A-100 is unconstitutional in that it allows Utility to take private property for public use without just compensation, and Commission lacks jurisdiction to impose such burdens on Sunflour.

30. Sunflour at all times and in all relevant manner acted reasonably, as necessary to serve legitimate business purposes, and in furtherance of trade and in good faith.

31. Sunflour reserves the right both to amend these responses as may be necessary and to plead further in this matter as it deems appropriate, including additional affirmative defenses.

32. Utility's failure to offer objections or make specific proposals for modification of Sunflour's standard crossing agreement has caused an unnecessary delay or complication of these proceedings, and the Commission should equitably apportion a greater share of costs to it.

33. Sunflour did not violate any duty owed to Utility under any law, statute code or otherwise.

34. Sunflour has been compliant with the Laws of South Dakota and the Rules of the Commission at all times relevant to this case.

35. Sunflour is entitled to just compensation for any physical occupation of its property, and reserves the right thereto, plus all damages, attorney's fees and costs.

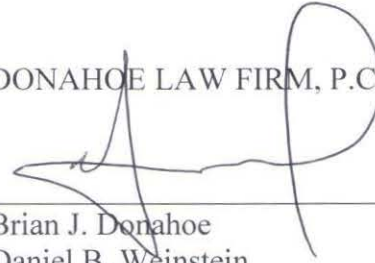
WHEREFORE, Sunflour prays for relief as follows:

1. That Utility's claims be dismissed, and its requested relief be denied;
2. An equitable apportionment of the costs of this proceeding by assessment of the docketing fee between the parties so that the Utility shall pay all or the greater portion of all fees;

3. For such other and further relief as the Commission may deem just and equitable.

Dated this 28<sup>th</sup> day of November, 2018.

DONAHOE LAW FIRM, P.C.



---

Brian J. Donahoe  
Daniel B. Weinstein  
401 E. 8th St., Suite 215  
Sioux Falls, SD 57103-7008  
Telephone: (605) 367-3310  
Facsimile: (866) 376-3310  
Email: [brian@donahoelawfirm.com](mailto:brian@donahoelawfirm.com)  
Email: [daniel@donahoelawfirm.com](mailto:daniel@donahoelawfirm.com)  
Attorneys for Plaintiff