

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Nancy Lange  
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John A. Tuma

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of a Petition by Qwest Corporation dba CenturyLink QC for Resolution of a Dispute with BNSF Railway Company Over the Use of Railroad Right-of-Way Under Minn. Stat. § 237.045

ISSUE DATE: November 7, 2017

DOCKET NO. P-421/RW-17-569

ORDER FINDING THAT MINN. STAT. § 237.045 GOVERNS PROPOSED FACILITY

**PROCEDURAL HISTORY**

On July 25, 2017, Qwest Corporation dba CenturyLink QC (CenturyLink) filed a petition under Minn. Stat. § 237.045, seeking resolution of a dispute with BNSF Railway Company (BNSF) over CenturyLink’s request to lay an underground cable in BNSF’s right-of-way.

Enacted in 2016, section 237.045 provides a standardized process for locating utility facilities in railroad rights-of-way. BNSF argued that the statute only applied to facilities that cross the right-of-way. CenturyLink contended that the statute applied to both crossings and parallelings.

On August 4, the Commission issued a notice soliciting comments on CenturyLink’s petition.

On August 22, BNSF and CenturyLink filed comments in response to the Commission’s notice. The Minnesota Telecom Alliance (MTA), the Minnesota Rural Electric Association (MREA), and the Minnesota Utility Investors Association (MUI) also filed comments supporting CenturyLink’s position.

On September 1, the Commission received a letter from Senator Dan Sparks, the chief author of the bill that ultimately became Minn. Stat. § 237.045. Senator Sparks supported CenturyLink’s interpretation of the statute.

On August 31, CenturyLink and BNSF filed reply comments.

On October 19, 2017, the matter came before the Commission.

## FINDINGS AND CONCLUSIONS

### I. Background

#### A. CenturyLink's Proposed Facility

CenturyLink seeks to lay underground cable along BNSF's tracks near the Edgewood Avenue South crossing in St. Louis Park (the proposed line).

The proposed line would provide telecommunications service to a radio station, replacing an older cable that malfunctioned about three years ago. CenturyLink installed a temporary, above-ground cable to serve the radio station, but that cable has been cut on several occasions, requiring emergency repairs.

The proposed line would start at a telephone pole located approximately 38 feet south of the track, within BNSF's right-of-way. From there, it would run 206 feet east-northeast, roughly parallel to the track, to another pole located approximately 46 feet south of the track and outside the right-of-way. A fence and a bike trail lie between the railroad track and the proposed line.

#### B. CenturyLink's First Crossing Application

In May 2014, CenturyLink submitted an application to BNSF for permission to build the proposed line. BNSF responded with a proposed wire-crossing agreement that included a "license fee" of \$27,000. CenturyLink objected to the amount of the license fee, and the parties attempted to negotiate a mutually agreeable amount but were unable to reach agreement.

In December 2015, CenturyLink asked the Minnesota Department of Commerce (the Department) to determine a just and reasonable fee under Minn. Stat. § 237.04.<sup>1</sup>

#### C. Minnesota Statutes Section 237.045

While that case was pending before the Department, the Minnesota Legislature passed a law, codified as Minn. Stat. § 237.045, that establishes a standardized application process for utilities seeking to build facilities within a railroad's right-of-way.

Under section 237.045, a utility that intends to place a facility "across or upon" a railroad right-of-way must submit an application to the railroad that includes an engineering drawing of the proposed facility, a \$1,250 crossing fee, and proof of insurance.<sup>2</sup>

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<sup>1</sup> Minn. Stat. § 237.04(b) provides that the Department "may, upon request of any . . . telephone company, telecommunications carrier, cable company, or fiber optic carrier determine the just and reasonable charge which a railroad . . . can prescribe for a . . . new or existing telephone, telegraph, telecommunications, cable, [or] fiber optic . . . line more or less paralleling a railroad right-of-way."

<sup>2</sup> Minn. Stat. § 237.045, subd. 3.

The utility may begin construction 35 calendar days after the railroad's receipt of a completed crossing application unless the railroad notifies the utility in writing that the proposed crossing or paralleling is a serious threat to the safe operation of the railroad or to the current use of the railroad right-of-way.<sup>3</sup>

If the railroad objects to the proposed crossing or paralleling or the utility objects to conditions imposed by the railroad and the parties are unable to resolve the objections, either party may petition the Minnesota Public Utilities Commission for assistance in resolving the dispute.<sup>4</sup> The Commission must issue an order on the petition within 120 days of its filing, assessing costs equitably among the parties.<sup>5</sup>

#### **D. CenturyLink's Second Crossing Application**

In July 2016, CenturyLink moved to dismiss its case before the Department to clear the way for a new crossing application under section 237.045.<sup>6</sup> BNSF opposed the motion, but the Department eventually granted dismissal.

On June 22, 2017, CenturyLink submitted a second completed application, a crossing fee, and the necessary certification of insurance to BNSF.

BNSF objected to CenturyLink's application. It did not object on the ground that the proposed facility would pose a serious threat to the safe operation of the railroad or to the current use of the railroad right-of-way, nor did it attempt to place any conditions on the paralleling. Instead, it argued that Minn. Stat. § 237.045 does not apply to the proposed line because it is not a "crossing" as defined under the statute and because it was commenced before the statute's effective date.<sup>7</sup>

On July 25, 2017, CenturyLink filed the petition now before the Commission. It requests that the Commission issue an order declaring that its application is governed by Minn. Stat. § 237.045.

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<sup>3</sup> *Id.*, subd. 5.

<sup>4</sup> *Id.*, subds. 8(a)–(b), 9(a)–(b).

<sup>5</sup> *Id.*, subd. 8(c).

<sup>6</sup> The statute applies to "any crossing commenced on or after July 1, 2016." *Id.*, subd. 2(a)(2).

<sup>7</sup> BNSF also argued that Minn. Stat. § 237.045 is preempted by the federal Interstate Commerce Commission Termination Act of 1995 and violates the Takings Clause of the United States and Minnesota constitutions. The Commission does not address these constitutional challenges. *See Starkweather v. Blair*, 71 N.W.2d 869, 884 (1955).

## **II. Positions of the Parties**

### **A. BNSF**

BNSF argued that the proposed line does not fall under section 237.045 because the statute's applicability is limited to "crossings," and the proposed line does not meet the definition of a crossing.

BNSF focused on subdivision 2(a)(2), which states that the statute applies to "any crossing commenced on or after July 1, 2016." The statute defines a "crossing" as "a utility facility constructed over, under, or across a railroad right-of-way" and expressly excludes "longitudinal occupancy of railroad right-of-way" from the definition of a crossing.<sup>8</sup> "Longitudinal occupancy," however, is not defined.

BNSF contended that the proposed line constitutes a longitudinal occupancy, not a crossing, and that even if the proposed line were a crossing, it was not commenced on or after July 1, 2016 because CenturyLink had a temporary facility in place before that date.

### **B. CenturyLink**

CenturyLink maintained that the proposed line falls within section 237.045 because it constitutes a "paralleling."

The statute defines "paralleling" as "a utility facility that runs adjacent to and alongside the lines of a railroad for no more than one mile, or another distance agreed to by the parties, after which the utility facility crosses the railroad lines, terminates, or exits the railroad right-of-way."<sup>9</sup>

CenturyLink disputed BNSF's contention that section 237.045 is limited to crossings, arguing that there would be no point in defining "paralleling" if the statute did not apply to parallelings. And it pointed to several other provisions of the statute that mention paralleling and would be rendered superfluous if the statute were interpreted to apply only to crossings.<sup>10</sup>

## **III. Commission Action**

The Commission concurs with CenturyLink that section 237.045 applies to parallelings as well as crossings, and that the proposed line constitutes a paralleling as defined by the statute.

CenturyLink's proposed line falls squarely within the definition of a paralleling under section 237.045, subdivision 1(d). The proposed line would run "adjacent to and alongside" BNSF's railroad tracks for 206 feet—less than a mile. And it would terminate at a pole outside BNSF's right-of-way, satisfying subdivision 1(d)'s definition by "exit[ing] the railroad right-of-way."

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<sup>8</sup> *Id.*, subd. 1(b).

<sup>9</sup> *Id.*, subd. 1(d).

<sup>10</sup> *See id.*, subs. 2(b), 5, 8(a), 11.

BNSF argues that, because subdivision 2(a)(2) states that the statute “applies to crossings,” it applies *only* to crossings. But as CenturyLink points out, this reading of the statute would render superfluous not only subdivision 1(d), which defines “paralleling,” but also several other provisions of section 237.045 (emphases added):

- Subdivision 2(b), which provides that section 237.045 does not apply to “a crossing *or paralleling* of a large energy facility”;
- Subdivision 3, which provides that any utility that intends to build “across *or upon* a railroad right-of-way” must apply to the railroad for permission to do so;
- Subdivision 5, which provides that a utility may begin construction of “the proposed crossing *or paralleling*” beginning 35 days after a railroad’s receipt of a completed crossing application;
- Subdivision 8, which requires a railroad to give a utility written notice if the railroad “objects to the proposed crossing *or paralleling*”; and
- Subdivision 11, which provides that a utility may “elect to undertake a crossing *or paralleling* under this section or section 237.04.”

In interpreting a statute, the Commission looks to the law as a whole and attempts to give effect to all its provisions. Reading section 237.045 as a whole, the Commission finds a clearly discernable intent that the law apply to parallel facilities as well as crossings.

BNSF argued that the legislative history of section 237.045 supports its interpretation of the statute. If a law is ambiguous, legislative intent may be ascertained by considering, among other things, the contemporaneous legislative history.<sup>11</sup> However, contrary to BNSF’s contention, the origin of section 237.045 strongly suggests an intent to include paralleling within its scope.

Section 237.045 was modeled after a South Dakota law. The South Dakota law defines “crossing” similarly to section 237.045, including the exclusion of “longitudinal occupancy.”<sup>12</sup> However, the law contains no mention of “parallel” or “paralleling.” In adapting the South Dakota law, the Minnesota Legislature added the concept of “paralleling,” thereby evincing a clear intent that section 237.045 apply to parallel facilities.

Finally, BNSF argued that even if the statute applies to parallelings, it does not apply to the proposed line because it was “commenced” before July 1, 2016. The Commission disagrees. CenturyLink filed its current crossing application in June 2017, months after July 1, 2016. And even if subdivision 2(a)(2)’s temporal requirement applies to the facility itself, the facility that is the subject of CenturyLink’s application—the proposed line—has yet to be “commenced.”

For all these reasons, the Commission finds that CenturyLink’s petition is governed by section 237.045.

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<sup>11</sup> Minn. Stat. § 645.16.

<sup>12</sup> See S.D. Codified Laws § 49-16A-100.2.

The statute requires the Commission to assess the costs associated with a petition equitably among the parties. The Commission finds that it lacks sufficient information on costs to assess them at this time and will therefore delegate authority to its Executive Secretary to establish, after the total costs associated with CenturyLink's petition are determined, a comment period on the equitable distribution of the costs among the parties, and to schedule the matter for the Commission's consideration at the earliest feasible date.

### ORDER

1. The Commission finds that CenturyLink's petition is governed by Minn. Stat. § 237.045.
2. The Commission delegates authority to its Executive Secretary to establish, after the total costs associated with CenturyLink's petition are determined, a comment period on the equitable distribution of the costs among the parties, and to schedule the matter for the Commission's consideration at the earliest feasible date.
3. This order shall become effective immediately.

BY ORDER OF THE COMMISSION

Daniel P. Wolf  
Executive Secretary



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