STATE OF MINNESOTA
BEFORE THE PUBLIC UTILITIES COMMISSION

Nancy Lange, Chair
Dan Lipschultz, Commissioner
Matt Schuerger, Commissioner
Katie Sieben, Commissioner
John Tuma, Commissioner

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

Docket No. 17-569

BNSF RAILWAY COMPANY'S REQUEST FOR REHEARING PURSUANT TO MINN. STAT. § 216B.27

BNSF Railway Company ("BNSF") respectfully submits this request for rehearing pursuant to Minn. Stat. § 216B.27. On November 7, 2017, the Minnesota Public Utilities Commission (the "Commission") issued an order addressing the petition filed by Qwest Corporation D/B/A CenturyLink QC ("CenturyLink") under Minn. Stat. § 237.045 (the "Order"). The Commission found that Minn. Stat. § 237.045 applied to the facility that CenturyLink placed on BNSF's right-of-way. The Commission did not address BNSF's arguments that Minn. Stat. § 237.045 is (1) preempted by the Interstate Commerce Commission Termination Act of 1995, 49 U.S.C. § 10501 (2016) (the "ICCTA"), and (2) constitutes an unconstitutional violation of the Takings Clause of the Minnesota and United States Constitutions.

BNSF contends that the Commission's Order is unlawful or unreasonable for the following reasons:

1. Minn. Stat. § 237.045 does not apply to this case because CenturyLink's facility is a longitudinal occupancy of BNSF's right-of-way, which is specifically excluded by the statute. Minn. Stat. § 237.045 applies in two situations: "(1) any crossing in existence before July 1, 2016, if an agreement concerning the crossing has expired or has been terminated… and (2) any crossing commenced on or after July 1, 2016." Longitudinal occupancies are specifically excluded under the statute. *See* Minn. Stat. § 237.045, subd. 1(b) ("'Crossing' means a utility facility constructed over, under, or across a railroad right-of-way. The term does not include longitudinal occupancy of railroad right-of-way.") (emphasis added). The application provision of Minn. Stat. § 237.045, subd. 2 is clear, unambiguous, and cannot be subject to more than one interpretation. If the language is unambiguous, the courts enforce the statute's plain and ordinary meaning. *White v. City of Elk River*, 840 N.W.2d 43, 53 (Minn. 2013) (citing *Emerson v. Sch. Bd. of Indep. Sch. Dist. 199*, 809 N.W.2d 679, 682 (Minn. 2012)); *see also* Minn. Stat. § 645.08(1) (2016). Here, CenturyLink's facility constitutes a longitudinal occupancy that is specifically excluded from the definition of a "crossing." Despite this fact, the Commission ruled that Minn. Stat. § 237.045 also applies to "parallelings" even though the term is not included in the application section of the statute.

2. Minn. Stat. § 237.045 does not apply to this case because CenturyLink's facility was commenced prior to July 1, 2016, before to the effective date of the statute. The statute makes no distinction between temporary and permanent facilities. For purposes of Minn. Stat. § 237.045, the relevant date for purposes of determining eligibility for relief under the statute is the date the facility was *commenced*, regardless of whether the facility placed was temporary or permanent. It is undisputed in this matter that CenturyLink's facility was commenced on BNSF's property prior to July 1, 2016 and was in fact providing service to CenturyLink's customers. The

Commission erred in finding that the facility was not commenced until the date of its current crossing application.

3. Minn. Stat. § 237.045 does not apply to this case because the facility that CenturyLink placed does not fit within the definition of a paralleling under the statute. According to the definition of a paralleling under Minn. Stat. § 237.045, subd. 1, a parallel is 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." Minn. Stat. § 237.045, subd. 1(d). In this case, the facility does not cross, terminate, or exit the right-of-way. The facility is entirely within the right-of-way, will be partially buried and partially above ground, and runs between two existing poles within the right-of-way. It connects to two poles within the right-of-way. At no time does the facility cross the railroad lines, terminate, or exit the right-of-way. At the public hearing on October 19, 2017, BNSF presented an aerial map of CenturyLink's facility showing that the facility does not cross the railroad line, terminate, or exit the right-of-way. *See* Exhibit W to BNSF Railway Company's Comment to CenturyLink's Petition for Resolution of Dispute dated August 22, 2017, at page 2. Therefore, even if the Commission finds that Minn. Stat. § 237.045 applies to parallelings, the facility in dispute does not meet the definition of a paralleling pursuant to Minn. Stat. § 237.045.

4. Although the Commission did not have jurisdiction to rule on the issues of federal preemption and the constitutionality of Minn. Stat. § 237.045, BNSF contends that Minn. Stat. § 237.045 is (1) preempted by the ICCTA, and (2) violates the Takings Clause of the Minnesota and United States Constitutions. *See Minnegasco, a Div. of NorAm Energy Corp. v. Minnesota Pub. Utilities Comm'n*, 549 N.W.2d 904, 907 (Minn. 1996) (holding that the Commission, as a

creature of statute, only has the authority given it by the legislature and any enlargement of express powers by implication must be fairly drawn and fairly evident from the agency objectives and powers expressly given by the legislature). Minn. Stat. § 237.045 is *per se* preempted by federal law because it seeks to regulate rail transportation. As a result, this dispute should be heard by the Surface Transportation Board, not this Commission. *See Soo Line R. Co. v. City of St. Paul*, 827 F.Supp.2d 1017 (D. Minn. 2010) (holding that because a proposed condemnation seeking a longitudinal easement is an act seeking to control the railroad's property, it was a form of regulation, and therefore, *per se* preempted by the ICCTA). Furthermore, Minn. Stat. § 237.045 constitutes an unconstitutional violation of the Takings Clause of the Minnesota and United States Constitutions. This is because the statute: (1) prescribes a flat fee for all crossings; (2) allows for construction to begin prior to adjudication on just compensation; and (3) attempts to circumvent the established Minnesota eminent domain procedures. For these reasons, Minn. Stat. § 237.045 is void as an unconstitutional violation of the Takings Clause of the Minnesota and U.S. Constitutions and preempted by the Minnesota eminent domain statutes set forth in Minn. Stat. ch. 117.

For these reasons, BNSF respectfully requests that the Commission find that sufficient reason exists to grant and hold a rehearing on the matters set forth in this application pursuant to Minn. Stat. § 216B.27.

Dated: November 27, 2017

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