

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Katie J. Sieben
Valerie Means
Matthew Schuerger
Joseph K. Sullivan
John A. Tuma

Chair
Commissioner
Commissioner
Commissioner
Commissioner

In the Matter of a Petition of Connexus
Energy for Resolution of a Dispute with
BNSF Railway Company Regarding Fees and
Additional Requirements Under Minnesota
Statutes Section 237.045

ISSUE DATE: October 5, 2021

DOCKET NO. PT-5817/RW-21-268

ORDER RESOLVING DISPUTE AND
AUTHORIZING COMMENCEMENT
OF CONSTRUCTION

PROCEDURAL HISTORY

I. Introduction

Minn. Stat. § 237.045 governs the application process for utilities seeking to build facilities within a railroad’s right-of-way. The statute applies to “(1) any crossing in existence before July 1, 2016, if an agreement concerning the crossing has expired or has been terminated. In such instance, if the collective amount that equals or exceeds the standard crossing fee under subdivision 6 has been paid to the railroad during the existence of the crossing, no additional fee is required; and (2) any crossing commenced on or after July 1, 2016.”¹ The railroad must inform the applicant of any additional necessary information within 15 calendar days of receipt of an application that is not complete.²

Under circumstances where the railroad objects to the utility’s proposed crossing, the statute sets forth a process for resolving an objection, as follows:

If a railroad objects to the proposed crossing or paralleling due to the proposal being a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way, the railroad must notify the utility of the objection and the specific basis for the objection. The railroad shall send the notice of objection to the utility by certified mail, with return receipt requested.

If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for assistance via mediation

¹ Minn. Stat. § 237.045, subd. 2.

² *Id.* at subd. 3(d).

or arbitration of the disputed crossing application. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

If the railway imposes additional requirements on the utility, the statute sets forth the process for resolving disputes regarding those additional requirements, as follows:

If a railroad imposes additional requirements on a utility for crossing its lines, 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 requirements. If it objects, the utility shall provide notice of the objection and the specific basis for the objection to the railroad by certified mail, with return receipt requested.

(b) If the parties are unable to resolve the objection, either party may petition the Public Utilities Commission for resolution or modification of the additional requirements. The petition must be filed within 60 days of receipt of the objection. Before filing a petition, the parties shall make good faith efforts to resolve the objection.

II. The Filings

On April 12, 2021, Connexus Energy (Connexus or the Cooperative) filed a petition for resolution of a dispute with BNSF Railway Company (BNSF), alleging that BNSF had unlawfully required a railroad crossing fee for placement of Connexus facilities in a public right-of-way; imposed unjustified additional requirements on Connexus's proposed utility crossing of the railroad; and sought reimbursement of unreasonable flagging expenses.³

On May 28, 2021, BNSF filed its response to the petition, disputing the assertions made by Connexus. On the same date, the Commission received comments from Meeker Cooperative Light and Power Association (Meeker) and Minnesota Rural Electric Association (MREA).

On June 17, 2021, the Commission received reply comments from BNSF; Connexus; Todd-Wadena Electric Cooperative (Todd-Wadena); and the Minnesota Telecom Alliance (MTA).

On September 9, 2021, the matter came before the Commission.

³ Under subd. 6 (b) of the statute, the utility must reimburse the railroad for any reasonable and necessary flagging expense associated with a crossing, based on the railroad traffic at the crossing.

FINDINGS AND CONCLUSIONS

I. Legal Standard

Under the statute, a utility may commence construction 35 calendar days after the receipt by the railroad of a completed crossing application, crossing fee, and certificate of insurance, unless the railroad notifies the utility in writing that the proposed crossing or paralleling is a serious threat to the safe operations of the railroad or to the current use of the railroad right-of-way.⁴

If a railroad imposes additional requirements on a utility, the utility may object to those requirements; if the parties are unable to resolve the objection, either party may file a petition with the Commission under subdivision 9 of the statute. The Commission must then determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the crossing.⁵

II. Railroad Crossing Application

On September 22, 2020, Connexus submitted its railroad crossing application for installation of utility conduit and electrical wire line crossing at BNSF rail lines near Round Lake Boulevard in Coon Rapids.

According to Connexus, its application was submitted on a form supplied by BNSF and contained all information required by Minn. Stat. § 237.045, subd. 3, including an engineering design in conformity with the National Electric Safety Code (NESC) showing the location of the proposed crossing and the railroad's property, tracks, and wires that the utility would cross. Connexus explained in its application that no crossing fee was required because the proposed crossing is located within a public right-of-way. Connexus also stated that it planned to commence construction 35 days after BNSF's receipt of the application and accompanying materials.

III. Connexus's Petition

After months of unsuccessful negotiations between Connexus and BNSF, Connexus filed a petition under Minn. Stat. § 237.045 subd. 9 (b) and (c) for resolution of its dispute with BNSF claiming that BNSF: unlawfully required a railroad crossing fee for placement of Connexus facilities in a public right-of-way; imposed unjustified additional requirements on Connexus's proposed utility crossing of the railroad; and sought reimbursement of unreasonable flagging expenses.

Connexus's petition asserts that BNSF seeks to impose 52 additional requirements, which the Cooperative asserts are not supported by special circumstances that would justify their imposition under the statute. Further, Connexus claimed that BNSF has failed to demonstrate that the flagging expenses for which it intends to seek reimbursement are reasonable or necessary.

Connexus stated that its completed application was received by BNSF on September 28. As part of its application, Connexus included documentation to demonstrate that the proposed crossing

⁴ *Id.* at subd. 5.

⁵ *Id.* at subd. 9 (c).

was in a public right-of-way and explaining that no crossing fee was therefore required.⁶ According to Connexus, BNSF did not claim that the Cooperative's application was incomplete within 15 days after the applicable statutory deadline for notification of an incomplete application. Ultimately, Connexus stated that the application, as filed, contained all the necessary and required information and that the Cooperative was authorized to commence construction on October 27, 2020.

After submitting its application, Connexus was notified by BNSF of the need for an additional 52 requirements. Connexus agreed to all but 14 of them, stating that the railroad lacked support for imposing the requirements because it had not identified any special circumstances as required under the statute. Connexus stated that BNSF's claim that the crossing is a busy crossing does not justify the additional requirements, which Connexus stated the railroad has attempted to impose on other railroad crossings. Connexus also emphasized that BNSF had not claimed that the crossing would pose a serious threat to safe operations or the use of the right-of-way. As a result, Connexus requested that the Commission authorize the Cooperative to commence construction.

In its negotiations with BNSF prior to filing its petition with the Commission, Connexus raised the issue of BNSF's previous bills for flagging expenses at the hourly rate of \$125 per hour (for a different project), stating that amount did not reflect Minnesota's market wages for flagging work of between \$11-\$15 per hour. Connexus also stated that BNSF's expenses improperly include non-flagging expenses for the labor of roadway workers and inspectors. According to the Cooperative, BNSF has not provided any payroll documentation to support such expenses. To understand the costs BNSF would seek for reimbursement, Connexus asked BNSF to explain whether other workers, described as "Roadway Worker in Charge," spend their time inspecting flagging work, but according to Connexus, BNSF did not specifically respond to this inquiry.

For these reasons, Connexus requested that the Commission find that BNSF has failed to demonstrate that the flagging expenses for which it seeks reimbursement are reasonable or necessary and require BNSF to assess costs for reimbursement of actual flagging work associated with installation of Connexus facilities within the right-of-way, calculated at the applicable hourly rate for flagging.

IV. BNSF's Response

In response to Connexus's petition, BNSF stated that the issues in dispute should be referred to the Office of Administrative Hearings for contested case proceedings because such a proceeding would benefit record development. BNSF also stated that such referral is consistent with Minn. R. 7829.1000, which requires the Commission to refer a proceeding if it "involves contested material facts and there is a right to a hearing under statute or rule, or if the commission finds that all significant issues have not been resolved to its satisfaction."

BNSF stated that Connexus's crossing application failed to include a crossing fee as required by statute and disputed that the crossing is in the public right-of-way. As a result, BNSF challenged the Cooperative's application, as filed, stating it was incomplete. BNSF stated that its October 8, 2020 correspondence with Connexus inquiring as to how the Cooperative measured

⁶ To avoid a protracted dispute over the crossing fee, Connexus stated that it paid the fee to BNSF on June 16, 2021.

the public road right-of-way at 240 feet wide was, in effect, notice to the Cooperative that the application was not complete.

In response to Connexus's assertions that the 52 additional requirements BNSF sought to impose were not supported by special circumstances, BNSF stated those requirements reflect basic, industry-accepted safety standards designed to protect the railroad's employees, contractors, and the traveling public. BNSF also stated that the proposed crossing is busy due to its location within an active rail corridor with double tracks that pass underneath a public highway grade separated crossing. BNSF stated that its April 6, 2021 correspondence with Connexus identifies special circumstances warranting the additional requirements.

BNSF also maintained that its claimed flagging expenses are reasonable and necessary but stated that it has not yet sought reimbursement from the Cooperative for such expenses, making the issue not yet ripe for Commission consideration. BNSF stated that Connexus's claims are merely speculative and that the Cooperative lacks standing to raise them. BNSF also stated that it does not receive any payment for flagging services, which are provided by a third-party contractor, and which include: overtime, rest days and holidays, vacation, paid holidays, railway and unemployment insurance, public liability and property damage insurance, health and welfare benefits, transportation, meals, lodging, and supervision.

In response to comments of other entities in this matter, BNSF stated that those comments were irrelevant and mischaracterized the facts of other cases. BNSF recommended that the Commission disregard those comments and consider only the comments filed by BNSF and Connexus.

V. Comments on the Petition

Several other entities filed comments in support of Connexus's petition, including MREA, Meeker, MTA, and Todd-Wadena. They stated that Connexus's filing highlights a long history of railroads failing to adhere to the statute's requirements, resulting in significant delays to the installation of utility facilities and causing additional expense for what should be a routine process.

VI. Commission Action

As a threshold matter, the Commission is not persuaded that resolution of the dispute between the parties requires contested case proceedings and will therefore deny BNSF's request for a contested case hearing with the Office of Administrative Hearings. Based on the record developed, the Commission is able to resolve these issues without further proceedings. The differences between the parties largely center on what conclusions should be drawn from the facts rather than on the facts themselves.

To the extent that the question of whether the crossing is located within the public right-of-way remains disputed, that issue now appears to be moot in light of Connexus's payment of the standard crossing fee of \$1,250 per crossing as set forth in the statute.⁷ As a result, it is no longer necessary to resolve the issue of whether the Cooperative's proposed construction of electrical distribution lines would be located within a public right-of-way. This determination, however,

⁷ *Id.* at subd. 6 (a).

provides no precedent as to whether it is a crossing within a public right-of-way under subdivision 6 (c) of the statute.

Although the parties continue to disagree on whether the application was complete at the time BNSF received it, the record supports a conclusion that the application was complete upon receipt on September 28, 2020. Connexus filed all information required by statute, including a completed application form, a certificate of insurance, and an engineering design conforming to guidelines published in the NESC. Connexus also provided a reasonable explanation for why the crossing fee was not statutorily required. The October 8, 2020 email from BNSF to Connexus did not assert that the application was incomplete under the statute; rather, the email requested an explanation of information contained in the application; namely, how the Cooperative measured the public road right-of-way as 240 feet wide. In making its request, BNSF did not assert that the information was necessary to make the application complete or that a crossing fee was required.

Based on these facts, BNSF failed to demonstrate that it informed Connexus within 15 days that the application was not complete and of any specific additional information that would be necessary to make the application complete.

Through negotiations, Connexus agreed to the majority of additional requirements BNSF imposed under the statute. The Commission is not persuaded, however, that there are special circumstances to support BNSF's additional requirements. Its April 6, 2021 correspondence with Connexus does not use the term "special circumstances" or identify a basis for the additional requirements in relation to special circumstances. The railroad argued that this is a busy crossing but did not articulate how the crossing is special, unique, or unusual and did not explain how the additional requirements attempt to address safety related to the frequency of rail traffic. And, the fact that the railroad imposes these same requirements on other utility crossings suggests that these are standard requirements, rather than additional requirements aimed at addressing special circumstances.

Based on these facts, BNSF failed to show that special circumstances exist, and no other record evidence supports such a finding. Further, there is no indication that the proposed crossing may undermine safety. Connexus has taken all required steps to ensure compliance with applicable safety standards, and BNSF did not notify Connexus in writing within 35 days of receiving the application that the proposed crossing is a serious threat to the safe operations of the railroad or current use of the railroad right-of-way.

In spite of BNSF's assertions that the issue of flagging expenses is not yet ripe for Commission consideration, the railroad identified the types of costs it deemed eligible for reimbursement under the statute. The Commission will therefore clarify that BNSF may charge reasonable and necessary flagging expenses but only the actual expenses paid directly to flagging employees, as well as any time specifically dedicated to flagging by other employees at their regular hourly rate. To the extent that BNSF seeks reimbursement for other costs, the Commission disagrees with BNSF that those are reasonable and necessary under the statute; exceeding the statute's limitation on flagging expenses is not permissible.

For all these reasons, the proposed construction of the electrical distribution lines may begin immediately upon issuance of this order.

VII. Additional Action

To facilitate further development of the broader issues raised herein that have the potential to continue affecting construction of electrical distribution facilities, the Commission will open a separate docket and provide notice to interested parties to comment on:

- Whether the Commission should open a formal investigation regarding the implementation of Minn. Stat. § 237.045 for the purposes of improving its application;
- What should the scope of any proposed investigation be;
- What process should the Commission use to conduct the investigation; and
- Any other information relevant to improving the implementation of Minn. Stat. § 237.045.

ORDER

1. BNSF's request for an Office of Administrative Hearings contested case hearing is denied.
2. BNSF may charge reasonable and necessary flagging expenses but only for the actual expenses paid directly to flagging employees, as well as for any time specifically dedicated to flagging by other employees at their regular hourly rate.
3. The proposed construction of the electrical distribution lines may begin immediately upon issuance of this order.
4. This order shall become effective immediately.

BY ORDER OF THE COMMISSION



Will Seuffert
Executive Secretary



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CERTIFICATE OF SERVICE

I, Chrishna Beard, hereby certify that I have this day, served a true and correct copy of the following document to all persons at the addresses indicated below or on the attached list by electronic filing, electronic mail, courier, interoffice mail or by depositing the same enveloped with postage paid in the United States mail at St. Paul, Minnesota.

Minnesota Public Utilities Commission

**ORDER RESOLVING DISPUTE AND AUTHORIZING COMMENCEMENT OF
CONSTRUCTION**

Docket Number **PT-5817/RW-21-268**

Dated this 5th day of October, 2021

/s/ Chrishna Beard

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