

Staff Briefing Papers

Meeting Date September 29, 2022 Agenda Item 3**

Docket No. **U-999/CI-22-89**

**In the Matter of an Investigation of the Implementation of Minnesota Statutes,
Section 237.045 Regarding Railroad Rights-of-Way, Crossing, or Paralleling by
Utilities**

Issue How should the Commission proceed in its inquiry into the application of
Minnesota Statutes, Section 237.045 to utility crossing requests?

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Relevant Documents

Date

Order Resolving Dispute and Authorizing Commencement of Construction (Docket 21-268)	October 5, 2021
Notice of Comment Period	February 17, 2022
Minnesota Telecom Alliance Comments	March 21, 2022
Minnesota Rural Electric Association Comments	March 21, 2022
Burlington Northern Sante Fe Railroad Company Comments	March 21, 2022
Century Link Reply Comments	April 4, 2022
Mille Lacs Band of Ojibwe 2-18-22 Comments	April 25, 2022

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The attached materials are work papers of the Commission Staff. They are intended for use by the Public Utilities Commission and are based upon information already in the record unless noted otherwise.

I. Statement of the Issue

How should the Commission proceed in its inquiry into the application of Minnesota Statutes, Section 237.045 to utility crossing requests?

II. Procedural History

In 2016, the Minnesota Legislature enacted Minnesota Statutes, Section 237.045. The statute authorized the Commission to consider objections to proposed utility crossing or paralleling of railroads, and determine whether additional requirements may be imposed upon proposed crossings. The Commission is also authorized to refer a dispute for mediation or arbitration and modify any additional requirements imposed upon on a utility.

In an October 5, 2021, Order in Docket 21-268 (described below), the Commission announced that it would open a separate docket to examine whether it should open a formal investigation regarding the application of Minn. Stat. § 237.045 to facilitate further development of the broader issues raised in these in these dockets and to improve the implementation of the statute.

On February 17, 2022, the Commission issued a Notice of Comment Period requesting comments from interested parties on the following questions:

- Should the Commission 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?
- Any other information relevant to improving the implementation of Minn. Stat. § 237.045?

Initial comments were accepted through March 21, 2022 and replies through April 4, 2022. Comments were received from the Minnesota Telecom Alliance (MTA), the Minnesota Rural Electric Association (MREA), Maslon, LLC on behalf of Burlington Northern Santa Fe Railway Company (BNSF), Lumen Technologies (CenturyLink), and the Mille Lacs Band of Ojibwe.

III. Statutes and Rules

Minnesota Statute §237.045 (statute) governs the crossing or paralleling of railroad rights-of-way by utilities. Subdivisions 8 and 9 of the statutes authorize the Commission to be involved with utility railroad crossing application disputes.

Subdivision 3 of the statute provides:

(a) Any utility that intends to place a facility across or upon a railroad right-of-way shall request prior permission from the railroad.

(b) The request must be in the form of a completed crossing application, including an engineering design showing the location of the proposed crossing and the railroad's property, tracks, and wires that the utility will cross. The engineering design must conform with guidelines published in the most recent edition of the (1) National Electric Safety Code, or (2) Manual for Railway Engineering of the American Railway Engineering and Maintenance-of-Way Association. The utility must submit the crossing application on a form provided or approved by the railroad, if available.

(c) The application must be accompanied by the standard crossing fee specified in subdivision 6 and evidence of insurance as required in subdivision 7. The utility must send the application to the railroad by certified mail, with return receipt requested.

(d) Within 15 calendar days of receipt of an application that is not complete, the railroad must inform the applicant regarding any additional necessary information and submittals.

Subdivision 5 of the statute provides:

Beginning 35 calendar days after the receipt by the railroad of a completed crossing application, crossing fee, and certificate of insurance, the utility may commence the construction of the crossing 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.

Subd. 6 states in part:

(a) Unless otherwise agreed by the parties or determined under section 237.04, a utility that crosses a railroad right-of-way, other than a crossing within a public right-of-way, must pay the railroad a onetime standard crossing fee of \$1,250, adjusted as provided in paragraph (e), for each crossing. Except as otherwise provided in this subdivision, the standard crossing fee is paid in lieu of any license, permit, application, processing fee, or any other fee or charge to reimburse the railroad for direct expenses incurred by the railroad as a result of the crossing. No other fee or charge may be assessed to the utility by the railroad.

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

(c) No crossing fee is required if the crossing is located within a public right-of-way.

(d) The placement of a single conduit and its content is a single facility. No additional fees are payable based on the individual fibers, wires, lines, or other items contained within the conduit.

Subdivision 8 of the statute states in part:

(a) 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.

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

Subdivision 9 of the statute states in part:

(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.

(c) If a petition is filed, the Public Utilities Commission shall determine, after notice and opportunity for hearing, whether special circumstances exist that necessitate additional requirements for the placement of the crossing. The Public Utilities Commission must issue an order within 120 days of filing of the petition. The order may be appealed under chapter 14 and section 216B.27. The Public Utilities Commission shall assess the costs associated with a petition equitably among the parties.

Minnesota Rule 7829.1600 (Treatment of Informal Complaint) states:

Commission staff shall try to help resolve informal complaints by correspondence, mediation, arbitration, and other informal means. If the complainant desires formal action by the commission, a formal complaint must be initiated by the commission, or filed by a qualified complainant.

IV. Previous Dockets

- A. Commission Docket P421/RW-17-569: *In the Matter of a Petition by West 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.***

In May 2014, CenturyLink filed an application with BNSF for placement of an underground telecommunication 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.

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

In its November 7, 2017 Order, the Commission found that Minn. Stat. § 237.045 applies to parallelings as well as crossings, and that the proposed line constitutes a paralleling as defined by Minn. Stat. § 237.045.¹ The Commission delegated 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.

On appeal, the Minnesota Court of Appeals affirmed the Commission's decision, finding that that the Commission did not err in interpreting the statute to apply to CenturyLink's proposed line. The Court of Appeals further held that proceedings under Minn. Stat. § 237.045 do not effect an unconstitutional taking under the Minnesota Constitution, and that the statute is not preempted by federal law.²

B. Commission Docket PT-5817/RW-21-268: *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*

Connexus Energy (Connexus) Petition

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. Connexus's petition asserted that BNSF subsequently sought to impose many

¹ Order Finding that Minn. Stat. § 237.045 Governs Proposed Facility, e-Dockets. No. 201711-137200-02, November 7, 2017.

² *Opinion, 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*. Docket No. A18-0207, State of Minnesota Court of Appeals, September 24, 2018 (<https://www.mncourts.gov/Access-Case-Records.aspx>).

unreasonable requirements on the crossing authorization that were not supported by special circumstances that would justify their imposition under Minn. Stat. § 237.045. Connexus also claimed that BNSF had failed to demonstrate that the flagging expenses for which it intends to seek reimbursement are reasonable or necessary.

In its October 5, 2021 Order, the Commission directed that proposed construction by Connexus could proceed immediately. The Commission directed that BNSF could 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. The Commission also announced that it would open a separate docket to examine whether it should open a formal investigation regarding the application of Minn. Stat. § 237.045 to facilitate further development of the broader issues raised in these in these dockets and to improve the implementation of the statute.

V. Comments Received on the February 17, 2022 Notice

Minnesota Rural Electric Association March 21 and 22, 2022 Comments

MREA stated an informal investigation would provide an opportunity for further development of the broader issues raised in previous right-of-way disputes. MREA suggested the scope of the investigation should include the following:

- 1) gather information on the issues utilities and other providers are experiencing when attempting to deploy, replace, repair, or maintain utility and communications infrastructure in or across railroad rights-of-way; and
- 2) obtain recommendations on possible steps the Commission could take in future dispute resolution proceedings under section 237.045 to better address those issues.

MREA suggested a notice and comment process with initial comments due sometime in the Fall of this year and reply comments due 60 days thereafter. MREA emphasized that any future action by the Commission would have to be within the context of such a dispute – either a petition for dispute resolution or a filing that seeks to enforce a prior Commission decision. MREA stated that a full understanding of their public interest implications, would be important context for future consideration of disputes that might arise under section 237.045.

Minnesota Telecom Alliance March 21, 2022 Comments

MTA concurred with MREA's position and supported its recommendations.

Mille Lacs Band of Ojibwe March 17, 2022 Comments³

³ Staff notes that the comments were dated March 17, 2022 but were received and e-filed on April 25, 2022.

In their March 17, 2022, comments, a tribal representative requested consultation on the project. Commission staff reached out several times in response to the request, however no meeting has been held.

BNSF March 22, 2022 Comments

BNSF stated that because the operative statute contains ambiguities, it would be helpful for it to be amended. BNSF did not favor initiation of a formal investigation but indicated it would not oppose one if it would improve implementations for all parties and assist in development of future legislation.

BNSF recommended the scope of investigation be limited to improving the statute's implementations for both railroads and utilities. BNSF cautioned that the investigation should not be used by any utility or railroad as an alternative to asking the Commission to resolve individual cases or applications through the procedures outlined in the statute.

BNSF noted that the Commission's statutory authority is limited to resolving disputes over an individual crossing application when a petition is filed by either a railroad or utility. BNSF recommended that the Commission conduct an informal investigation as an informal complaint pursuant to Minnesota Rule 7829.1600. According to BNSF, this approach would enable stakeholders to explore creative solutions to application of the statute while maintaining flexibility.

Lumen Technologies (CenturyLink) April 4, 2022 Comments

Lumen Technologies concurred with, and joined, the recommendations of the MTA.

VI. Staff Analysis

Both the railroad and utilities have agreed that continued discussion of the implementation of the statute is appropriate. The consensus of responses received, including those from utilities and the railroad, did not support establishment of a formal investigation and instead recommended the use of a comment and reply period. Staff agrees with the informal approach to the investigation as it would provide a robust record for a decision.

Staff recommends the Commission adopt MREA's recommendations for a comment and reply period as the format for the informal investigation, and include the following topics:

- 1) gather information on the issues utilities and other providers are experiencing when attempting to deploy, replace, repair, or maintain utility and communications infrastructure in or across railroad rights-of-way including application processing and permit conditions

2) obtain recommendations on possible steps the Commission could take in future dispute resolution proceedings under Minn. Stat. § 237.045 to better address those issues.

Staff questions whether, as advocated by BNSF, the matter constitutes an informal complaint under the Commission's procedural rules in Chapter 7829. Minnesota Rule 7829.1500 describes informal complaints as those against "utilities" defined in the chapter to include only electric, natural gas and telephone service providers. Staff does not support BNSF's request to limit the informal investigation to improving the statute's implementations for both railroads and utilities because interested parties may benefit from a broader discussion of utility crossings. A broader discussion may facilitate development of modifications of the law by the Legislature or through administrative rulemaking.

VII. Decision Options

Scope of Investigation

1. Gather information on the issues utilities and other providers are experiencing when attempting to deploy, replace, repair, or maintain utility and communications infrastructure in or across railroad rights-of-way. *(MREA, MTA, Lumen, BNSF, Staff)*
2. Obtain recommendations on possible steps the Commission could take in future dispute resolution proceedings under section 237.045 to better address those issues.
(MREA, MTA, Lumen, Staff)
3. Direct that the scope of the informal investigation be limited to improving the statute's implementations for both railroads and utilities. *(BNSF)*

Format of Investigation

4. Direct the Executive Secretary to issue a notice requesting comments consistent with the scope of the investigation and the order in this matter.
(Staff, BNSF MTA, MREA, CenturyLink)
5. Direct that staff conduct an informal investigation regarding implementation of the statute pursuant to Minnesota Rule 7829.1600. *(BNSF)*

Staff Recommendations: **1, 2, and 4**