

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Request to Determine  
the Just and Reasonable Compensation and  
Conditions for the Proposed Underground  
Fiber Conduit at Mile Post 15.9

**RECOMMENDATION ON  
MOTION TO  
DISMISS WITHOUT PREJUDICE**

This matter is pending before Administrative Law Judge Jeanne M. Cochran pursuant to a Notice of and Order for Prehearing Conference filed March 14, 2016. On July 27, 2016, Qwest Corporation dba CenturyLink QC (Qwest) filed a Motion to Dismiss the Proceedings as Moot. On August 10, 2016, BNSF Railway Company (BNSF) filed a Memorandum in Opposition to Qwest's Motion to Dismiss. The Administrative Law Judge held a status conference with the parties on August 23, 2016, to discuss scheduling of oral argument and other related matters. On September 8, 2016, Qwest filed Comments on Legislative History and Affidavit of Jason D. Topp.

The Administrative Law Judge heard oral argument on the motion to dismiss on September 12, 2016, and the record with respect to the motion closed on that date.

Jason D. Topp, Associate General Counsel, Qwest Corporation, appeared on behalf of Petitioner Qwest. Jason Lien and Cyri Lillejord-Wiggins, Maslon LLP, appeared on behalf of Respondent BNSF.

Based upon the record in this case, and the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

**RECOMMENDATION**

**IT IS HEREBY RECOMMENDED THAT:**

Qwest's motion to dismiss without prejudice be **GRANTED**.

Dated: October 5, 2016

  
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JEANNE M. COCHRAN  
Administrative Law Judge

## NOTICE

This report is a recommendation, not a final decision. The Commissioner of the Department of Commerce (Department) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2016), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Michael Rothman, Commissioner, Department of Commerce, Attn: Melissa Knoepfler, Suite 500, 85 Seventh Place East, St. Paul, MN 55101, (651) 296-2715, to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2016).

Under Minn. Stat. § 14.62, subd. 1 (2016), the Commissioner is required to serve the final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

### Introduction

The Department initiated this contested case hearing at the request of Qwest pursuant to Minn. Stat. § 237.04 to determine the just and reasonable compensation and conditions for the construction, maintenance and operation of Qwest's proposed underground fiber conduit that would cross or parallel BNSF's right-of-way.<sup>1</sup>

On July 29, 2016, Qwest brought a motion to dismiss the present proceedings as moot under Minn. R. 1400.6600 (2015). Qwest asserts that legislation, which became effective on August 1, 2016, provides an alternative methodology for providers of telephone communications to obtain access to railroad right-of-ways and states that it will file an application seeking access consistent with the terms of the new statute. As a result, Qwest has rescinded its request that the Department determine the appropriate compensation under Minn. Stat § 237.04 in this proceeding.<sup>2</sup>

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<sup>1</sup> Department's Notice and Order for Prehearing Conference at 2 (March 14, 2016).

<sup>2</sup> See Declaration of Cyri Lillejord-Wiggins at Exhibit (Ex.) I; Qwest's Motion to Dismiss Proceedings as Moot at 1 (July 29, 2016).

## Factual Background

On May 1, 2014, Qwest submitted an application to BNSF to install a proposed underground fiber conduit to replace an existing facility in BNSF's right-of-way at mile post 15.90 in Hennepin County, Minnesota.<sup>3</sup>

On June 17, 2014, BNSF provided Qwest with a proposed wire crossing agreement that included a "license fee" of \$27,000.<sup>4</sup> Qwest objected to the amount of the license fee and the parties attempted to negotiate a mutually agreeable fee for the crossing, but were unable to come to an agreement.<sup>5</sup>

On December 11, 2015, Qwest requested the Department to make a determination, pursuant to Minn. Stat. § 237.04 (2014), of the just and reasonable charge for Qwest to construct an underground conduit to replace existing facilities across BNSF property.<sup>6</sup>

On January 15, 2016, BNSF objected to Qwest's request for a compensation determination.<sup>7</sup> BNSF asserted that the Department lacks jurisdiction to consider the request because state regulatory action that impacts railroad operations and rail safety is preempted by federal law, including the Interstate Commerce Act and the Federal Railroad Safety Act, and regulations promulgated thereunder.<sup>8</sup> BNSF also asserted that Qwest's proposed entry onto its right-of-way, "without payment of an appropriate fee or execution of an agreement concerning the terms and conditions of use and entry," would impermissibly interfere with railroad operations and pose an undue safety risk to BNSF and the public at large.<sup>9</sup>

In a letter to the Department dated February 3, 2016, Qwest asserted that BNSF was unable to provide any basis for the \$27,000 license fee and it argued that BNSF's federal preemption argument was meritless.<sup>10</sup> Qwest urged the Department to set a reasonable fee for the crossing consistent with the mandates of Minn. Stat. § 237.04.<sup>11</sup>

On March 14, 2016, the Department initiated this contested case hearing by filing a Notice and Order for Prehearing Conference with the Office of Administrative Hearings. The Department identified the issues to be determined as follows: (1) Does federal law preempt the Department's authority to determine the just and reasonable compensation and conditions for crossing or paralleling BNSF's right-of way pursuant to Minn. Stat. §

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<sup>3</sup> Declaration of C. Lillejord-Wiggins at Ex. A.

<sup>4</sup> *Id.* at Ex. B.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at Ex. C.

<sup>8</sup> *Id.* citing *In re CSX Transportation Inc. Petition for Declaratory Order*, 2005 WL 1024490, \*4 (S.T.B.) (Board found, based on "well-established precedent," that Congress foreclosed state or local power to determine how a railroad's traffic should be rerouted); and *BNSF v. State of Montana*, 880 F.2d 1104, 1106 (9<sup>th</sup> Cir. 1989) (FRSA preempts state regulation that impacts safety concerns).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at Ex. D.

<sup>11</sup> *Id.*

237.04?; (2) What is the just and reasonable charge, based on the diminution in value caused by the crossing or paralleling of BNSF's right-of-way?; and (3) What just and reasonable terms and conditions shall be prescribed for the construction, maintenance, and operation of Qwest's line to avoid any injury or hazard created by its crossing or paralleling BNSF's right-of-way pursuant to Minn. Stat. § 237.04(a).<sup>12</sup>

During the April 1, 2016 Prehearing Conference, counsel for Qwest noted that Qwest had already laid a temporary utility cable on BNSF's property in the location identified in its application to BNSF.<sup>13</sup>

On May 31, 2016, the Governor signed into law Minn. Stat. § 237.045 (2016), which provides an alternative methodology for providers of telephone communications and other utilities to obtain access to railroad right of way.<sup>14</sup> The new statute became effective August 1, 2016.<sup>15</sup>

On July 27, 2016, Qwest notified BNSF and the Administrative Law Judge that it was rescinding its request for a determination of appropriate compensation under Minn. Stat. § 237.04, and that it planned instead to proceed under the newly enacted statute.<sup>16</sup>

### **New Statutory Procedure Governing Railroad Right-of-Way Crossings**

Minnesota Statutes, section 237.045 became effective on August 1, 2016. It provides utilities with an alternative to the procedure set forth at Minn. Stat. § 237.04 to apply for and resolve disputes about railroad right-of-way crossings.

The new statute sets forth the requirements for utility providers to apply for and obtain access to railroad right-of-ways. Pursuant to Minn. Stat. § 237.045, subd. 2, the application process applies to:

- (1) any crossing in existence before the effective date of this section if an agreement concerning the crossing has expired or has been terminated.  
... and
- (2) any crossing commenced on or after the effective date of this section.<sup>17</sup>

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<sup>12</sup> Department's Notice and Order for Prehearing Conference at 2.

<sup>13</sup> See Declaration C. Lillejord-Wiggins at ¶¶ 8 and 9, and at Ex. G.

<sup>14</sup> 2016 Minn. Laws, ch. 180, § 2.

<sup>15</sup> *Id.*; Minn. Stat. § 654.02 (2016) (Effective Date and Time of Laws).

<sup>16</sup> Qwest's Motion to Dismiss Proceedings as Moot at 1 (July 27, 2016).

<sup>17</sup> Minn. Stat. § 237.045, subd. 2.

Unlike Minn. Stat. § 237.04, the new statute establishes a standard flat fee of \$1,250 to be paid by a utility to a railroad for crossing a railroad right-of-way.<sup>18</sup> No other fee or charge may be assessed to the utility by the railroad.<sup>19</sup>

The new statute also provides that disputes concerning proposed crossings are within the jurisdiction of the Public Utilities Commission, not the Department of Commerce.<sup>20</sup> In the event the railroad and utility are unable to resolve disputes concerning the proposed crossing, the statute provides that either party may petition the Public Utilities Commission for resolution of the matter.<sup>21</sup>

Under the new statute, utilities seeking access to cross railroad right-of-ways may elect to proceed under section 237.045 or section 237.04.<sup>22</sup>

### **Motion to Dismiss**

Qwest asserts that the present proceeding should be dismissed as moot because it has rescinded its request that the Department determine the appropriate compensation and conditions in this matter under Minn. Stat. § 237.04 and intends to file an application consistent with the new process under Minn. Stat. § 237.045. Qwest contends that its decision to proceed under the new statute was due to “the tremendous expense associated with this proceeding, the demands of BNSF for compensation well in excess of the statutory limit, and the extended time period that this proceeding has taken place.”<sup>23</sup>

BNSF argues that Minn. Stat. § 237.045 does not apply to the crossing at issue in this matter. First, BNSF argues that the crossing was not commenced on or after August 1, 2016. BNSF contends that, prior to the August 1<sup>st</sup> effective date of the statute, Qwest placed a new partially above-ground utility line on BNSF’s property without BNSF’s permission. As a result, BNSF asserts that Qwest cannot be found to have “commenced” this crossing on or after August 1, 2016. Second, BNSF claims that the crossing does not fall within the scope of Minn. Stat. § 237.045 because it is not a “crossing in existence before the effective date of this section [where] an agreement concerning the crossing has expired or has been terminated.”<sup>24</sup>

BNSF also argues that it will be prejudiced by a dismissal of Qwest’s claims. BNSF maintains that it has expended a significant amount of time and effort in the present case. BNSF states that it has retained an expert, made site inspections, prepared and served discovery, and spent significant legal fees defending the case. BNSF asserts that its appraisal is complete and that it was in the midst of preparing a motion for summary disposition. BNSF contends that if Qwest is allowed to dismiss its claim and refile under

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<sup>18</sup> Compare Minn. Stat. § 237.045, subd. 6, (setting a standard crossing fee of \$1,250) with Minn. Stat. § 237.04(b), (providing that the charge for crossing a railroad right-of-way shall be “based on the diminution in value caused by the crossing.”)

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* subds. 8, 9

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* subd. 11.

<sup>23</sup> Qwest’s Motion to Dismiss Proceedings as Moot at 1 (July 29, 2016).

<sup>24</sup> Minn. Stat. § 237.04, subd. 2(1).

the new statute, it will be forced to spend additional time and resources objecting to Qwest's new application. Moreover, BNSF argues that because Qwest has had its utility line on its property for many months in advance of the new statute, BNSF should be compensated based on the standards under Minn. Stat. § 237.04 that applied at the time the line was placed. Similarly, BNSF claims that, by installing the partially above-ground line without permission, Qwest has trespassed on BNSF's property and created an immediate safety hazard.

Finally, in the event Qwest's motion to dismiss is granted, BNSF asserts that it should be awarded its costs and attorneys' fees for defending this current case.

During oral argument on the motion, Qwest clarified that the cable it has placed on BNSF's property is above-ground and temporary, and replaced a facility that was old and failing. Qwest maintains that it is standard practice to place temporary above-ground facilities when existing facilities start to experience outages and fail. Because Qwest is seeking to install a permanent underground fiber conduit, it maintains that it has not yet commenced the crossing and may avail itself of the process afforded under Minn. Stat. § 237.045.

## **Analysis**

In considering motions to dismiss in contested case proceedings, administrative law judges look to the standards developed in district court practice.<sup>25</sup> The rules of the Office of Administrative Hearings provide that “[i]n ruling on motions where parts 1400.5100 to 1400.8400 are silent, the administrative law judge shall apply the Rules of Civil Procedure for the District Court for Minnesota to the extent that it is determined appropriate in order to promote a fair and expeditious proceeding.”<sup>26</sup>

Because Qwest seeks to voluntarily dismiss its case, Minn. R. Civ. P. 41.01 applies.

Rule 41.01(a) provides that a plaintiff may dismiss an action without order of the court at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or by filing a stipulation of dismissal signed by all parties who have appeared in the action. No answer is required under the rules of the Office of Administrative Hearings, making the first part of Rule 41.01(a) inapplicable.<sup>27</sup> In addition, the parties have not stipulated to dismissal. Consequently, dismissal pursuant to Rule 41.01(a) is not available to Qwest.

Rule 41.01(b) provides that, except for dismissals pursuant to Rule 41.01(a), an action shall not be dismissed at the plaintiff's instance except upon order of the court and upon such terms and conditions as the court deems proper. Rule 41.01(b) further provides that unless otherwise specified in the order, “a dismissal herein is without prejudice.” Rule 41.01(b) is identical to Fed. R. Civ. P. 41(b), and both rules have been

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<sup>25</sup> See Minn. R. 1400.6600.

<sup>26</sup> *Id.*

<sup>27</sup> See Minn. R. 1400.5100-.8400 (2015).

interpreted consistently to require evaluation of the following factors in determining whether a voluntary dismissal should be granted: (1) the defendant's effort and expense in preparing for trial; (2) any excessive delay or lack of diligence on the part of the plaintiff in prosecuting the action; (3) insufficiencies in the plaintiff's explanation of the need for a dismissal; and (4) whether a summary judgment motion has been filed by the defendant.<sup>28</sup> A dismissal that would strip a defendant of a defense that would otherwise be available may be sufficient prejudice to justify denial of a motion for voluntary dismissal.<sup>29</sup>

Applying the factors to this case, the Administrative Law Judge concludes that dismissal of the proceedings is appropriate. Unlike the cases cited by BNSF,<sup>30</sup> this matter has been pending only for six or seven months<sup>31</sup> and there is no evidence of delay or lack of diligence on the part of Qwest in pursuing its claims. In addition, Qwest's request for dismissal is based on a new statutory procedure that was not in existence when Qwest initiated these proceedings under Minn. Stat. § 237.04. The new statute, Minn. Stat. § 237.045, was created by the legislature specifically for utilities seeking to place facilities across railroad right-of-ways. BNSF was involved in the legislative process associated with the passage of the statute, including participating in hearings on the bill,<sup>32</sup> and was certainly aware when the Governor signed the bill into law on May 31, 2016. Qwest notified BNSF of its intent to proceed under the new statute and filed its motion to dismiss in July.<sup>33</sup> BNSF has not filed a summary disposition motion and much of the effort and expense it has incurred in preparation for this hearing may be used in the alternative process before the Commission. For example, BNSF can assert its preemption defense before the Public Utilities Commission. In addition, BNSF can also argue to the Commission that section 237.045 does not apply to the crossing.<sup>34</sup> Moreover, in the event the Commission agrees with BNSF and determines that section 237.045 does not apply in this situation, BNSF will be able to use much of its work product in any new proceeding under Minn. Stat. § 237.04 if Qwest refiles at a later date.

The Administrative Law Judge finds, therefore, that BNSF will not be unduly prejudiced. Nor will BNSF be denied a defense by a dismissal of Qwest's claims in this matter. Because the factors weigh in favor of granting Qwest's motion to dismiss, the

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<sup>28</sup> *Witzman v. Gross*, 148 F.3d 988, 992 (8<sup>th</sup> Cir. 1998); *Altimus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. Ct. App. 1998).

<sup>29</sup> *Altimus v. Hyundai Motor Co.*, 578 N.W.2d at 411.

<sup>30</sup> See *Williams v. Ford Motor Credit Co.*, 627 F.2d 158 (8<sup>th</sup> Cir. 1980) (granting motion to dismiss without prejudice was abuse of discretion where two and one-half day jury trial had been held after extensive pretrial preparation and discovery and it appeared plaintiff feared trial court may grant motion for judgment notwithstanding the verdict.); *Altimus v. Hyundai Motor Co.*, 578 N.W.2d at 412 (denying motion for voluntary dismissal without prejudice where request made two years after initiation of suit and would deny defendants an existing defense.)

<sup>31</sup> The Notice and Order for Prehearing Conference was issued on March 14, 2016.

<sup>32</sup> See Qwest's Comments on Legislative History at 1-2, and Ex. 1 (Sept. 8, 2016).

<sup>33</sup> See Declaration of Cyri Lillejord-Wiggins at Exhibit (Ex.) I; and Qwest's Motion to Dismiss Proceedings as Moot at 1 (July 29, 2016).

<sup>34</sup> The question of whether the crossing at issue qualifies as a crossing under the new statute, Minn. Stat. § 237.045, is not properly decided in this proceeding because the Public Utilities Commission, not the Department, has the jurisdiction to resolve disputes under section 237.045.

Administrative Law Judge recommends the Department dismiss this matter without prejudice and allow Qwest to proceed under Minn. Stat. § 237.045.

The Administrative Law Judge also notes that she does not have jurisdiction to consider a trespass claim. Should BNSF wish to pursue such a claim, it would need to file an action in district court.

### **Attorneys' Fees Request**

BNSF argues that, in the event Qwest's motion to dismiss is granted, BNSF should be awarded its attorneys' fees and costs for defending this matter "given the late timing of [Qwest's] request."<sup>35</sup> BNSF contends that an award of costs and fees is authorized by Minn. R. Civ. P. 41.01(b), which permits a motion to dismiss to be granted "upon the terms and conditions the Court deems proper."

Unlike judicial courts, administrative law judges do not possess general jurisdiction or inherent powers. Consequently, absent express authority in the governing statute,<sup>36</sup> administrative law judges cannot award attorney's fees.

In this case, there is no authority in the governing statute, Minn. Stat. § 237.04, to award attorneys' fees. Nor has BNSF identified any other statute that would authorize an award of attorneys' fees. BNSF's request for attorneys' fees is denied.

**J. M. C.**

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<sup>35</sup> BNSF's Memorandum in Opposition to Qwest's Motion to Dismiss at 7 (Aug. 10, 2015).

<sup>36</sup> See, e.g., Minnesota Equal Access to Justice Act, Minn. Stat. §§ 15.471-.474 (2016) (prevailing party may request attorney's fees where agency's position not substantially justified).