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VIA E-FILING

239902

January 19, 2016

Ms. Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street SW
Washington, DC 20423

ENTERED
Office of Proceedings
January 19, 2016
Part of
Public Record

Re: STB Finance Docket No. 35982, Jackson County, Missouri – Acquisition and
Operation Exemption – Union Pacific Railroad Company

Dear Ms. Brown:

Enclosed for filing in the above-reference docket is the Reply of Jackson County to CenturyLink
Communications, LLC's Motion for Housekeeping Stay.

If you have any questions, please let me know.

Respectfully Submitted,


Justin J. Marks

Enclosures

EXPEDITED HANDLING REQUESTED

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

FINANCE DOCKET NO. 35982

**JACKSON COUNTY, MISSOURI
-- ACQUISITION EXEMPTION--
UNION PACIFIC RAILROAD COMPANY**

**VERIFIED NOTICE OF EXEMPTION
Pursuant to 49 C.F.R. § 1150.31**

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Dated: January 19, 2016

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**VERIFIED NOTICE OF EXEMPTION
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**JACKSON COUNTY'S REPLY TO CENTURYLINK COMMUNICATIONS, LLC'S
MOTION FOR HOUSEKEEPING STAY**

Jackson County, Missouri through undersigned counsel, hereby replies in opposition to the Motion of CenturyLink Communications, LLC, for a Housekeeping Stay of Jackson County's December 23, 2015 Verified Notice of Exemption. Petitioner's Motion should be denied because *none* of CenturyLink's stated concerns relate to the validity of the Notice; *all* of Petitioner's stated concerns relate to an apparent commercial dispute with Union Pacific Railroad Company regarding fiber optic easements and Petitioner has not otherwise established any need for a housekeeping stay.¹

INTRODUCTION

On December 23, 2015, Jackson County filed the Notice. Jackson County seeks an exemption to acquire from UPRR and operate approximately 17.7 miles of rail line (the

¹ CenturyLink Communications, LLC is referred to herein as "CenturyLink" or "Petitioner." The Motion for Housekeeping Stay is referred to herein as the "Motion." The Notice of Exemption is referred to as the "Notice." The Union Pacific Railroad Company is referred to as "UPRR."

“Corridor”). In the Notice, Jackson County twice noted that substantially all of the Corridor is out of service, that the Corridor serves no freight customers, but that if a customer requires service, Jackson County would provide service. Notice at 3. The Notice is scheduled to become effective on Friday, January 22, 2016.

On January 15, 2016, CenturyLink filed a Motion for a housekeeping stay and an order that Jackson County “immediately release relevant documents ... and information to address issues raised by CenturyLink.” Motion at 10.² CenturyLink asserts that a housekeeping stay and release of documents is required because it is not clear from the Notice whether its rights under two fiber optic easements will be preserved upon consummation of Jackson County’s acquisition of the Corridor. CenturyLink asserts that its rights under one of the easements are tied to “whether a railroad operates or retains any right, title, or interest” in the Corridor and that if not “the center of its national network could be jeopardized with cascading, detrimental consequences to telecommunications service across the nation.” Motion at 13.

CenturyLink has fiber maintenance, ingress/egress and relocation obligations under one or both of these easements. Motion at 5-6. CenturyLink points out that the Notice fails to disclose the “possible impact to CenturyLink of the proposed transaction” and “makes no reference to affected third parties with rights in the corridor, such as underlying landowners, or easement holders like CenturyLink.” Motion at 12.

The Board grants housekeeping stays when it needs additional time or information (before a notice of exemption becomes effective) to consider issues presented in the

² Petitioner does not move to reject the Notice (see Motion at 9, n. 11) and does not seek a traditional stay (see Motion at 11), so Jackson County will not address the legal arguments made with regard to both of these remedies and will limit its discussion to the relevant factual assertions made in the section of the Motion discussing traditional stay criteria. See Motion at 11-14.

housekeeping stay request.³ Jackson County respectfully submits the Motion should be denied because the Board does not need additional time or information to consider the issues presented by CenturyLink before the Notice becomes effective. Although substantial portions of the Corridor are out of service and the Corridor serves no freight customers, Jackson County has said that it would provide service if a freight customer requires service. Jackson County *does* plan to use the Corridor for a recreational trail and may use it for commuter rail service. However, neither of these uses are inconsistent with its freight service obligation and the applicable Board rules (at 49 C.F.R. § 1150.31, *et seq*) do not require an applicant to describe uses of the line to be acquired and third party impacts beyond the purview of the Board.

As Jackson County explains below, CenturyLink’s rights are *expressly not* tied to “whether a railroad operates or retains any right, title, or interest” in the Corridor and the contiguity of its fiber network is not affected by Jackson County’s proposed acquisition. CenturyLink’s concerns are entirely commercial in nature and beyond the jurisdiction of the Board. CenturyLink appears to have a dispute with UPRR and seeks a housekeeping stay (and release of documents) to gain leverage in its dispute. Jackson County, caught in the middle, respectfully requests that the Board not allow its housekeeping stay procedure to be used to delay a project that is of vital interest and importance to the citizens of Jackson County and the region.

ARGUMENT

The Board will grant a housekeeping stay when it needs additional time or information (before a notice becomes effective) to consider the issues presented in the housekeeping stay request.⁴ Petitioner asserts that the Notice of Exemption procedure may not be appropriate for Jackson County’s acquisition of the Corridor and that the Board (and Petitioner) need time

³ *General Railway Corp., D/B/A/ Iowa Northwestern Railroad – Exemption for Acquisition of Railroad Line – in Osceola and Dickinson Counties, IA*, STB Finance Docket No. 34867, slip op at 2 (STB Served May 25, 2006).

⁴ *Id.*

(beyond January 22, 2016 when the Notice becomes effective) to examine the proposed transaction. Petitioner's supporting arguments fall into two broad categories: first, that Petitioner's own rights in two fiber easement agreements may be in jeopardy if the Board does not issue a housekeeping stay and look into the transaction; second, that apart from its own interests, use of the class exemption procedure might not be appropriate with respect to this transaction and the Board should issue a housekeeping stay to evaluate this issue. In this case, a housekeeping stay is not necessary or appropriate, because the Board can consider and dispose of all of Petitioner's issues with information now in the record before the January 22d effective date of the Notice.

1. None of CenturyLink's Assertions Regarding The Confidential Easement Agreement Implicate The Board's Jurisdiction

CenturyLink and UPRR are parties to a confidential Easement Agreement that governs CenturyLink's fiber rights on the Corridor. It is important to note that CenturyLink does not even assert that its rights under the confidential Easement Agreement are dependent on the rail carrier status of the owner/operator. CenturyLink does disclose that the confidential Easement Agreement gives it "certain rights to maintain its fiber optic facilities" along and within the Corridor; rights of ingress and egress to the Corridor; and that the confidential Easement Agreement "defines when CenturyLink can be required to relocate its facilities (at CenturyLink cost or otherwise)." Motion at 5. All three of these issues - maintenance, ingress/egress and relocation obligations/costs - are commercial issues between UPRR and CenturyLink governed by the terms of the confidential Easement Agreement and plainly beyond the Board's jurisdiction.⁵

⁵ Recognizing that none of its issues are within the jurisdiction of the Board, CenturyLink asserts that "utility property issues can be inextricably intertwined with rail transportation issues." Motion at 6. Perhaps they can, but

It appears (see Motion at 5) that UPRR and CenturyLink have a dispute about partial assignment of the confidential Easement Agreement. Whether UPRR has the right to partially assign the confidential Easement Agreement is not an issue within the Board's jurisdiction. It is properly left to negotiations and (failing that) dispute resolution between UPRR and CenturyLink in front of a tribunal with jurisdiction.

2. None of CenturyLink's Assertions Regarding the Court Easement Deed Implicate the Board's Jurisdiction

CenturyLink explains that it possesses certain other rights in the Corridor (besides those in the confidential Easement Agreement) granted by an easement deed by federal court order (the "Court Easement Deed"). First, according to CenturyLink, the Court Easement Deed gives it the right to "maintain its facilities in railroad rights-of-way, including the Corridor." Motion at 6. Like CenturyLink's maintenance rights under the confidential Easement Agreement, its maintenance rights under the Court Easement Deed do not implicate the jurisdiction of the Board.

Second, CenturyLink asserts that the Court Easement Deed includes "important provisions, which are relevant here, including provisions that tie certain rights gained by CenturyLink via the class action to whether a railroad operates or retains any right, title, or interest in the Railroad Right of Way." Motion at 6. CenturyLink asserts that these rights make "the issue of whether the Corridor will remain an operating rail line by a *bona fide* railroad, or whether UPRR will retain any interest therein" critical to CenturyLink. *Id.* CenturyLink includes a copy of the Court Easement Deed (see *id.* n. 5, Exhibit D to the Motion), but does not cite to any provisions or otherwise explain how it is "important" or "relevant" or which provisions "tie"

they are not intertwined in the present case. The two cases Petitioner relies on, see Motion at 6-7, involve ICCTA preemption of state law. CenturyLink is not raising an ICCTA preemption issue, so the cited cases are inapposite.

rights gained by CenturyLink “to whether a railroad operates or retains any right, title, or interest” in the Corridor. CenturyLink does say:

If the Corridor ceases use by a railroad for freight railroad purposes, and UPRR declines to retain an interest therein, CenturyLink's rights under its easements could be diminished. If this occurs, CenturyLink could be subject to renewed claims of trespass and for ejection from the Corridor. If CenturyLink loses these hard-fought rights in the Corridor, the center of its national network could be jeopardized with cascading, detrimental consequences to telecommunications service across the nation.

Motion at 13.

Petitioner has the burden of proof on this Motion and has not shown how its rights under the Court Easement Agreement are affected by the validity of the Notice. In fact, the relevant language in the Court Easement Deed contradicts Petitioner’s domino theory quoted above – it *unties* CenturyLink’s existing fiber system from whether there is an operating railroad or one with retained property rights. It expressly allows CenturyLink’s existing fiber system to remain even if “no railroad operates and no railroad retains any right, title or interest.” Court Easement Agreement, Exhibit D to Motion at 7.⁶ The Court Easement Agreement provides that CenturyLink cannot connect its existing fiber system to *new* fiber lines from off the easement property, but this is a limit on expansion from fiber lines off the easement property, not a limit on the existing fiber system.⁷

⁶ The relevant language is:

This Easement also shall not permit any component of a Telecommunications Cable System to remain in a Railroad Right of Way except (a) under existing or future agreements with the railroad or (b) in any Railroad Right of Way in which no railroad operates and no railroad retains any right, title, or interest.

Court Easement Agreement at 7.

⁷ The relevant language is:

This Easement also shall not permit any new components to be installed to connect the existing Telecommunications Cable System to the edge of the Right of Way in any Railroad Right of Way as to which the Interstate Commerce Commission or the Surface Transportation Board has entered an order, pursuant to 49 U.S.C. § 10903, that the railroad is authorized to cease to provide or maintain rail service over that right of way and the railroad no longer provides or maintains rail service over that line, provided

There are no deficiencies in Jackson County’s Notice, but in any case CenturyLink’s national fiber network is not in jeopardy because of Jackson County’s planned acquisition and there will be no “cascading, detrimental consequences to telecommunications service across the nation” as a result of the acquisition. See Motion at 13.

3. CenturyLink’s General Arguments Regarding The Need For A Housekeeping Stay Are Unpersuasive

Petitioner’s second broad argument is that the Board should issue a housekeeping stay to determine whether use of the class exemption procedure might not be appropriate with respect to this transaction (see Motion at 2). When one strips away CenturyLink’s commercial motives (discussed above), its housekeeping stay argument is particularly unpersuasive.

First and most fundamentally, CenturyLink does not identify a single misstatement in the Notice. With respect to freight service, Petitioner is aware of the fact that UPRR does not provide service today. See Motion at 3, n. 1. In 1979, the St. Louis Southwestern Railway Company, a subsidiary of the Southern Pacific Transportation Company acquired and then embargoed the Corridor. UPRR acquired the line through its merger with Southern Pacific in 1996.⁸ To the best knowledge of Jackson County, UPRR has not provided service on the Corridor since the acquisition almost twenty (20) years ago. With respect to freight service, the Notice is very clear: a substantial portion of the Corridor is out of service; there are no freight customers; Jackson County will provide service if a freight customer requires service, through a contract operator.

that if the railroad does not cease such rail service or later reactivates such service, then this limitation shall not apply.

Court Easement Agreement at 7-8.

⁸ *Missouri Central Railroad Co. – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Co.*, STB Finance Docket No. 33508 slip op at 8-9 (STB served Apr. 30, 1998).

Second, CenturyLink asserts that Jackson County's planned trail use and possible commuter rail use are inconsistent with or would complicate freight use and that these uses were not mentioned in the Notice. Motion at 4 ("A stay is needed in this matter so the Board ... can better understand the more complicated nature of the planned use of the Corridor than is otherwise set forth in the Notice");⁹ Motion at 7 (the notice procedure may be inappropriate "because of the lack of complete information regarding the future use of the Corridor"); Motion at 10 ("the County appears intent on removing tracks in favor of a recreational trail, and for converting the Corridor to future transit use"). Trail and commuter rail use are not inconsistent with the provision of freight service. Numerous recreational trails run adjacent to active rail lines in the United States and numerous commuter rail operations share track and/or a rail corridor with freight. Acknowledging the importance of safety, rail with trails and commuter/freight rail shared use are not unusual or complicated uses. Between the public planning process and the Notice, Jackson County has provided complete information to the public regarding its plans. The Notice was not required to describe consistent uses outside of the STB jurisdiction. Jackson County has no plans to remove track for the trail and Petitioners statement regarding track removal is unfair and unsubstantiated.¹⁰

⁹ CenturyLink reveals that the complexity it anticipates is not really among Jackson County's planned uses, but between Jackson County's uses and CenturyLink's uses:

"[n]on-freight railroad uses of the Corridor (such as for a trail, or commuter rail) may create operating conflicts for CenturyLink, and complicate issues regarding responsibility for the cost of any telecommunications facility relocation necessary to accommodate such uses that were not contemplated in the easement agreement or court order. CenturyLink also requires continuing access to the Corridor, including the right to supplement facilities and repair telecommunications facilities."

Motion at 6. This is a commercial issue.

¹⁰ With regard to Petitioner's "attempts to reach out to counsel for the County" for definitive answers (see Motion at 10), counsel for Petitioner called Jackson County counsel for the first time on January 13 and the purpose of the call

CONCLUSION

For the foregoing reasons, Jackson County respectfully requests that the Board deny CenturyLink's Motion.

was to inform counsel of Petitioner's intention to seek a housekeeping stay unless Jackson County wished instead to withdraw the Notice or itself ask the Board to extend the effective date of the Notice.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kevin M. Sheys" and "Justin J. Marks". The signature is stylized and cursive.

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Dated: January 19, 2016

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of January 2016, I served a copy of the foregoing via email and first class mail upon:

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