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Joan C. Peterson
Corporate Counsel



December 13, 2006

Mr. Corey Conover
Assistant City Attorney
Minneapolis City Attorney's Office
333 South Seventh Street, Room 300
Minneapolis, MN 55402

Re: Minneapolis Permit Fees

Dear Mr. Conover:

Qwest has addressed communications to the City Attorney's Office regarding the City of Minneapolis' excessive permit fees since 2004. As our numerous written and verbal communications have made clear, there are two main issues with the City's practices. The first is the extremely high permit fees charged. The second is that Minneapolis requires companies to obtain "excavation" permits even where there is no "excavation" occurring on the project. Because the Excavation Permit fees are even higher than Obstruction Permit fees, this requirement exacerbates the already untenable level of Minneapolis' permit fees. Qwest is extremely disappointed that the City has not responded to Qwest's good faith efforts to resolve these issues over the last two years.

By this letter, Qwest notifies the City that Qwest will proceed formally on these issues unless the City acts to reform its fees and practices as requested herein prior to January 31, 2007.

Minneapolis' Excessive Permit Fees

Minn. Stat. § 237.162 requires that any permit fees be "based on the *actual costs* incurred by the local government unit in managing the public right-of-way." Further, Minnesota Rules Part 7819.1000 requires that a local government unit's permit fee schedule must be "designed to recover the local government unit's *actual costs* incurred in managing the public right-of-way." Qwest first raised this issue with the City with regard to a fee of \$45,186 that the City charged Qwest to pull cable through existing conduit.

On its face, a fee of \$45,186 is unreasonable and cannot possibly reflect the “actual costs” to the City of managing the public right-of-way. In fact, these fees are so high that the initial response from a Minneapolis Assistant City Attorney was to instruct Qwest that Qwest had misunderstood the City’s forms and paid the total cost of the project rather than the City’s fee.¹ This Assistant City Attorney instructed Qwest to obtain a fee schedule from the Minneapolis Public Works Department (“PWD”) in order to ascertain the correct fees that Qwest should be paying. In accord with these instructions, Qwest contacted the PWD. The PWD did not provide a written fee schedule but provided the requested information verbally. Qwest then used the information to calculate all permit fees assessed against Qwest. Qwest’s review showed that Qwest was, in fact, being assessed fees pursuant to the City’s permit fee information and that Minneapolis is charging extremely high permit fees.²

In an effort to assess the reasonableness of the Minneapolis’ permit fees, Qwest conducted a comparison of the permit fees that the PWD charges with charges assessed by other local units of government. Qwest found that Minneapolis’ fees are significantly higher than permit fees charged by other local governments. Qwest looked at one project it conducted and compared the fees that Qwest was charged in Minneapolis with the fees Qwest would have been charged by other local government units for the same project. According to the calculation using the Minneapolis PWD’s formula, the Minneapolis permit fee for pulling cable through existing conduit from Franklin to 24th Central Offices is \$45,186. By comparison, other local government units would charge permit fees in the range of \$125 to \$3,538 for the same project.³ While Qwest believes that the \$3,538 fee charged by another city is also above actual costs, even that high fee pales in comparison to Minneapolis’ \$45,186 permit fee. Qwest is not aware of any other local government unit that charges anywhere near the level that Minneapolis charges for its permits. The Minneapolis-

¹ See Exhibit A, June 10, 2005 letter from Joan Peterson to Assistant City Attorney Edward Backstrom memorializing a voice mail in which Mr. Backstrom stated “that Qwest was misreading the permit and that the \$45,000 was not a permit fee to Qwest; rather, it was an estimate of the total cost of the project”.

² The City of Minneapolis PWD Excavation Permit Fee is \$115 per permit (this covers the first 75 feet) plus \$1.60 a foot (after the first 75 feet) plus a \$25 erosion charge. (Source: Phone call to Minneapolis PWD). See Exhibit B, spreadsheet entitled “Minneapolis ROW Excavation Permit Fees: Placement Projects” showing excavation permit fees charged to Qwest by the Minneapolis PWD for projects involving the placement of cable/fiber in existing ducts and the corresponding Excavation Permits issued to Qwest. See Exhibit C, spreadsheet entitled “Minneapolis ROW Excavation Permit Fees: Placement Involving Digging Projects” showing permit fees charged to Qwest by the Minneapolis PWD for ten additional projects that were for both placement of cable/fiber in existing ducts and for digging and extension of existing ducts and their corresponding Excavation Permits.

³ The highest excavation permit fee from other cities, \$3,538, is from the City of St. Paul. St. Paul and Minneapolis are the only cities that charge a per foot excavation fee in addition to a flat fee. The other surrounding cities, as well as Hennepin and Ramsey Counties, charge only flat fees for excavation. See Exhibit D, listing the excavation permit fees from Hennepin and Ramsey Counties and cities surrounding Minneapolis. Qwest does not believe that per foot charges are justified by either Minneapolis or St. Paul. Yet even St. Paul’s fees are significantly lower than Minneapolis’ fees.

imposed fee of \$45,186 is unreasonable and cannot possibly reflect the “actual costs” of the City. It is difficult to understand how the City of Minneapolis could incur actual costs that are, on average, 6,215% higher than those of other local government units.⁴

Based on this information, Qwest asked that you review the City’s permit fees with the City’s actual costs. Qwest also asked that Minneapolis’ Department of Public Works establish a new schedule that reflects the City’s actual costs. Qwest asked for expeditious review of its request. After numerous communications in 2004 and 2005, Qwest was told that the City was in the process of conducting a review and would complete its review and provide the cost basis for its fees in July of 2005. When Qwest sought the results of that review in August of 2005, Qwest was informed that it had not been completed. Later in 2005 and again in January, February and March 2006, Qwest repeated its request to receive the results of the study or, at a minimum, to be given an estimate of when that study might be completed. Apparently, the study has still not been completed because Qwest has never been provided with the study or any other justification for the level of permit fees charged by Minneapolis. The City has, for over two years, been unable to provide any justification for its permit fees based on actual costs as required by Minnesota law. The only conclusion that can be drawn from this lack of justification is that the City’s fees are not based on actual costs and, therefore, not in compliance with Minnesota law.

Action Requested: Qwest requests that the City of Minneapolis return to Qwest the permit fee amounts Qwest paid to the City from 2004 to the present. Qwest requests a refund of \$70,119.⁵ Qwest also requests that the City reverse the amount of \$110,597 owed from Qwest to the City based on permit fees.⁶ Finally, Qwest requests that the City not impose any permit fees for future permits unless and until the City can demonstrate that its fees are based on actual costs as required by Minnesota law.

Unjustified Requirement for “Excavation” Permit

The second problem Qwest has raised is that the City requires that all permits where any work is conducted underground be obtained as “excavation” permits rather than “obstruction” permits. The City’s “excavation” permits are more expensive than its “obstruction” permits. The City appears to consider any underground work to be “excavation” even if the work does not require removing soil or any degradation to the right-of-way. As Qwest has communicated to the City, we believe such an interpretation should

⁴ The Minneapolis PWD Excavation Fee for this project is 6,215% higher than the average Excavation Fee (\$727) would be for the same project in the six surrounding cities/counties listed on Exhibit D.

⁵ This amount is documented in Exhibits B and E attached to this letter.

⁶ This amount (current as of October 10, 2006) is documented in Exhibits B and C attached to this letter.

not apply to situations where there is no degradation to the surface of the roadway or removal of soil materials, such as when work is done in conduits accessed through a manhole.

In the 1990's, many communications providers were tearing up City streets in order to lay their cable in the ground. Qwest understood the City's concern with the degradation of the roadway that can occur with numerous cuts into the surface of the roadway. In order to minimize future harm to the physical surface of Minneapolis' streets, Qwest placed conduit in numerous locations. Qwest incurred significant additional expense in placing this conduit instead of cutting into the roadway to place cable. However, the existence of this conduit allows Qwest simply to open a manhole in order to place new cable rather than to dig into the street surface. Despite the differences between opening a manhole to work in existing conduit and cutting or digging in to a street's surface, the City has required Qwest to obtain an Excavation Permit for this activity.

Qwest has pointed out to the City that its requirement of an Excavation Permit for this activity is not consistent with Minnesota law. Minnesota Statute section 237.162, Subd. 5, defines the term excavate: "'Excavate' means *to dig into or in any way remove, physically disturb, or penetrate* a part of a public right-of-way." The use of the words "dig," "remove," and "physically disturb" indicate the excavation relates to some harm to the physical surface itself. This interpretation is confirmed by Minnesota Statute section 216D.01, Subd. 5, which defines excavation as an "activity that moves, removes, or otherwise disturbs the soil by use of a motor, engine, hydraulic or pneumatically powered tool, or machine-powered equipment of any kind, or by explosives." Thus, it is clear under state statutes that an act such as opening a manhole cover to gain access to conduit below the surface of the right-of-way and then replacing the manhole cover when completed should not be considered "excavation" because there is no degradation to or physical disturbance of the roadway. Yet, the City requires that companies obtain an Excavation Permit in that situation.

The City's own ordinance demonstrates that it is incorrect to require an Excavation Permit and charge an Excavation Permit Fee where there is no degradation of the roadway. The applicable Minneapolis City Ordinance distinguishes the types of costs that can be recovered in an Excavation Permit fee from those that can be recovered from an Obstruction Permit fee. The only difference is that the Excavation Permit fee includes an additional cost for "degradation." Minneapolis Ordinances Chapter 430.60 states:

- (a) *Excavation permit fee.* The excavation permit fee shall be in an amount sufficient to recover the following costs, if applicable:
 - (1) The city management cost.
 - (2) The disruptive cost.

- (3) The mapping data cost.
 - (4) The degradation cost.
- (b) *Obstruction permit fee.* The obstruction permit fee shall be in an amount sufficient to recover the following costs, if applicable:
- (1) The city management cost.
 - (2) The disruptive cost.
 - (3) The mapping data cost.

Thus, the City's Public Works Department requirement of an Excavation Permit where there is no degradation of the right-of-way is not supportable under state law or Minneapolis Ordinance. Qwest asked that the City immediately amend its practices and cease requiring companies to obtain an Excavation Permit where there is no degradation to the right-of-way involved in the project. The City acknowledged that the excavation permits and associated fees did not correspond to the work Qwest was performing. You stated the following in a letter dated December 22, 2005:

Staff has acknowledged that we do not have a permit fee that is specifically based upon the cost incurred by the City for this specific situation. Staff believes the proper course is to study the reasonableness and feasibility of setting up a separate category of permit fees for this class of work. Department staff tells me that this may take a number of weeks to study and then institute the necessary proceedings to amend the ordinance and the appurtenant fee schedules as required.⁷

Since receiving the December 22, 2005 letter from you, Qwest has made numerous requests to receive a copy of the study conducted or an estimate of when that study might be completed. The City has never provided any information on the progress of this study or of new fee schedules, despite the representations that such activity "may take a number of weeks." It is apparent that the City's requirement that Qwest obtain an Excavation Permit when accessing through a manhole and placing facilities in conduits is not justified by Minnesota law or the City's ordinances.

Action Requested: Qwest requests that the City of Minneapolis cease requiring Qwest to obtain excavation permits where Qwest is not disturbing the surface or removing anything from the removing anything from the right-of-way.

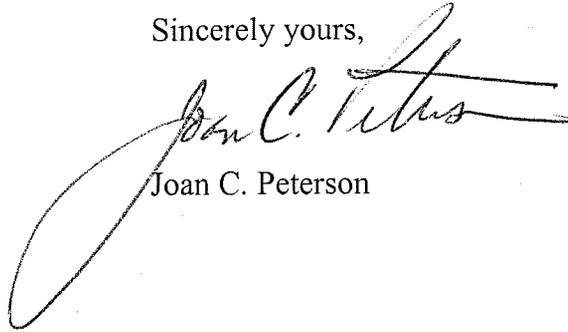
⁷ December 22, 2005 letter to Joan Peterson from Corey Conover.

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Conclusion

The City of Minneapolis has been unable to justify its permit fees and permit practices for more than two years. It is evident that the City cannot justify either its fees or its practices. Qwest's attempts to work cooperatively with the City have been in vain. Thus, unless the City acts to reform its fees and practices as requested herein prior to January 31, 2007 Qwest will pursue remedies pursuant to Minnesota Statutes § 237.163, Subd. 5(4), and City of Minneapolis Code of Ordinances Section 430.115 (4).

Sincerely yours,

A handwritten signature in black ink, appearing to read "Joan C. Peterson", with a large, sweeping flourish extending from the bottom left of the signature.

Joan C. Peterson

JCP/bardm

Enclosures