

Decision No. C20-0004

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0888R

IN THE MATTER OF THE APPLICATION OF TOWN OF TIMNATH FOR AUTHORITY TO MODIFY THE EXISTING AT-GRADE CROSSING ON THREE BELL PARKWAY (LCR 3) ACROSS THE GREAT WESTERN RAILROAD, CROSSING #244881N, IN THE TOWN OF TIMNATH, LARIMER COUNTY, STATE OF COLORADO.

COMMISSION DECISION: (1) DENYING MOTION TO INTERVENE OUT OF TIME AND MOTION TO AMEND COMMISSION DECISION NO. C19-0127; AND (2) PROVIDING NOTICE OF CIVIL PENALTY

Mailed Date: January 3, 2020
Adopted Date: December 11, 2019

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I. BY THE COMMISSION

A. Statement

1. Through this Decision, we deny the Motion to Intervene Out of Time and the Motion to Alter and/or Amend Commission Decision No. C19-0127 filed on October 16, 2019, by Great Western Railroad of Colorado, LLC (GWRR).

2. In addition, this Decision requires that the signed Construction and Maintenance Agreement ordered by Decision No. C19-0127 (Agreement) be filed by **January 31, 2020**. If this deadline is not met due to GWRR's failure to negotiate in good faith with the Town of Timnath (Timnath), the Commission will issue a notice of civil penalty assessment against GWRR for failure to comply with the Commission's order, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. The civil penalty amount shall be \$2,000 for each day the signed Agreement is not filed with the Commission after the deadline on January 31, 2020.

B. Background

3. This proceeding involves an application filed by Timnath on December 19, 2018, requesting authority to widen the existing crossing to add a bike lane on the west side and install sidewalks on both sides, and install active warning equipment consisting of flashing lights, four-quadrant gates, bells, a new cabin, and constant warning time circuitry at the crossing of Three Bell Parkway (also known as Larimer County Road 3) with the tracks of GWRR (Application). Timnath plans to obtain a quiet zone at this crossing from the Federal Railroad Administration. In the Application, Timnath stated it would pay the costs for signal work and road work, and it proposed an allocation of costs associated with crossing surface upgrade and maintenance work. Timnath requested that pursuant to Rule 7211(a) of the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code*

of *Colorado Regulations 723-7*, it be responsible for the portion of crossing surface upgrade and maintenance work costs related to crossing surface extensions for sidewalks, and GWRR be responsible for the remaining costs related to crossing rehabilitation and track maintenance. Timnath estimated that construction would begin in June 2019 and be completed by July 2019. The Commission gave notice of Timnath's application to all interested parties, and no interventions were timely filed.

4. Section 40-4-106, C.R.S., grants the Commission jurisdiction over the crossings in Colorado between railroad tracks and public highways. As relevant here, § 40-4-106(2)(a), C.R.S., authorizes the Commission to prescribe the terms and conditions of installation and operation, maintenance, and warning at crossings between railroad tracks and public highways as may to the Commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted.

5. By Decision No. C19-0127, issued January 31, 2019, the Commission granted the Application with its statement of cost allocation. The Commission concluded that good cause exists and that the requirements of public safety are met by granting the Application. Decision No. C19-0127 at ¶ 17. The Commission required Timnath to file a copy of the signed Agreement by June 30, 2019, prior to starting work at the crossing. Decision No. C19-0127 at Ordering ¶ 5.

**C. Motion to Intervene Out of Time and Motion to Alter and/or Amend
Commission Decision No. C19-0127**

6. On October 16, 2019, GWRR filed a Motion to Intervene Out of Time (Motion to Intervene) and a Motion to Alter and/or Amend Commission Decision No. C19-0127 (Motion to Amend).

7. In its Motion to Intervene, GWRR states that it did not intervene during the 30-day intervention period ending on January 19, 2019, because it did not anticipate any reason to intervene at that time. To explain why it is now moving to intervene, GWRR claims that an incomplete cost estimate was submitted with the Application, that costs of materials have increased from those represented in the Application, that additional costs are now associated with Timnath's proposed quiet zone designation, and that the approved improvements cannot be completed as originally outlined because GWRR has replaced the rail on both sides of the crossing approach with heavier weight rails as part of a track improvement project GWRR began in April 2019. Therefore, GWRR seeks permissive intervention pursuant to Rule 1401(c) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, in order to request alteration or amendment of Decision No. C19-0127 based on a current scope of work and updated cost estimate. GWRR states that the proceeding will substantially affect its pecuniary and tangible interests and that if it is not permitted to intervene, it will be substantially affected in terms of both the scope and cost of work associated with the Application as well as conditions that were not present at the time the Application was submitted and adopted by the Commission.

8. In its Motion to Amend filed pursuant to § 40-6-112, C.R.S., GWRR repeats claims made in its Motion to Intervene concerning costs, quiet zone designation, and changed track conditions at the crossing. With the Motion to Amend, GWRR filed a revised construction scope of work that accounts for the changed rail weight on both sides of the crossing. GWRR requests that Decision No. C19-0127 be amended in accordance with "GWR Engineering Standards," to assure construction of a safe crossing and future quiet zone, and, in turn, states that these standards require modification of the crossing within the roadway easement as defined

in the revised scope of work. GWRR also filed a revised cost estimate that reflects increased costs for signal work and for crossing surface upgrade and maintenance work. GWRR asserts that the change in rail weight on the crossing approach requires additional consideration for cost allocation not addressed in the Application. Addressing Timnath's plans to seek a quiet zone designation at the crossing, GWRR claims that Timnath must comply with the process outlined in the OmniTRAX Public Projects Manual, that Timnath should take into account the installation of supplemental safety measures as well as consolidate or close adjacent crossings, and that GWRR should be reimbursed for work performed to complete safety diagnostics and design, review, implement, and maintain railroad facilities within the new quiet zone. GWRR requests Decision No. C19-0127 be amended to update the scope of work and cost estimate.

9. On October 30, 2019, Timnath filed a response in opposition to GWRR's Motion to Intervene and Motion to Amend. Timnath states that before filing the Application, it expressly informed GWRR it would request cost allocation in the Application unless outstanding issues with the cost estimate were resolved. It submitted an email supporting this contention with its filing as Exhibit B. Timnath claims that GWRR's revised cost estimate encompasses an entire rehabilitation project, including rail replacement, and that this exceeds the scope of the improvements requested in the Application. Timnath reports that following the issuance of Decision No. C19-0127, GWRR refused to negotiate an Agreement or construct the approved improvements, basing its refusals on disagreement with the decision's cost allocation and citing the need for additional engineering review. Timnath states that it completed all engineering review processes in effect at the time the Application was filed. It also asserts that any alleged material cost increases are a result of GWRR's refusal to negotiate the Agreement. For these reasons, it opposes GWRR's Motion to Intervene and Motion to Amend.

10. Additionally, Timnath states that it would be prejudiced if the Motion to Intervene was granted because it has spent many years of staff work and tens of thousands of taxpayer dollars to improve the crossing.

D. Findings and Conclusions

11. Pursuant to Rule 1401(a) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, the Commission may, for good cause shown, allow late intervention, subject to reasonable procedural requirements. Additionally, pursuant to Rule 1500 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, the person seeking leave to intervene bears the burden of proof with respect to the relief sought.

12. We deny GWRR's Motion to Intervene. GWRR requests intervention nearly nine months after the Commission granted the Application through Decision No. C19-0127. GWRR was provided with notice of this proceeding during the 30-day intervention period ending on January 19, 2019, and it did not intervene at that time. The Commission is not persuaded that GWRR's desire to present supplemental information and seek alteration of a Commission decision warrants late intervention. Further, to allow GWRR's intervention now would be severely prejudicial to Timnath. The town submitted its Application over one year ago and states that it has invested significant resources to move the approved improvements to completion. Therefore, the Commission declines to find good cause to grant GWRR's motion to intervene.

13. Section 40-6-112(1), C.R.S., states that "[t]he commission, at any time upon notice to the public utility affected, and after opportunity to be heard as provided in the case of complaints, may rescind, alter, or amend any decision made by it."

14. We deny GWRR's Motion to Amend and decline to reexamine Decision No. C19-0127 pursuant to § 40-6-112(1), C.R.S. GWRR is not a party in this proceeding. Its

request for alteration or amendment of the decision is therefore improper. Additionally, we concluded in Decision No. C19-0127 that good cause exists and that the requirements of public safety are met in granting the Application, and nothing submitted in GWRR's filings merits reconsideration of that conclusion or consideration of GWRR's proposed updated scope of work and cost estimate in this proceeding.

15. Furthermore, we are concerned by arguments in GWRR's Motion to Amend that, without providing any citation to relevant rules or statutes, indicate internal policies and standards of GWRR and/or OmniTRAX must be followed for the approved improvements to be constructed. The Commission appreciates that in some instances, companies' internal policies and standards may complement our statutory role of promoting the safety of the public at railroad crossings, but we remind GWRR and its attorneys that such policies and standards cannot overrule our decisions approving crossing improvements. We suggest that GWRR's attorneys for this matter review the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, and Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7, before submitting further filings to the Commission.

16. We note that the signed Agreement ordered by Decision No. C19-0127 to be filed by June 30, 2019, has not been filed. We direct GWRR to negotiate in good faith with Timnath so that a reasonable Agreement governing the construction and maintenance of the improvements approved in Decision No. C19-0127 will be reached in a timely manner.

17. Section 40-4-106(1)(b), C.R.S., as amended by the 2019 Colorado General Assembly, provides that if the Commission issues an order or promulgates a rule requiring a railroad company to comply with railroad crossing safety regulations, the Commission

may impose a civil penalty against a railroad company that fails to comply with the order or rule. Pursuant to Rule 4 *Code of Colorado Regulations* 723-1-1302(b) of the Commission's Rules of Practice and Procedure, the Commission may impose a civil penalty, when provided by law. Although we have initiated pre-rulemaking stakeholder engagement in Proceeding No. 19M-0379R to consider adopting rules specific to this new statutory authority, we find the instant Proceeding requires the Commission to act in this individual adjudication before rules can be adopted. We find § 40-4-106(1)(b), C.R.S., does not require that the Commission adopt rules in order to use the fining authority conferred in § 40-4-106(1)(b), C.R.S.

18. In this Proceeding, we find that failure to submit the signed Agreement by the Commission-ordered deadline will further delay implementing the crossing improvements authorized and ordered by the Commission in Decision No. C19-0127. The improvements include flashing lights, four-quadrant gates, bells, a new cabin, and constant warning time circuitry. Consistent with our jurisdiction to take actions reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted at the crossing, we have already found the requirements of public safety are met by approving the Application. Decision No. C19-0127 at ¶ 17. We find that significant delay in commencing construction creates a safety concern as the improvements are postponed.

19. Therefore, we find this Proceeding is an appropriate instance in which to exercise the statutory authority conferred in § 40-4-106(1)(b), C.R.S.

20. Through this Decision, the Commission provides notice to GWRR that if the signed Agreement is not submitted by the close of business on January 31, 2020 due to GWRR's failure to negotiate in good faith with Timnath, the Commission intends to issue a notice of a civil penalty assessment against GWRR for failure to comply with the Commission's order, as

authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. The civil penalty amount shall be \$2,000 for each day the signed Construction and Maintenance Agreement is not filed with the Commission after the deadline of January 31, 2020.

II. ORDER

A. The Commission Orders That:

1. The Motion to Intervene Out of Time, and the Motion to Alter and/or Amend Commission Decision No. C19-0127, filed October 16, 2019, by Great Western Railway of Colorado, LLC (GWRR), are denied.

2. The signed Construction and Maintenance Agreement (Agreement) between GWRR and the Town of Timnath, ordered to be filed by the Commission in Decision No. C19-0127, issued January 31, 2019, shall be filed by **January 31, 2020**.

3. The Commission provides notice to GWRR that in the event the signed Agreement is not submitted by the deadline imposed by this Decision due to GWRR's failure to negotiate in good faith with the Town of Timnath, the Commission intends to issue a notice of civil penalty assessment against GWRR for failure to comply with this order of the Commission, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. The civil penalty amount shall be \$2,000 for each day the signed Agreement is not timely filed with the Commission after the deadline.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Decision.

5. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 11, 2019.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners