

Decision No. C24-0348

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24A-0076R

IN THE MATTER OF THE APPLICATION OF THE CITY OF FORT COLLINS AND LARIMER COUNTY FOR AUTHORITY TO CONVERT THE LARIMER COUNTY ROAD 9 AT-GRADE CROSSING OF GREAT WESTERN RAILWAY FROM PRIVATE TO PUBLIC AND TO WIDEN THE CROSSING (DOT NO. 244870B) IN THE CITY OF FORT COLLINS, LARIMER COUNTY, STATE OF COLORADO.

**COMMISSION DECISION DENYING APPLICATION FOR
REHEARING, REARGUMENT, OR RECONSIDERATION**

Mailed Date: May 23, 2024

Adopted Date: May 1, 2024

I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission denies the Application for Rehearing, Reargument, or Reconsideration (RRR) of Commission Decision C24-0207 filed on April 23, 2024, by Cottonwood Land and Farms, LLC (Cottonwood). The Commission reaches this determination based on the RRR itself and without need for consideration of the Joint Motion for Leave to file a Response to Cottonwood's RRR (Joint Motion), filed by the City of Fort Collins (Fort Collins) and Larimer County (collectively Joint Applicants) on May 3, 2024, opposing the RRR, and Cottonwood's Response to the Joint Motion, filed on May 7, 2024. The Commission therefore denies the Joint Motion as moot.

B. Background

2. On February 12, 2024, Joint Applicants filed an application with the Commission (Application) requesting authority to change the crossing of Larimer County Road 9 with the tracks

of the Great Western Railway (GWR) from a private crossing to a public crossing, and to widen the crossing at railroad milepost 78.68 of the Greeley Subdivision, National Inventory No. 244870B in Fort Collins, Larimer County.

3. On February 14, 2024, the Commission gave notice of the Application to all interested parties, including adjacent property owners pursuant to § 40-6-108(2), C.R.S.

4. On March 13, 2024, Cottonwood filed a Notice of Intervention as of Right or in the Alternative Motion for Permissive Intervention (Intervention). As grounds to intervene, Cottonwood stated that determinations made regarding the Application could have a direct pecuniary and tangible impact on its existing or future contracts. Cottonwood further indicated the GWR crossing at issue is adjacent to property that Cottonwood has a legal right to use via a mining permit. Additionally, Cottonwood asserted it sought to protect its continued and unfettered use of an historical access road adjacent to the crossing for access to its properties. Cottonwood did not indicate that it contests or opposes the specific crossing changes proposed in the Application and did not request a hearing.

5. On March 20, 2024, Joint Applicants filed a Motion to Strike Intervention of Right and Response to the Motion to Intervene of Cottonwood Land and Farms, LLC (Motion to Strike). In their response, Joint Applicants contended that Cottonwood failed to establish that a legally protected interest or cognizable legal right may be affected by granting the Application. Joint Applicants further claimed the proposed improvement to the crossing would not negatively impact Cottonwood's access or property rights and that the crossing improvement would be constructed entirely on Colorado State University and GWR properties and would not interfere with Cottonwood's use of the historical access road. Additionally, Joint Applicants stated the

mining permit at issue is currently in Fort Collins' possession and although Fort Collins anticipates transfer to Cottonwood as a successor operator, it has not done so yet.

6. The Commission, through Decision C24-0207 issued on April 2, 2024, granted Cottonwood's motion to permissively intervene. The Commission also determined, because no intervenor in the proceeding opposed the application or requested a hearing, that it would hear the matter upon the record, without a formal hearing under § 40-6-109(5), C.R.S., and Rule 1403, 4 *Code of Colorado Regulations* CCR (CCR) 723-1. The Commission found that good cause existed and the requirements of public safety were met, and granted the Application.¹

C. Cottonwood's Application for RRR

7. On April 23, 2024, pursuant to § 40-6-114 C.R.S., and Rule 1506, 4 CCR 723-1, Cottonwood filed an application for RRR. Cottonwood asserts that it has legitimate safety concerns regarding the Application's proposed construction at the crossing, and now formally opposes the Application and requests a hearing. Cottonwood, as the anticipated successor operator of a mining permit currently held by Fort Collins, states it has safety concerns regarding its mining of the property adjacent to the crossing and the Poudre Trail. Cottonwood anticipates its operations will involve the use of heavy machinery, including the movement of heavy haul tracks transporting gravel and other materials, which, it contends, was not expressly addressed by Fort Collins in its report on heavy vehicle traffic, made pursuant to Rule 7204(a)(II).²

¹ After the Commission's deliberations at the March 27, 2024, Commissioners' Weekly Meeting, but prior to the issuance of the resulting written decision, Cottonwood filed a Motion for Leave to Amend Intervention and attached an amended intervention that included an express statement of opposition and a request for a hearing. However, since the Commission had already concluded its oral deliberations on the matter, it did not take up this subsequent filing.

² Cottonwood RRR, at 6.

8. Cottonwood also argues the Commission, by granting Cottonwood's intervention and subsequently determining the matter without a hearing, rendered its intervention meaningless.³ Cottonwood points out that the Commission, in granting its permissive intervention, found that the Application in this proceeding may substantially affect Cottonwood's pecuniary or tangible interests.⁴ Cottonwood therefore argues it should be afforded due process and an opportunity to engage with the Joint Applicants to determine any contested issues.⁵ Cottonwood argues its Intervention, read fairly in its entirety, expressed a desire to engage with the Application, rather than to just monitor the proceeding.⁶ Cottonwood asserts that it had not yet fully formed its posture toward the Application at the time of its Intervention, but rather intended to subsequently avail itself of the process and rights afforded by its intervention.⁷

9. Additionally, Cottonwood contends the Commission's Decision was premature, as it was issued before the deadline to respond to the City's Motion to Strike pursuant to Rule 1400(b).⁸ If it has been afforded the opportunity, Cottonwood argues, it could have included its decision to amend its Intervention to address the issues presented in the Motion to Strike.⁹

D. Findings and Conclusions

10. The Commission Rules governing interventions are clear: Rule 1401(a) states that "[i]f a person wishes to intervene and to request a hearing, that person's intervention . . . must state that the application or petition is contested or opposed, must give reason why the application or petition is contested or opposed, and must explicitly request a hearing." Similarly, Rule 1403(b)

³ *Id.* at 1–2.

⁴ *Id.* at 4.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.* at 4–5.

⁸ *Id.* at 7.

⁹ *Id.* at 7.

states “[a] proceeding will not be considered to be contested or opposed, unless an intervention has been filed that contains a clear statement specifying the grounds on which the proceeding is contested or opposed.” Accordingly, a party that wishes to intervene for purposes of opposing an application and engaging in a hearing must include these specifications in its intervention: (1) a statement that the application is contested, (2) reasons specifying why the application is contested, and (3) an explicit request for a hearing.

11. Cottonwood’s Intervention failed to include these components, and the Commission cannot infer parties’ intentions. As Cottonwood acknowledges,¹⁰ the Commission allows intervenors to monitor a proceeding while not taking a position on the application. Because Cottonwood’s Intervention contained neither a statement of opposition nor an explicit request for a hearing, the Commission reasonably concluded that Cottonwood wished to intervene in this proceeding for purposes other than opposing the Application and participating in a hearing (such as monitoring). While the Commission, in granting permissive intervention, recognized that Cottonwood has pecuniary or tangible interests in the matter, this does not create a presumption of opposition to the application or necessarily trigger a hearing. Similarly, the Commission finds no merit in Cottonwood’s assertion that it had not yet fully formed its posture at the time of its Intervention and intended to avail itself of the rights afforded by the intervention. This is not how the Commission’s processes operate; the Commission needs to be aware of parties’ positions at the onset of the proceeding so that it can properly determine whether to expend the administrative resources required for a fully adjudicated process.

12. Cottonwood also suggests that, had it been afforded the full 14 days to respond to the Joint Applicants’ Motion to Strike, it could have amended its intervention to include a statement

¹⁰ *Id.* at 4.

of opposition and request for hearing. However, the Commission denied the Joint Applicants' Motion to Strike and allowed Cottonwood to intervene. Therefore, it is unpersuasive for Cottonwood to now argue that they should have been afforded more time to respond to a motion – that was ultimately denied – so that it could have made additional, unrelated amendments to its Intervention prior to the deadline. Additionally, the Application was filed on February 12, 2024, more than three months ago, and it would be prejudicial to the Joints Applicants to mandate a hearing take place at this juncture, which would essentially restart the entire process, after Cottonwood failed to timely make such a request at the beginning of this proceeding.

13. Accordingly, the Commission denies Cottonwood's RRR. Because we deny the RRR on its merits, we further deny, as moot, Joint Applicants' subsequent Joint Motion seeking to respond in opposition to the RRR and reach this decision without reliance on the Joint Motion or Cottonwood's Response.

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration, filed by Cottonwood Land and Farms, LLC, on April 23, 2024, is denied consistent with the discussion above.

2. The Joint Motion for Leave to file Response to Application for Rehearing, Reargument, or Reconsideration of Commission Decision No. C24-0207, filed by the City of Fort Collins and Larimer County on May 3, 2024, is denied.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 1, 2024.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads 'Rebecca E. White'.

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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MEGAN M. GILMAN

TOM PLANT

Commissioners