

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24M-0274R

IN THE MATTER OF THE DEVELOPMENT OF TEMPLATE CONSTRUCTION AND MAINTENANCE AGREEMENTS AND PRELIMINARY ENGINEERING AGREEMENTS FOR USE IN PUBLIC CROSSING PROJECTS IN COLORADO CONSISTENT WITH RULE 4 CODE OF COLORADO REGULATIONS 723-7-7214.

INTERIM DECISION REQUIRING FILINGS AND SCHEDULING PREHEARING CONFERENCE

Issued Date: July 22, 2024

I. STATEMENT, SUMMARY AND PROCEDURAL HISTORY

A. Statement and Summary

1. This Decision requires that the Colorado Department of Transportation (“CDOT”) file a copy of its master template Construction and Maintenance (“C&M”) Agreement (“C&M Agreement”) and master template preliminary engineering (“PE”) agreement (“PE agreement”) (if any); and (b) participants to file their current or recent template C&M and PE agreements (if any) on or by August 5, 2024. This Decision also invites participants to file proposed C&M and PE template agreements and any C&M and PE agreements that they have used which they believe will be helpful in developing template C&M and PE agreements by that same deadline, and schedules a fully remote prehearing conference for August 19, 2024 to address the forward movement of this Proceeding.

B. Procedural History and Background

2. On June 14, 2024, the Commission initiated this Proceeding so that it may implement newly adopted Rule 7214 of the Commission’s the Rules Regulating Railroads, Rail

Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7. Starting November 22, 2024, Rule 7214 requires road authorities and railroads, railroad corporations, rail fixed guideways, transit agencies, or owners of the track to use Commission-approved template C&M and PE agreements for public crossing projects over which the Commission has jurisdiction.¹ This Proceeding is a forum to develop Commission-approved template C&M and PE agreements for use per Rule 7214, 4 CCR 723-7.²

3. When it initiated this matter, the Commission explained that in Proceeding No. 21R-0538R, it adopted Rule 7214, 4 CCR 723-7 in response to many concerns raised by rulemaking participants about significant delay in parties executing agreements necessary for Commission-approved crossing projects to move forward.³ In its rulemaking decisions, the Commission found the record reflected a variety of reasons for these significant delays and that while template agreements may not completely solve all potential disputes and delays associated with entering into agreements, public comments suggest that templates agreements will greatly minimize delays, disputes, and associated increased costs that have become common in Commission crossing proceedings.⁴

4. The Commission required the following entities to participate in this Proceeding: road authorities, CDOT, railroads, railroad corporations, rail fixed guideways, transit agencies, and owners of tracks over which the Commission has jurisdiction.⁵ The Commission directed these required participants and any other interested persons to file a notice of participation that includes

¹ Rule 7214, 4 CCR 723-7.

² Decision No. C24-0420 at 1 (mailed June 14, 2024) (“Decision No. C24-0420”).

³ Decision No. C24-0420 at 3.

⁴ *Id.* citing Decision No. R23-0618 at ¶¶ 200 and 203, (mailed September 22, 2023), Proceeding No. 21R-0538R (“Decision No. R23-0618”); Decision No. C23-0780 at ¶ 98, (mailed November 27, 2023), Proceeding No. 21R-0538R (“Decision No. C23-0780”).

⁵ *Id.* at 1.

their contact information by July 5, 2024.⁶ The Commission specifically noted that CDOT is required to participate to provide its “existing templates as a starting point for discussions.”⁷

5. The Commission’s Decision opening this Proceeding highlights numerous minimum standards for the template agreements that are to be developed, which are not repeated here.⁸

6. When it initiated this matter, the Commission also referred this Proceeding to an administrative law judge (“ALJ”).⁹ The Commission noted that the assigned ALJ may, by separate order, establish a procedural schedule, set any procedural requirements and deadlines, establish an appropriate process for dispute resolution, assist the participants in convening and facilitating any workshops, and assist in other coordination among the participants.¹⁰

7. Since the Commission initiated this matter, numerous interested entities made filings providing notice that they will participate by or before the July 5, 2024 deadline.¹¹ However, CDOT has not filed a notice that it would participate, nor has it filed a copy of its existing master template C&M agreement, despite Commission direction to participate in this Proceeding for that purpose.¹²

II. FINDINGS AND CONCLUSIONS

8. Rule 7214 exempts parties to contracts with CDOT, (a road authority), from its requirement to use Commission-approved template C&M and PE agreements for public crossing

⁶ *Id.* at 7.

⁷ *Id.* at 1-2.

⁸ *Id.* at 3-4 citing Decision No. R23-0618 at ¶ 202.

⁹ *Id.* at 5-7.

¹⁰ *Id.* at 5.

¹¹ *See e.g.*, filings made by the Town of Tinmath and Denver Transit Operators on July 5, 2024, and filings made by the Weld County Board of County Commissioners, the Regional Transportation District, Union Pacific Railroad Company, the Cities of Aurora and Arvada, and Larimer County on July 3, 2024. Other interested entities made similar filings on July 5 and 2, 2024, and June 21 and 28, 2024.

¹² *Id.* Decision No. C24-0420 at 1-2.

projects over which the Commission has jurisdiction. In doing so, the Commission acknowledged that CDOT's template agreements work well and include terms unique to CDOT.¹³ Thus, while CDOT's template agreements will include terms unique CDOT, they may still serve as a helpful starting point for initial discussions to create template C&M and PE agreements for use per Rule 7214, 4 CCR 723-7. For the reasons discussed, and consistent with Decision No. C24-0420 and the Commission's rulemaking Decisions in Proceeding No. 21R-0538R, CDOT must file a blank copy of its most recent master template C&M agreement (*i.e.*, one that has not been completed and executed for a specific project).¹⁴ If CDOT has a master template PE agreement, it is also required to file a blank copy of that. If possible, CDOT must file both documents in an executable format such as Microsoft Word.

9. In addition, the ALJ finds that other template or recently used C&M and PE agreements may further facilitate discussions to create template agreements. As such, all other participants who have template C&M and PE agreements used in Colorado¹⁵ are required to file blank copies of those agreements (*i.e.*, copies that are not completed or executed for a specific project). Participants are also invited to file proposed template C&M and PE agreements; any C&M and PE agreements that participants have used which they believe may be helpful in this Proceeding; and any other document they believe may be helpful in creating master template C&M

¹³ Decision No. R23-0618, ¶ 201.

¹⁴ Indeed, Decision No. R23-0618 requires CDOT to file its template agreements in "the miscellaneous proceeding opened for the purpose of approving template agreements." Decision No. R23-0618, ¶ 201. And, in the Decision opening this Proceeding, the Commission explicitly stated that CDOT is required to participate in this Proceeding "to provide [its] existing templates as a starting point for discussions..." Decision No. C24-0420 at 1. CDOT agreed to do this. CDOT's 5/23/23 Comments in Proceeding No. 21R-0538R at 1. *See* Decision No. R23-0618, ¶ 174.

¹⁵ Although only template agreements used in Colorado are required, should participants have template agreements used in other states that they believe may be helpful, participants are encouraged to file those as well.

and PE agreements that will be used per Rule 7214, 4 CCR 723-7. If possible, participants must file these agreements and documents in an executable format such as Microsoft Word.

10. Given this Proceeding's unique procedural posture, the ALJ also schedules a fully remote prehearing conference to determine the best way to move this Proceeding toward a resolution. During the prehearing conference, the ALJ will determine the immediate next steps, which may include establishing processes, deadlines, and workshop and hearing dates. The ALJ anticipates that the required template agreements will be primarily developed by participants, and that the ALJ will intercede as necessary to help participants overcome obstacles. While there are numerous options to move this Proceeding forward, the ALJ believes an appropriate starting point is to establish a deadline for participants to meet with each other in an informal workshop to begin discussions and a deadline by which participants must file a status report as to that initial discussion. To encourage participants' open and frank discussions, the ALJ does not plan to participate in the initial workshop. It may be appropriate to schedule additional informal workshop sessions, or more formal sessions in which the ALJ participates. Participants should be prepared to provide their positions and suggestions as to how this Proceeding should move forward during the prehearing hearing conference, including the above items, and their availability for informal and formal workshops and any additional hearings that may be necessary.

11. Participants will appear at the prehearing conference from remote locations by videoconference and may not appear in person for the prehearing conference. The remote prehearing conference will be held using the web-hosted service, Zoom. Attachment A hereto includes important technical information and requirements to facilitate holding the prehearing

conference remotely. All those participating in the hearing must carefully review and follow all requirements in this Decision and Attachment A.

12. To minimize the potential that the videoconference hearing may be disrupted by non-participants, the link and meeting ID or access code to attend the hearing will be provided to the participants by email before the hearing, and participants will be prohibited from distributing that information to anyone not participating in the hearing. Participants will receive an email with information needed to join the hearing at the email addresses on file with the Commission for this Proceeding. As such, it is important that all participants ensure that the Commission has the correct email address for them.

III. ORDER

A. It Is Ordered That:

1. On or by August 5, 2024, the Colorado Department of Transportation (“CDOT”) is required to file a blank copy of its most recent master template Construction and Maintenance Agreement (“C&M Agreement”), consistent with the above discussion. If it has a master template preliminary engineering agreement (“PE agreement”), CDOT is required to file that on or by August 5, 2024. Both should be filed in an executable format such as Microsoft Word.

2. On or by August 5, 2024, participants who have template C&M and PE agreements (used in Colorado) must file a blank copy of those in this Proceeding, consistent with the above discussion. By that same date, participants may also file proposed template C&M and PE agreements; any C&M and PE agreements that participants have used which they believe may be helpful in this Proceeding; and any other document they believe may be helpful in creating master template C&M and PE Agreements that will be used per Rule 7214 of the Rules Regulating

Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7, consistent with the above discussion. As possible, template or proposed C&M and PE agreements should be filed in an executable format such as Microsoft Word.

3. A remote prehearing conference is scheduled as follows:

DATE: August 19, 2024

TIME: 11:00 a.m.

PLACE: Join via Zoom at a link emailed to participants.

4. This Order is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Rebecca E. White,
Director