

Decision No. R04-1575-I

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

DOCKET NO. 04A-372R

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IN THE MATTER OF THE APPLICATION OF THE BOARD OF COUNTY COMMISSIONERS OF CHAFFEE COUNTY, COLORADO, FOR THE AUTHORITY TO REINSTATE THE UNION PACIFIC RAILROAD COMPANY'S PRIVATE HIGHWAY-RAILROAD CROSSING LOCATED NEAR RAILROAD MILE MARKER 213.07 IN CHAFFEE COUNTY, COLORADO.

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**INTERIM ORDER OF  
ADMINISTRATIVE LAW JUDGE  
DALE E. ISLEY  
GRANTING STAFF PETITION TO INTERVENE;  
DENYING MOTION FOR SUMMARY JUDGMENT; AND  
ORDERING APPLICANT TO RETAIN LEGAL COUNSEL**

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Mailed Date: December 29, 2004

**I. STATEMENT**

1. The captioned application of the Board of County Commissioners of Chaffee County, Colorado (Chaffee County) was filed with the Colorado Public Utilities Commission (Commission) on July 19, 2004. On July 26, 2004, the Commission issued its Notice of Application Filed.

2. On September 3, 2004, the Union Pacific Railroad Company (UPRR) filed its Petition for Leave to Intervene and Entry of Appearance and Notice of Intervention (UPRR Petition) in this docket. The UPRR Petition was granted on September 20, 2004. *See*, Decision No. R04-1109-I. That decision also deemed this application complete as of September 20, 2004, established a procedural schedule, and set the matter for hearing on December 21, 2004. That hearing date was subsequently vacated and the hearing was re-scheduled for January 10, 2005. *See*, Decision No. R04-1239-I.

3. On November 19, 2004, the Staff of the Commission (Staff) filed a Petition for Intervention, Entry of Appearance, and Notice Pursuant to Rules 9(d) and 24(a)(1) (Staff Petition). Any desired responses to the Staff Petition were due on or before December 4, 2004. *See*, 4 *Code of Colorado Regulations* (CCR) 723-1-22(b). However, none were filed and, as a result, the Staff Petition is uncontested.

4. The Staff Petition acknowledges that Staff's request to intervene in this matter was filed until well after the September 30, 2004, deadline established by the Commission's applicable procedural rules. However, it also indicates that Staff's counsel was not made aware of the need to intervene until November 12, 2004. While this would not ordinarily constitute sufficient grounds to warrant a grant of this late-filed Staff Petition, no other party has objected to the same. Therefore, the Staff Petition will be granted on that basis.

5. On November 24, 2004, UPRR filed a Motion for Summary Judgment (SJ Motion). The SJ Motion contends that the railroad crossing that is the subject of this application does not cross a public highway and, therefore, is a private crossing over which the Commission has no jurisdiction. As a result, UPRR requests that this application be dismissed.

6. On December 27, 2004, Chaffee County filed its Response to the SJ Motion (Response). On December 28, 2004, Chaffee County filed its Motion for Extension of Time to Respond (Motion for Extension). The Staff did not respond to the SJ Motion.

7. The Response was signed by Donald S. Reimer, P.E. Mr. Reimer was described in this pleading as a "Representative of Applicant." The Motion for Extension was signed by James M. Treat, P.E. This pleading indicated that Mr. Treat executed the same "At the Request of Applicant." Contrary to the requirements of 4 CCR 723-1-22(d), there is no indication in

either the Response or the Motion for Extension that either Mr. Reimer or Mr. Treat are attorneys at law.<sup>1</sup> It must be presumed, therefore, that they are not attorneys.

8. For the reasons more fully set forth below, Chaffee County must be represented in this matter by legal counsel. The Commission has previously held that if parties appear *pro se* when they should appear through an attorney their pleadings must be stricken as nullities. *See*, Decision No. C04-0884 (citing *Bennie v. Triangle Ranch Co.*, 216 P. 718 (Colo. 1923); *Woodford Mfg. Co. v. A.O.Q., Inc.*, 772 P.2d 652 (Colo. App. 1988); and *Matter of Estate of Nagel*, 950 P.2d 693 (Colo. App. 1997)). As a result, the Response and the Motion for Extension must be stricken.<sup>2</sup>

9. Summary judgment may be granted if the pleadings, affidavits, and discovery responses filed in a matter establish that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. *See*, Rule 56(c) of the Colorado Rules of Civil Procedure. Summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to any material fact. All doubts as to the existence of such an issue must be resolved against the moving party. *See, Ridgeway v. Kiowa School Dist. C-2*, 794 P.2d 1020 (Colo. App. 1989).

10. Section 40-4-106(2)(a), C.R.S., grants the Commission jurisdiction to determine, order, and prescribe the just and reasonable manner at which any “public highway may be constructed” across the tracks of any railroad corporation at grade. Chaffee County’s responses

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<sup>1</sup> Indeed, the designation used in the subject pleadings, “P.E.” would suggest that Messrs. Reimer and Treat are professional engineers and are not attorneys at law.

<sup>2</sup> The Response could also be stricken on the ground that it was not filed on a timely basis. In its Motion for Extension, Chaffee County contends that it was unaware of any time requirements for responding to the SJ Motion. However, Chaffee County was advised on two prior occasions that 4 CCR 723-1-22(b) required that any desired responses to motions had to be filed within 14 days of the mailed date of the motion. *See*, Decision Nos. R04-1109-I and R04-1239-I.

to the discovery propounded to it by UPRR make it clear that Chaffee County Road No. 102 does not presently cross the UPRR railroad tracks at the point in question. However, the application and discovery responses make it equally clear that Chaffee County is in the process of formulating a plan that may result in extending Chaffee County Road No. 102 across the UPRR railroad tracks at some time in the future.

11. In arguing that the Commission does not have jurisdiction in this matter, UPRR apparently construes the above-quoted statute to require that construction of a public highway across railroad tracks must actually be completed before the Commission can consider the merits of an application for a public crossing at that point. However, the undersigned administrative law judge (ALJ) does not construe the statute in this way. Use of the “may be constructed” language indicates that the Commission has jurisdiction to consider and grant (at least on a conditional basis) a public crossing request in anticipation of the construction of a public highway across the railroad tracks of a railroad corporation. Therefore, summary judgment is not appropriate merely on the basis of the fact that Chaffee County Road No. 102 does not presently cross the UPRR railroad tracks.

12. In addition, it is apparent that factual disputes exist with regard to whether Chaffee County’s plan to extend Chaffee County Road No. 102 across the UPRR railroad tracks is *bona fide* and, if so, whether Chaffee County Road No. 102, as extended, will qualify as a “public highway” within the meaning of § 40-4-106(2)(a), C.R.S. These disputes cannot be resolved on a summary judgment basis. As a result, the SJ Motion will be denied.

13. Rule 21 of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1-21, *requires* a party in a proceeding before the Commission to be represented by legal counsel *unless* one of the following exceptions applies: (a) the person is an *individual* who is a party to the

proceeding and who wishes to appear *pro se* to represent *only* his *individual* interest (4 CCR 723-1-21(b)(1)); or (b) the person appears on behalf of a closely held corporation, but *only* as provided in § 13-1-127, C.R.S. (4 CCR 723-1-21(b)(2)).<sup>3</sup> As indicated above, the Commission recently had occasion to emphasize the mandatory nature of this requirement and to determine that pleadings filed by, and appearances made by non-attorneys, which are not in compliance with 4 CCR 723-1-21 are void and of no legal effect. *See, e.g.*, Decisions No. C04-1119 and No. C04-0884.

14. Chaffee County is clearly not an individual. Nor does it appear to qualify as a closely held entity within the meaning of § 13-1-127, C.R.S.<sup>4</sup> Therefore, it must retain legal counsel before proceeding further with this application. Chaffee County shall retain legal counsel in this matter and shall cause to have such counsel enter his/her appearance herein on or before January 5, 2005. Its failure to do so will result in the dismissal of this application.

## II. ORDER

### A. It Is Ordered That:

1. The Petition for Intervention, Entry of Appearance, and Notice Pursuant to Rules 9(d) and 24(a)(1) filed by the Staff of the Colorado Public Utilities Commission is granted.
2. The Motion for Summary Judgment filed by the Union Pacific Railroad Company is denied.

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<sup>3</sup> To the extent necessary, the ALJ grants a variance to 4 CCR 723-1-21(b)(2) so that the Rule is as broad in its reach as § 13-1-127, C.R.S.

<sup>4</sup> Even if Chaffee County is somehow deemed to be a closely held entity, it would not qualify for *pro se* representation in this proceeding since the amount in controversy exceeds the \$10,000 limitation imposed by § 13-1-127(2)(a), C.R.S. *See*, paragraph 11 of the application wherein Chaffee County estimates the cost of the proposed crossing to be \$30,000.

3. The Response to Union Pacific Railroad Company's Motion for Summary Judgment and the Motion for Extension of Time filed by the Board of County Commissioners of Chaffee County, Colorado, are rejected.

4. The Board of County Commissioners of Chaffee County, Colorado, shall retain legal counsel in this matter and shall cause to have such counsel enter his/her appearance in this proceeding on or before January 5, 2005. Its failure to do so will result in the dismissal of the captioned application.

5. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF COLORADO

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Administrative Law Judge