

Decision No. C14-1030

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 12A-1216R

IN THE MATTER OF THE APPLICATION FOR THE MODIFICATION OF AN EXISTING
AT-GRADE CROSSING KING'S ROAD CROSSING IN THE TOWN OF WINTER PARK,
COLORADO.

**COMMISSION DECISION
DENYING EXCEPTIONS**

Mailed Date: August 26, 2014
Adopted Date: August 20, 2014

I. BY THE COMMISSION

A. Statement

1. This Decision considers exceptions filed on July 30, 2014, by Winter Park Holdings, LLC and Grand Park Development, LLC (collectively, Cornerstone) to Recommended Decision No. R14-0808. Applicant, Town of Winter Park (Winter Park), filed a response to the exceptions on August 6, 2014. Consistent with the discussion below, we deny Cornerstone's exceptions .

B. Background

2. In this proceeding, Winter Park seeks authority to upgrade active warning signals, make roadway improvements, and install medians at the Kings Crossing Road intersection with the Union Pacific Railroad Company. The purpose of these proposed improvements is to bring the crossing into compliance with the Federal Railroad Administration train horn rule in order that Winter Park may seek establishment of a quiet zone at the crossing. The parties proposed different lengths for a median at the crossing; Winter Park proposed 175 feet, in contrast to Cornerstone's 60 feet. In his Recommended Decision granting Winter Park's application, the

Administrative Law Judge (ALJ) recommends approving the construction of a 175 foot median proposed by Winter Park. The ALJ found that, although a 175 foot median will block the ability of vehicles to make left-turns into and out of a Cornerstone access point west of the crossing, the facts and circumstances that demonstrate an increased level of safety promoted by a 175 foot median, and safety at the crossing must take a priority over access issues near the crossing.¹

3. Cornerstone takes exception to the findings in the Recommended Decision approving the construction of a 175 foot median and the resulting limitation to Cornerstone construction traffic. Cornerstone states that its agreement with Winter Park, known as the Haul Road Agreement, provides Cornerstone with access to Kings Crossing Road for construction traffic and has the purpose of directing construction traffic away from existing roadways within Winter Park.² The Haul Road Agreement is included as an attachment to Cornerstone's exceptions. Cornerstone claims it offered the Haul Road Agreement into evidence, and the ALJ's decision to exclude this agreement from the evidentiary record constitutes error.

4. Cornerstone claims that the ALJ improperly focused his decision on what would make the crossing at Kings Crossing Road safer without considering the impact of the length of the constructed median on the safety of the public using the surrounding roads if all construction traffic coming from Cornerstone is forced through the town.³ Cornerstone claims that construction of the 175 foot median is inconsistent with the intention of the Haul Road Agreement to direct construction traffic away from Winter Park,⁴ and requests the Commission reverse the Recommended Decision to account for the existence of the Haul Road Agreement.

¹ Recommended Decision, ¶¶ 59, 64.

² Cornerstone Exceptions, at 2.

³ *Id.*, at 3.

⁴ *Id.*, at 2-3.

Alternatively, Cornerstone requests the Commission stay adoption of the Recommended Decision and re-open the hearing to take testimony regarding the Haul Road Agreement.

5. In its response, Winter Park objects to the exceptions and notes that the parties to this proceeding were required to pre-file copies of exhibits that they intended to introduce at hearing. The Haul Road Agreement was not among the pre-filed exhibits provided by Cornerstone prior to hearing, and the Haul Road Agreement was not listed as an exhibit that would be sponsored by any of the proposed Cornerstone witnesses. Winter Park states that, because this exhibit was not included by Cornerstone with its pre-filed exhibits, the ALJ properly disallowed the admission of the Haul Road Agreement into evidence.⁵

6. Regardless of Cornerstone's failure to designate the Haul Road Agreement as an exhibit in this proceeding, Winter Park contends that the Haul Road Agreement concerns a roadway located approximately one-fourth mile east of the subject crossing and is irrelevant to this case. Winter Park argues the ALJ considered all evidence and testimony, and made a proper determination consistent with the Commission's statutory charge pursuant to § 40-4-106(2)(a), C.R.S., in finding that Winter Park's application should be granted, including that a 175 foot median should be constructed to promote public safety and prevent accidents at the crossing.⁶

C. Discussion

7. We deny Cornerstone's exceptions on multiple, independent grounds. First, we agree with Winter Park that Cornerstone did not properly offer the Haul Road Agreement into evidence at hearing as a pre-filed exhibit or through testimony. Cornerstone had ample

⁵ Winter Park Response, ¶ 2-3.

⁶ *Id.*, ¶ 4-5.

opportunity to include the Haul Road Agreement among its pre-filed exhibits in this proceeding and declined to do so. Based on our review of the transcript, Cornerstone witness Clark Lipscomb discussed the Haul Road Agreement in his testimony at hearing;⁷ however, Cornerstone did not attempt to offer the Haul Road Agreement into evidence during Mr. Lipscomb's testimony, and we find no ruling from the ALJ addressing whether to admit the agreement into evidence at that time.⁸ Attempting to include new evidence in the record on exceptions is improper when Cornerstone had ample opportunity to present the Haul Road Agreement into evidence at hearing.

8. Second, we agree with Winter Park that the Haul Road Agreement is not relevant. To be relevant, evidence must make the existence of any fact that is of consequence to the determination of the action more or less probable.⁹ Even relevant evidence may be excluded if its probative value is substantially outweighed by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.¹⁰ The Haul Road Agreement addresses access to one-fourth mile east of the crossing at Kings Crossing Road and does not affect determinations directly related to the crossing at issue for purposes of this proceeding.

9. Third, the Haul Road Agreement is cumulative of other evidence considered by the ALJ. The ALJ considered testimony and evidence that a 175 foot median likely would direct

⁷ Winter Park objects to the agreement not being admitted in evidence. *Hearing Transcript*, at 219: 9-13, 220: 10-14. Cornerstone is permitted response, and offers to rephrase as opposed to offering the agreement. *Id.*, at 220: 15-21.

⁸ *Hearing Transcript*, at 218–221. It is unclear if the exhibit is offered at another time, and Cornerstone makes no citation in its exceptions to the ALJ's explicit ruling on excluding the Haul Road Agreement from evidence.

⁹ Rule 401, Colorado Rules of Evidence.

¹⁰ *Id.* Rule 403.

traffic through Winter Park, including “limit[ing] the options for Cornerstone’s construction traffic,” and nevertheless found that the increased safety resulting from a 175 foot median at the crossing superseded access concerns. Recommended Decision at ¶65.

10. Fourth, Cornerstone’s exceptions cited the Haul Road Agreement and argued as follows:

[T]he Town must grant “any licenses or easements required to implement the express and implied purpose” of the Haul Road Agreement. Clark Lipscomb testified on behalf of Cornerstone at the hearing regarding the existence of the Haul Road Agreement. A true and correct copy of the Haul Road Agreement is attached hereto as **Appendix A**. Upon mention of the Haul Road Agreement, the Town’s counsel objected and the Haul Road Agreement was not permitted into evidence. The Town’s insistence on the 175 foot median that blocks Cornerstone’s access and forces construction traffic through the Town is patently inconsistent with the Haul Road Agreement. The 175 foot median forces Cornerstone into an untenable position of having to direct construction traffic through the Town, against the express intention of the Haul Road Agreement.¹¹

(Bolding in original)

To the extent Cornerstone argues that the Recommended Decision should be reversed because it is contrary to the intent of the Haul Road Agreement, agreements and actions of a local government municipality do not overcome the Commission’s findings on safety.¹²

11. The ALJ properly considered all relevant evidence presented consistent with the requirements of § 40-4-106(2)(a), C.R.S., in reaching his conclusions. We agree with his determinations, particularly that safety at the crossing must take priority over access issues near the crossing. The exceptions filed by Cornerstone are denied.

¹¹ Cornerstone Exceptions, at 2.

¹² See, e.g., *City of Craig v. Pub. Utils. Comm’n*, 656 P.2d 1313, 1317 (Colo. 1983) (citing *Century Electric Service v. Stone*, 564 P.2d 953 (Colo. 1977)).

II. ORDER**A. The Commission Orders That:**

1. Exceptions to Recommended Decision No. R14-0808 filed by Winter Park Holdings, LLC, and Grand Park Development, LLC, on July 30, 2014, are denied, consistent with the discussion above.

2. The 20-day period provided 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.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
August 20, 2014.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JOSHUA B. EPEL

PAMELA J. PATTON

GLENN A. VAAD

Commissioners