

Decision No. R14-0611-I

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 CROSSINGS KING'S ROAD CROSSING IN THE TOWN OF WINTER PARK,
COLORADO.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
ROBERT I. GARVEY
DENYING MOTION *IN LIMINE***

Mailed Date: June 5, 2014

I. STATEMENT

1. On November 20, 2012, the Town of Winter Park (Town or Applicant) filed an Application in which the Town seeks authority to modify the existing at-grade crossing located at King's Crossing Road in the Town. That filing commenced this proceeding.

2. On December 3, 2012, the Commission gave notice of the Application; and established an intervention period until January 2, 2013.

3. By Decision No. C13-0057-1, issued January 11, 2013, the Commission deemed the Application complete within the meaning of § 40-6-109.5, C.R.S., and referred this matter to an Administrative Law Judge (ALJ) .

4. On December 19, 2012, Union Pacific Railroad Company (UPRR) intervened of right in this proceeding. The crossing at issue cross UPRR's track. UPRR neither opposes nor contests the Application but stated that it will participate in any hearing. UPRR is represented by legal counsel in this matter.

5. On January 3, 2011, one day after the intervention period ended, Cornerstone Winter Park Holdings, LLC and Grand Park Development, LLC (collectively, Cornerstone), filed their Joint Motion to Intervene. In that filing, Cornerstone asserted that they own property adjacent to the crossing at issue in this proceeding. They also asserted that the grade separation is contractually required at the crossing and an engineering firm has been contracted to complete the design with approval expected in 2013. Further, Cornerstone contended that information contained within the Town's Application is incorrect in light of the future Cornerstone development in the area of the subject crossing and an Annexation Agreement and the First Amendment to the Annexation Agreement between Cornerstone and the Town.

6. On January 11, 2013, the Town filed their objection to Cornerstone's Motion to Intervene. As grounds, the Town argued that the intervention was late and good cause had not been shown to allow the late intervention.

7. Also on January 11, 2013, Cornerstone filed their Revised Motion to Intervene. In this motion, Cornerstone claimed that the late filing of the intervention was due to their receipt of the Notice on December 4, 2012, therefore they believed that the intervention period ended on January 3, 2013. In the alternative, Cornerstone argued that since the intervention was only one day late there was no prejudice to the Application or any party and failure to allow the intervention would prejudice Cornerstone's interest as well as the public's interest.

8. On January 18, 2013, Applicant filed their Objection to Revised Motion to Intervene. Applicant argued that the intervention should be denied due to a lack of good cause to allow the intervention, and in addition Cornerstone did not meet the requirements of an intervenor by right.

9. By Interim Decision No. R13-0133-I, issued January 30, 2013, the interventions of UPRR and Cornerstone were granted and a prehearing conference was scheduled for February 7, 2013.

10. At the scheduled prehearing conference all parties were represented. Applicant moved to stay the proceeding in order to pursue a settlement with the Intervenors and also to seek a judicial determination as to whether the Annexation Agreement between Cornerstone and the Town is valid. Applicant agreed to waive the requirement that a Commission Decision be issued within 210 days and to provide a status report every 90 days.

11. By Interim Decision No. R13-0187-I, issued on February 7, 2013, the proceeding was stayed and Applicant's waiver of the requirement that a Commission Decision issue within 210 days was acknowledged.

12. On January 29, 2014, Applicant filed its Motion to Lift Stay and Set for Prehearing Conference.

13. On February 12, 2014, Intervenor Cornerstone filed its Response to the Motion. Cornerstone stated it did not object to the relief requested but still intended to contest the Application.

14. By Interim Decision No. R13-0171-I, issued on February 13, 2013, the Motion to Lift Stay and Set for Prehearing Conference was granted and a prehearing conference was scheduled for March 13, 2014.

15. Pursuant to Interim Decision No. R14-0469-I issued May 5, 2014, a prehearing conference was held on May 15, 2014. At the prehearing conference the ALJ *sua sponte* continued the scheduled evidentiary hearing until June 18, 2014 to allow additional time for the parties to file exhibits.

16. On May 19, 2014, the Town filed a Motion *In Limine* Regarding the Testimony of Sue Grabler (Motion). As grounds the Town states that the testimony of Ms. Grabler will not be useful to the trier of fact, and instead includes opinions that are either irrelevant, baseless, or that are within the sole province of the ALJ.

17. On June 2, 2014, Cornerstone filed its Response to Motion *In Limine* Regarding Testimony of Sue Grabler (Response). In its Response, Cornerstone argues that Ms. Grabler can provide testimony concerning the cost to construct the quiet zone improvements, and the financial feasibility of a grade separated crossing

II. DISCUSSION

18. As the party seeking an Order, the Town bears the burden of establishing that the relief sought in the Motion in Limine should be granted. Section 24-4-105(7), C.R.S.; Rule 4 *Code of Colorado Regulations* (CCR) 723-1-1500 of the Commission's Rules of Practice and Procedure

19. Rule 1501(a) of the Rules of Practice and Procedure, 4 CCR 723-1, requires the Commission, to the extent practical to conform to the Colorado Rules of Evidence. However, Rule 1501(a) is explicit that the Commission is not bound to the technical rules of evidence and that the Commission may receive and consider evidence not admissible under the rules of evidence. Thus, the Commission has discretion to admit or refuse to admit evidence.

20. The Motion filed by the Town appears to request that Ms. Grabler's testimony as an expert and also her testimony in general be excluded.

21. Cornerstone has endorsed all of its witnesses, including, Ms. Grabler, as experts, yet failed to state the field of expertise of any of the witnesses.¹ It cannot be determined by the filings of Cornerstone the field of expertise of Ms. Grabler.

22. Without knowledge of the field of expertise Cornerstone intends to qualify Ms. Grabler, the question of whether Ms. Grabler can be qualified as an expert is not ripe.

23. Ms. Grabler's report contains information regarding the proposed median contained in the Town's application. Ms. Grabler's report indicates she will testify as to how the proposed median will effect access to the property owned by Cornerstone. *Cornerstone's Response, Exhibit 1*. Testimony concerning the proposed median is relevant to the issues in this proceeding.

24. Having found that Ms. Grabler may have testimony relevant to the proceeding, the Motion of the Town shall be denied.

III. ORDER

A. It Is Ordered That:

1. The Motion *In Limine* Regarding the Testimony of Sue Grabler filed by the Town of Winter Park on May 19, 2014 is denied.

¹ Colorado Rule of Civil Procedure (C.R.C.P.) 26(a)(2)(A) requires the disclosure of the field of expertise of an expert witness. Under *Rule 1405(a)(II) of the Rules of Practice and Procedure*, 4 CCR 723-1, Chapter 4, 26(a) 1-4 of the C.R.C.P. are not incorporated by reference.

2. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ROBERT I. GARVEY

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director