

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-463R

IN THE MATTER OF THE APPLICATION OF THE TOWN OF CASTLE ROCK,
4175 N. CASTLETON COURT, CASTLE ROCK, COLORADO 80109; FOR
AUTHORITY TO CONSTRUCT FRONT STREET AS A GRADE SEPARATION
AT THE CROSSING OF THE ROADWAY WITH THE UNION PACIFIC RAILROAD
COMPANY; IN DOUGLAS COUNTY, STATE OF COLORADO

**INTERIM ORDER OF
ADMINISTRATIVE LAW JUDGE
KEN F. KIRKPATRICK
DENYING MOTION TO
COMPEL PROOF OF COSTS**

Mailed Date: July 27, 2004

I. STATEMENT

1. On July 19, 2004, the Union Pacific Railroad Company (UP) filed its Motion to Compel Proof of Costs. By this motion the UP seeks an order of the Commission “compelling proof of the actual theoretical costs of the Front Street Grade Separation.” On July 23, 2004, the Town of Castle Rock (Town) filed its Response in Opposition to the Motion. For the reasons set forth below the motion should be denied.

2. This proceeding concerns the cost allocation of a project, the construction of which has already been approved. The project is a grade separation at the crossing of Front Street with the tracks of the UP in Castle Rock, Colorado. This Commission has jurisdiction over the terms, conditions, and specifications of such a grade separation as well as the jurisdiction to determine an allocation of the costs of the project between the railroad corporations affected and the municipality in interest under § 40-4-106(3)(a), C.R.S. The

Commission has adopted Rules Governing Applications for Railroad-Highway Grade Separations, which are found at 4 *Code of Colorado Regulations* 723-20. Rule 5, Cost Allocation for Grade Separation, states as follows:

- 5.1 Upon receipt of an application for a railroad grade separation project, meeting the criteria at subsections 3.1, 3.2, 3.3, 3.4, 3.5, and 3.6, of these of these rules, the Commission may allocate the costs of right-of-way acquisition, engineering, and construction of the minimum project which separates a reasonably adequate roadway facility from a reasonably adequate railroad facility in the following way: 50 percent of the cost to be borne by the railroad corporation or railroad corporations and 50 percent of the cost to be borne by the state, county, municipality, or public authority in interest. However, the Commission may impose a different allocation if demonstrated by substantial evidence of benefit and need. ...

A reasonably adequate facility is defined elsewhere in the Rules and varies depending upon what type of roadway is crossing what type of track. The Rules recognize that while the structure as actually built may have substantial enhancements, requested by either the railroad or the municipality in interest, these additional enhancements will be paid for by the party requesting them and will not be shared between the parties.¹

3. The UP in its motion notes that the overall estimated project costs, including all enhancements, has decreased substantially from the original estimate of \$7.2 million to approximately \$5.6 million. It suggests that the cost of the theoretical structure, originally estimated at \$5.2 million, has most likely decreased by a similar amount. Therefore it seeks to have what it calls the “actual theoretical” costs of the theoretical structure proven by the Town and used as the allocation basis.

¹ The Colorado Supreme Court has upheld the use of such a methodology. See *Atchison, Topeka, and Santa Fe Ry. V. PUC*, 763 P.2d 1037 (Colorado 1988).

4. The Town opposes the motion, noting that actual costs may vary up or down and ultimately will not be known until the project is completed. It attaches an affidavit from a former employee of this Commission stating that in the past estimated costs have always been used, and that the use of actual costs would complicate matters because of the differences between the project actually built compared to the theoretical structure which is not built.

5. The Rules do not explicitly speak to the issue. However, implicit in the Rules is the understanding that a reasonably adequate facility may be a theoretical one, since larger facilities typically will be built to take advantage of overall economies of scale. On the other hand, the Rule concerning cost allocation indicates simply that the Commission “may” allocate on a 50 /50 basis. It seems clear that the Commission has the authority to deviate from the 50/50 allocation should the evidence warrant. For example, there must be some check to prevent a municipal applicant from simply filing an inflated cost estimate to obtain a high allocation to the railroad, when actual construction costs are known to be considerably less.

6. The question really is, who has the burden? It appears that under the structure of the Rules the Town has set forth an amount, supported by testimony,² which constitutes a *prima facie* case of the cost of the reasonably adequate facility. At this point the city has satisfied its burden of going forward. However, the UP may offer evidence that the cost of a reasonably adequate facility varies from the amount that the town has claimed. If the UP establishes that the cost of a reasonably adequate facility is substantially different than what the town has claimed, a different allocation may be warranted. This is entirely consistent with the Commission’s Rule, which states that it may impose a different allocation if demonstrated by

² See Direct Testimony of Bob Goebel on Behalf of the Town of Castle Rock, filed July 12, 2004.

substantial evidence of benefit and need. However, it is not necessary for the Town to establish more than it already has to establish its *prima facie* case.³ Therefore the Motion to Compel Proof of Costs should be denied.

II. ORDER

A. It Is Ordered That:

1. The Motion to Compel Proof of Costs filed July 19, 2004 by the Union Pacific Railroad Company is denied.
2. This Order shall be effective immediately.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge

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³ This assumes, of course, that the testimony of Goebel is offered and admitted into evidence.