

Decision No. R14-1351

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 14A-0624R

IN THE MATTER OF THE APPLICATION OF THE WEST MOUNTAIN METROPOLITAN DISTRICT AND THE TOWN OF FRASER FOR AUTHORITY TO CONSTRUCT A NEW HIGHWAY-RAIL GRADE SEPARATION AT THE PROPOSED CROSSING OF GRAND PARK DRIVE AND THE UNION PACIFIC RAILROAD COMPANY TRACKS IN FRASER, COLORADO AND ABOLISH THE AT-GRADE RAILROAD CROSSING AT KINGS CROSSING ROAD (DOT NO. 254-214U) IN WINTER PARK, COLORADO.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
GRANTING APPLICATION IN PART**

Mailed Date: November 10, 2014

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I. STATEMENT, FINDINGS, CONCLUSIONS**A. Procedural History.**

1. On June 5, 2014, the West Mountain Metropolitan District (the District) and the Town of Fraser (Fraser) (collectively, Applicants), filed an “Application for Authority to Construct a New Highway-Rail Grade Separation at the Proposed Crossing of Grand Park Drive and the Union Pacific Railroad Company Tracks in Fraser, Colorado and Abolish the At-Grade Railroad Crossing at King’s Crossing Road (DOT No. 254-215U) in Winter Park, Colorado” (Application) with exhibits.

2. Contemporaneously with the Application, Applicants filed a “Forthwith Motion to Consolidate” (Forthwith Motion), which sought to consolidate this proceeding with Proceeding No. 12A-1216R. The Commission denied the Forthwith Motion. Decision No. C14-0966-I issued August 11, 2014.

3. Applicants supplemented the Application with filings made in response to deficiency notices from the Public Utilities Commission Staff on June 18 and 20, 2014.

4. The Commission provided public notice of the Application on June 20, 2014.

5. Union Pacific Railroad Company (Union Pacific) filed an “Entry of Appearance and Notice of Intervention,” which it amended by a filing made on July 14, 2014.

6. On July 30, 2014, the Commission deemed the Application complete.

7. On August 11, 2014, the Commission referred this matter for disposition to an administrative law judge (ALJ). Decision No. C14-0966-I.

8. The Town of Winter Park (Winter Park), Cornerstone Winter Park Holdings, LLC (Cornerstone), and Grand Park Development LLC (Grand Park) filed timely Motions to Intervene.

9. The Commission received ten public comments in opposition to the Application.

10. The ALJ held a prehearing conference, at which all parties except for Cornerstone and Grand Park appeared. As a result of that prehearing conference, the ALJ established a procedural schedule and hearing date. Decision No. R14-1066-I issued September 2, 2014.

11. Based upon Cornerstone and Grand Park's failure to appear at the prehearing conference, the ALJ ordered that they each show cause why their Motion to Intervene should not be denied. Decision No. R14-1067-I issued September 5, 2014.

12. On September 5, 2014, Applicants filed an Amended Application with exhibits and a "Motion to Amend Application, Waive Response Time, and Vacate Briefing Schedule". The Amended Application seeks the Commission enter a Decision authorizing construction of a grade separation at Grand Park Drive and the Union Pacific tracks in Fraser, and to allocate costs in accordance with § 40-4-106, C.R.S., and the Commission's Rules, including Rule 7207 of the Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7.

13. On September 12, 2014, Winter Park, Cornerstone and Grand Park made filings withdrawing their Motions to Intervene. On September 15, 2014, the ALJ accepted the Amended Application, dismissed Winter Park, Cornerstone and Grand Park as parties to this proceeding, and vacated the briefing schedule. Decision No. R14-1126-I.

14. The remaining parties are Applicants and Union Pacific.

15. Decision No. R14-1126-I required Applicants and Union Pacific to make a filing indicating whether either of them requests an evidentiary hearing on the Amended Application.

16. On September 18, 2014, Applicants and Union Pacific made a joint filing waiving an evidentiary hearing. That same day, the ALJ vacated the remaining procedural schedule, and

informed the parties that the hearing date would be preserved until the ALJ could confirm there is no need for an evidentiary hearing. Decision No. R14-1156-I.

17. The ALJ vacated the evidentiary hearing on October 17, 2014. Decision No. R14-1257-I. Coincidentally, Applicants and Union Pacific submitted a Joint Motion to Vacate Hearing and Grant Application (Joint Motion) the same day the hearing was vacated. The Joint Motion states that the Amended Application is unopposed.

18. As the remaining parties have agreed to waive an evidentiary hearing, and the Amended Application is unopposed, the Commission may grant the Application under a modified procedure without a hearing. § 40-6-109(5), C.R.S., and Rule 1403, 4 CCR 723-1 of the Commission's Rules of Practice and Procedure.

B. Applicable Legal Standards.

19. Applicants carry the burden of proof by the preponderance of the evidence. § 24-4-105(7), C.R.S; Rule 1500 of the Rules of Practice and Procedure, 4 CCR 723-1. The preponderance standard requires the finder of fact to determine whether the existence of a contested fact is more probable than its non-existence. *Swain v. Colorado Dept. of Revenue*, 717 P.2d 507 (Colo. App. 1985).

20. Pursuant to § 40-4-106(3)(a)(I), C.R.S., the Commission has authority to order any crossing constructed at different levels according to Commission approved plans and specifications, upon just and reasonable terms and conditions to be prescribed by the Commission. The statute also authorizes the Commission to prescribe the terms upon which the separation should be made and the proportion in which the expense of the separation of the grade should be divided between the railroad corporations affected or between the corporation and the state, county, municipality, or public authority in interest.

21. Rule 7327(a), 4 CCR 723-7, requires that where a public road, highway, or street crosses above any railroad or street railroad track used or proposed to be used for transporting freight cars, minimum overhead and side clearances must be observed, as set forth in that same Rule. In particular, where a railroad or street railroad crosses above any public road, highway, or street, the minimum overhead clearance is 14'0". Rule 7327(b), 4 CCR 723-1. Rule 7327(c) sets forth a minimum opening clearance of 26'0" for railroads that cross a public road, highway, or street.

22. For the Commission to consider cost allocation of a grade separation structure, minimum criteria set forth in Rule 7206, 4 CCR 723-1, must be met. As relevant here, the Rule requires that the exposure factor exceed 75,000, the roadway be a collector, arterial, or freeway with an actual or projected volume of 5,000 Average Daily Traffic or greater, and the rail line must have an actual or projected volume of four train movements per day.

23. Rule 7207 requires the Commission to allocate costs of right-of-way acquisition, engineering, and construction of the minimum project that separates a reasonably adequate road-way facility from a reasonably adequate railroad facility. Under that rule, unless the evidence demonstrates benefit and need for a different allocation, the Commission must allocate 50 percent of the cost to the railroad corporation or corporations, and 50 percent of the cost to the State, County, Municipality, or public authority in interest.

C. Findings and Discussion.

24. The public comments uniformly object to requests for relief that are no longer at issue. In particular, the original Application sought an order abolishing the crossing at Kings Crossing Road, and that costs for the construction of the grade separation at issue in the

Amended Application be allocated to Winter Park. Both of those requests for relief were eliminated by the Amended Application.

25. The Amended Application seeks the Commission enter a Decision authorizing construction of a grade separation at Grand Park Drive and the Union Pacific tracks in Fraser, and allocate costs in accordance with § 40-4-106, C.R.S., and the Commission's Rules.

1. Construction of the Grade Separation.

26. The Amended Application proposes the construction of a grade separation at Milepost 60.00 on the Moffat Tunnel Subdivision of the Union Pacific in Fraser. The project design allows for a new grade-separated crossing of a yet to be constructed road, Grand Park Drive, and the Union Pacific tracks.

27. Applicants propose that the Union Pacific bridge structure over the new Grand Park Drive roadway be a three-span structure with Grand Park Drive located under span two. The total length of the bridge structure from the back face of abutment to back face of abutment is 115'-1 1/2" with the length of Span 2 at 50'-0" from Pier Two to Pier Three. The minimum vertical clearance from the roadway to the bottom of the structure is 17'-11". The roadway occupies a 40'-0" easement from guardrail to guardrail.

28. Applicants propose that the Union Pacific bridge structure over the new Grand Park Drive be 40'-10 3/4" out to out, which can accommodate two tracks on 20'-0" track centers. Only one track will be constructed as part of this proceeding.

29. The Amended Application states that once the new crossing is operational, there is a projection of 13,550 vehicles per day (VPD) using the crossing. The Amended Application further states that there are currently 19 freight train movements per day, and 2 Amtrak passenger train movements per day that use the track at the proposed crossing location, traveling

at a maximum timetable speed of 30 miles per hour, with no estimates of growth for freight trains provided at this time.

30. Applicants wish to start construction in the spring of 2015, with a projected completion date of September 30, 2018.

31. Applicants submit that the proposed construction project will greatly improve the public safety by reducing traffic accidents, reducing traffic, improving response times for public safety vehicles that cannot currently reach portions of Winter Park and Fraser when a train is present, and by allowing for safer transport of people and goods within Fraser and the Fraser Valley region.

32. The ALJ finds that the proposed minimum clearances meet or exceed the clearances required by Rule 7327, 4 CCR 723-7. In addition, the ALJ finds and concludes that, through their Amended Application and exhibits thereto, Applicants have met their burden of proof for Commission authorization of the proposed grade separation construction, and have shown good cause for said construction. In addition, the ALJ finds that the proposed grade separation construction is in the public interest. The proposed grade separation construction shall be authorized. However, Applicants shall be required to make additional filings related to the construction, as set forth below.

33. The Applicants will be required to inform the Commission in writing that construction of the new grade separated structure is complete and operational within ten days of completion, or by September 30, 2018, whichever is earlier. This letter may be provided later than September 30, 2018 if there are delays to the construction schedule.

34. The Applicants shall be required to file a signed copy of the Construction and Maintenance Agreement (Agreement) for the new bridge structure prior to the start of

construction. The signed Agreement must be filed by March 31, 2015. Construction at the crossing may not begin until the Agreement has been filed. Applicants indicated in their Joint Motion (filed October 17, 2014), that the Agreement would be signed shortly after the October 17, 2014 filing.

35. Union Pacific shall also be required to file a copy of the new crossing inventory form for this crossing by completion of the project on September 30, 2018.

2. Cost Allocation.

36. The District is a quasi-municipal district organized under Title 32 of the Colorado Revised Statutes. The District is authorized to construct street improvements, overpasses, and grading for the benefit of the District's inhabitants and taxpayers. The grade separation proposed in the Amended Application is dedicated to the District's inhabitants and taxpayers in Fraser. The ALJ finds that the District is an affected public authority in interest for purposes of the Amended Application. Therefore, costs may be allocated to the District. Rule 7207, 4 CCR 723-7.

37. Union Pacific is the railroad corporation with a track at the location of the proposed grade construction. Thus, costs must be allocated to Union Pacific. *Id.*

38. According to the Amended Application, there are currently 19 freight and 2 Amtrak train movements through the location of the subject crossing per day. The roadway is being designed as a two-lane collector. The projected traffic volume expected to use the subject crossing in 2025 based on the traffic study performed for this area is 13,550 VPD. The traffic volume multiplied by the train volume results in a calculated exposure factor of 284,550. The ALJ concludes that Applicants have met the requirements under Rule 7206, 4 CCR 723-7, for the subject grade separation to be eligible for consideration of cost allocation of the structure.

39. The cost of the grade separation is estimated at \$8,483,431. The Applicants estimate the cost of the theoretical structure that separates a reasonably adequate roadway facility from a reasonably adequate railroad facility at the subject crossing at \$4,465,917. The Applicants request that 50 percent of this cost be apportioned to the District and 50 percent of the cost be apportioned to Union Pacific. Union Pacific does not oppose this request.

40. The ALJ has reviewed the design of the theoretical structure. The ALJ finds that the design conforms to the requirements of the reasonably adequate facility as set forth by Rule 7201(g), 4 CCR 723-7, for both the roadway and railroad. The Applicants provided a cost estimation of the theoretical structure cost.

41. Applicants did not include the estimated costs of right-of-way, parcel by parcel, including railroad right-of-way, in the theoretical structure cost estimate. The Amended Application states that two easement fees are necessary for the project, that is, a \$2,960 fee for a permanent easement, and a \$7,832 fee for a temporary construction easement.¹ As Rule 7202(a), 4 CCR 723-7, requires costs of right-of-way acquisition to be allocated, these costs will be added to the cost estimate and the cost allocation.

42. The Amended Application includes a 10 percent markup on the subtotal of construction and mobilization costs, which adds an additional \$361,142 to the cost estimate. The markup amounts to contingency costs for unanticipated items.

43. The theoretical structure will never be built. Because the theoretical structure is never built, unanticipated items, such as contingency costs, will never come to pass in construction.² Further, no burden of proof has been met to demonstrate that the cost is

¹ Cornerstone is donating all other necessary easements upon completion of the construction.

² Unanticipated contingency costs are different from items that are anticipated, but are not listed.

reasonably incurred or that the method of calculation is indicative of costs actually incurred. The ALJ will not consider or include the unanticipated or contingency costs as an engineering cost for purpose of the theoretical structure cost estimate. *See* Decision No. R07-0744, ¶ 162 (refusing to include contingency costs) issued August 31, 2007 in Consolidated Proceeding Nos. 06A-352R and 06A-388R. The \$361,142 contingency cost will be subtracted from the theoretical structure cost estimate provided by the Applicants.

44. Based on the above modifications, the cost estimate for the theoretical structure is \$4,115,567.00. Consistent with Rule 7202 and § 40-4-106, C.R.S., this cost will be allocated at 50 percent to the District and 50 percent to Union Pacific, with each entity paying \$2,057,783.50 towards the cost of the grade separation structure. All remaining costs of the grade separation structure will be the responsibility of the Applicants jointly.

D. Conclusions.

45. For the above reasons and authorities, the ALJ recommends that the Commission authorize the construction of the grade separation crossing as requested in the Amended Application, and allocate costs between the District and Union Pacific as set forth herein.

46. Pursuant to § 40-6-109(2), C.R.S., the ALJ hereby transmits to the Commission the record in this proceeding, and recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The “Amended Application for Authority to Construct a New Highway-Rail Grade Separation at the Proposed Crossing of Grand Park Drive and the Union Pacific Railroad Company Tracks in Fraser, Colorado and Abolish the At-Grade Railroad Crossing at King’s Crossing Road (DOT No. 254-215U) in Winter Park, Colorado” (Amended Application) filed by

West Mountain Metropolitan District (the District) and the Town of Fraser (Fraser), (collectively, Applicants) is granted in part.

2. Applicants' request to include a 10 percent markup on the subtotal of construction and mobilization costs, (an additional \$361,142), in the cost allocation is denied. This amount is not included in the cost allocation set forth herein.

3. The costs for purchasing easements necessary for the construction of the grade separation (\$10,792 total) is included in the cost allocation set forth herein.

4. The Applicants are authorized and ordered to proceed with construction of a grade separation structure of the new Grand Park Drive with the Union Pacific Railroad Company (Union Pacific) tracks in Frasier, Colorado as set forth in the Amended Application.

5. Union Pacific and the District shall each pay \$2,057,783.50 towards the cost of the construction of the grade separation structure with the Applicants jointly responsible for the remaining costs of the grade separation in the Amended Application.

6. Applicants shall make a filing in this proceeding notifying the Public Utilities Commission that construction is complete and operational. Applicants shall make this filing either within ten days of completion of the grade separation structure, or by 5:00 p.m. on September 30, 2018, whichever is earlier. This letter may be provided later than September 30, 2018 if there are delays to the construction schedule.

7. Applicants shall file a copy of the signed Construction and Maintenance Agreements by May 31, 2015. No crossing construction may commence until this is filed.

8. Union Pacific shall file a copy of the new crossing inventory form for the subject crossing at the end of the project by 5:00 p.m. on September 30, 2018.

9. Proceeding No. 14A-0624R is closed.

10. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

11. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

12. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(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 "Doug Dean".

Doug Dean,
Director