Decision No. C22-0490

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21D-0402R

IN THE MATTER OF PETITION OF LA PLATA COUNTY, COLORADO FOR A DECLARATORY RULING DETERMINING WHETHER THE JURISDICTION OF THE COLORADO PUBLIC UTILITIES COMMISSION PREEMPTS ENFORCEMENT OF CERTAIN PROVISIONS OF THE LA PLATA COUNTY LAND USE CODE AS AGAINST THE DURANGO AND SILVERTON NARROW GAUGE RAILROAD.

COMMISSION DECISION DENYING APPLICATION FOR REHEARING, REARGUMENT, OR RECONSIDERATION OF DECISION NO. C22-0390

Mailed Date: August 18, 2022
Adopted Date: August 17, 2022

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I. BY THE COMMISSION

A. Statement

1. Through this Decision, the Commission denies the Application for Rehearing, Reargument, or Reconsideration (RRR) of Decision No. C22-0390, filed by American Heritage Railways, Inc. (AHR) and The Durango & Silverton Narrow Gauge Railroad Company (DSNGR) on July 20, 2022, requesting the Commission vacate Decision No. C22-0390 and entirely terminate this Proceeding.

2. This case arises out of the Petition for Declaratory Ruling (Petition), filed by La Plata County (the County) on August 30, 2021, pursuant to Rule 1304(f) of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1. The Petition requested the Commission issue certain declarations relating to physical changes made by DSNGR to Rockwood Station, located 18 miles north of Durango, Colorado, in rural La Plata County. DSNGR made these changes in the summer of 2020 to accommodate a new passenger service route, the Cascade Canyon Express, along the existing DSNGR rail line. On March 8, 2022, Administrative Law Judge (ALJ) Steven H. Denman issued Recommended Decision No. R22-0141 (Recommended Decision), granting, in part, and denying, in part, the declaratory relief requested in the Petition. On April 8, 2022, AHR and DSNGR filed exceptions to the Recommended Decision pursuant to § 40-6-109(2), C.R.S. By Decision No. C22-0390, issued June 30, 2022, the Commission denied the exceptions and upheld the ALJ's Recommended Decision in its entirety. AHR and DSNGR then filed their Application for RRR pursuant to § 40-6-114, C.R.S., requesting the Commission vacate Decision No. C22-0390 and terminate the proceeding.

3. In an application for RRR, the challenging party must specify with particularity the grounds upon which the applicant considers the Commission's decision "unlawful." § 40-6-114(1), C.R.S. The Commission may reverse, change, or modify a decision if, after rehearing, reargument, or reconsideration, it appears the original decision of the Commission is in any respect "unjust or unwarranted." § 40-6-114(3), C.R.S.

4. After considering the arguments in the Application for RRR, the Commission does not find cause to reverse, change, or modify its prior decision. The Commission therefore denies the RRR and upholds Decision No. C22-0390 in its entirety.

B. Discussion of Application for RRR and Resulting Findings and Conclusions

5. AHR and DSNGR argue the Commission should reconsider the determinations in Decision No. C22-0390 that conclude: (i) the County has standing to seek the requested declaratory relief; (ii) the Commission has jurisdiction to entertain the Petition; (iii) the Commission has authority to interpret § 30-28-127, C.R.S.; and (iv) DSNGR's changes to Rockwood Station constitute "extensions, betterments, or additions" within the meaning of those terms in § 30-28-127, C.R.S.

1. Challenge to Procedures Followed

a. Acceptance of Petition

6. AHR and DSNGR contend the Commission unlawfully deprived DSNGR of notice and opportunity to be heard by failing to treat the Petition as a complaint under § 40-6-108, C.R.S. They contend the Commission "entered a peremptory *ex parte* order"[1] accepting the Petition. AHR and DSNGR contend the Petition was, in substance, a complaint. They suggest the Petition itself alleged it was filed pursuant to § 40-6-108, C.R.S., and that the

[1] Application for RRR, p. 3 (citing Decision No. C21-0584-I, issued Sept. 17, 2022).

County acknowledged in briefing that the Petition could be considered a complaint.[2] Using this reasoning, they contend service of the Petition on DSNGR was mandatory pursuant to § 40-6-108(1)(e), C.R.S. They argue Rule 1304(f) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, authorizing petitions for declaratory order, does not apply because such petitions seek declarations "directly affecting only the petitioner itself, unlike the petition in this case that was instead aimed at affecting DSNGR"[3] AHR and DSNGR contend, had the Commission ordered the Petition be served on DSNGR and provided opportunity to respond, the Commission would have been apprised that the County lacked standing to seek the requested declaratory rulings and that the Commission lacked jurisdiction to determine the legal issues.

7. The Commission denies this claim on RRR.

8. First, AHR and DSNGR mischaracterize the legal effect of the Commission's "acceptance" of a petition for declaratory order. When a petition for declaratory order is filed, the Commission first decides whether to "accept" or "not accept" the petition. *See* Rule 1304(f)(III) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1 (providing, at its discretion and prior to issuing notice, the Commission may dismiss or otherwise not accept any petition seeking a declaratory order). This initial determination is more procedural than substantive and precedes any decision on the merits that ultimately "grants" or "denies" the requested declaratory relief. Since the Commission entertains petitions for declaratory order entirely at its discretion,[4] this initial step whether to accept a petition is a necessary opportunity for the Commission to control its dockets and decline to take up a petition. Accordingly, the

[2] Application for RRR, p. 3 (citing Petition, ¶ 1 and La Plata County Reply Brief, filed Nov. 19, 2021, p. 6).

[3] Application for RRR, p. 3, fn. 2.

[4] *See* § 24-4-105(11), C.R.S. ("Every agency shall provide by rule for the entertaining, in its sound discretion…of petitions for declaratory orders"); Rule 1304(f)(III), 4 CCR 723-1 (providing Commission may, prior to issuing notice, dismiss or otherwise not accept any petition for declaratory order),

effect of the Commission's determination to "accept" the Petition was the case could move forward to a period for notice and intervention, followed by legal briefing as scheduled by the assigned ALJ. The Commission explained these mechanics in Decision No. C21-0584-I, stating at ¶ 7, "If a petition meets [the requirements of Rule 1304(f)], the Commission then exercises its discretion to accept or dismiss the Petition." Given this context, we find the Commission's decision to accept the Petition was not an unlawful "peremptory *ex parte*" order that now warrants invalidating the entire proceeding.

9. Second, we reject AHR and DSNGR's contention that the Petition was, in substance, a formal complaint under § 40-6-108, C.R.S., and that the procedures for noticing a complaint should have been followed. To the contrary, the Petition was filed by the County as a petition for declaratory order pursuant to Rule 1304(f), 4 CCR 723-1, and was construed by the Commission as such. As discussed above, the Commission's first determination in this Proceeding was to "accept" the filing as a petition for declaratory order and initiate the standard procedures for notice, hearing, and decision of a petition. Treating the filing as a petition for declaratory order is consistent with the ALJ's findings, as upheld by the Commission. *See* Recommended Decision, ¶ 36 (finding Petition is clearly a petition for declaratory ruling filed pursuant to Rule 1304(f), 4 CCR 723-1, and it is not necessary to rule on whether the Petition should be considered a complaint). AHR and DSNGR overstate the County's alleged concession that their pleading was a complaint. The County clearly intended to file a petition for declaratory order, as evidenced by the form of the filing and as well as the type of relief sought. The County's statement cited by AHR and DSNGR was made in the context of reiterating, in its brief to the ALJ, that it requests a declaratory ruling. The County went to on to say, although it did not

invoke the Commission's complaint procedures in its pleading, it plead sufficiently to satisfy the requirements for a complaint "if the Commission believed that were a more appropriate means of resolving the controversy."[5] Accordingly, although it possible this dispute could have been brought to the Commission through various means, including potentially as a complaint, it has been clear from the onset the matter is before the Commission as a petition for declaratory order. We also reject the notion that the Petition had to be a complaint because a petition for declaratory order directly affects only the petitioner itself, as AHR and DSNGR argue in their RRR. The controversy here concerned a matter of conflicting positions affecting *both* DSNGR and the County. The Commission's processes contemplate that a petition for declaratory order, even if brought by a single party, can affect other parties, and thus require a notice period and opportunity for intervention by motion and by right. Here, those processes functioned as intended; AHR and DSNGR timely intervened and the ALJ acknowledged their intervention as of right and allowed them to participate fully in the proceeding.[6]

10. Finally, AHR and DSNGR fail to identify meaningful harm that would invalidate the ensuing proceeding, either from the Commission's procedures for accepting the petition or its treatment of the filing as a petition for declaratory order instead of as a complaint. As addressed above, the decision to "accept" the Petition was not a substantive decision on the merits. The Commission explained this in Decision No. C21-0584-I, stating at ¶ 8, "We find the Petition alleges sufficient controversy regarding the Commission's jurisdiction as it relates to this ongoing dispute between the County and DSNGR to accept the Petition and *proceed to* adjudication" (emphasis added). This determination allowed the case to move forward to

[5] La Plata County Reply Brief, filed Nov. 19, 2021, p. 6.

[6] *See* Decision No. R21-0662-I, issued Oct. 11, 2021 (acknowledging Notice of Intervention as of Right, filed Oct. 11, 2021, by AHR and DSNGR).

assignment of an ALJ, establishment of parties, and scheduling of briefing. AHR and DSNGR fail to make a persuasive case on RRR that they were prejudiced by having to wait until briefing to make their jurisdictional arguments to the ALJ. After timely intervening, AHR and DSNGR had, and utilized, opportunity to file a brief setting forth their position on any issues they believe the Commission should address.[7] They also had opportunity to raise these same concerns to the Commission through their exceptions to the Recommended Decision and again through their Application for RRR. Consequently, both the ALJ and the Commission have fully heard, considered, and repeatedly rejected, AHR and DSNGR's arguments challenging the County's standing to bring the Petition and the Commission's jurisdiction to hear the matter. We thus see no merit to their claim on RRR that the Commission should nonetheless terminate the entire proceeding because AHR and DSNGR did not have opportunity to make these arguments before the Commission formally accepted the Petition and set a notice and intervention period or because the Commission did not treat the filing as a complaint and follow the requirements for serving notice of a complaint.

b. Scope of Issues Decided by ALJ

11. AHR and DSNGR contend they were deprived of due process by not having notice and opportunity to be heard on an issue the ALJ ultimately decided. They contend DSNGR has a property right in its Commission-issued certificate of public convenience and necessity that cannot be impaired or restricted by the Commission without due process, which they argue the Commission did by allegedly upholding the County's assertion of authority to stop

[7] *See* Decision No. R21-0662-I, issued Oct. 22, 2021, ¶ 15 (ALJ instructing parties to address in briefing: (1) Commission's jurisdiction over dispute between County and AHR/DSNGR; (2) whether Cascade Canyon Express requires a new certificate of public convenience and necessity; (3) if the Commission finds in the affirmative on Issue No. 2, what remedies does the Commission have the authority to order; and (4) any other issues the parties believe the Commission should address).

DSNGR's operation of the Cascade Canyon Express passenger train service. They contend the issues on which the ALJ requested briefing did not include whether the changes DSNGR made in the use of Rockwood Station constituted "extensions, betterments, or additions" under § 30-28-127, C.R.S. They contend, by not specifically requesting briefing on this issue, the ALJ denied AHR and DSNGR the opportunity to be heard on a critical issue the ALJ ultimately decided.

12. The Commission denies this claim on RRR.

13. AHR and DSNGR similarly argued in their exceptions that they lacked notice and opportunity to respond to certain issues in the Recommended Decision. As we found previously, *see* Decision No. C22-0390 at ¶¶ 68-70, we reject this claim and find the ALJ's ruling consistent with the relief requested in the Petition. Most significantly, we find the request in the Petition that the Commission declare the physical changes to Rockwood Station "constitute 'extensions,' 'betterments,' and/or 'additions' subject to § 30-28-127, C.R.S. requiring compliance with the County's existing Code," provided adequate notice to AHR and DSNGR that this issue was presented for decision.[8] Further, in the ALJ's briefing order, the ALJ broadly "determined that briefs should be filed regarding the merits of the Petition" and instructed the parties to submit briefs on specified questions and "any other issues the parties believe the Commission should address in this proceeding."[9] Given this plain language in both the Petition and briefing instruction, we find no grounds on RRR to reconsider our finding that AHR and DSNGR had adequate notice and opportunity to respond to all the issues set forth in the Petition, including the issue whether the contested changes to Rockwood Station constitute "extensions, betterments, or

[8] Petition, Request for Relief, ¶ 92.i.

[9] Decision No. R21-0662-I, issued Oct. 22, 2021, ¶¶ 14-15.

additions" subject to § 30-28-127, C.R.S. As we stated in Decision No. C22-0390 at ¶ 70, the chosen litigation strategy of AHR and DSNGR to not respond in briefing to certain portions of the Petition does not mean they were deprived of due process.

14. We also deny the claim on RRR that AHR and DSNGR were deprived in this Proceeding of a property right in their certificate of public convenience and necessity without due process. This same issue was raised, and appropriately denied, in exceptions. We affirm here that the County's efforts to enforce its land use code concern DSNGR's expanded use of Rockwood Station, not its preexisting use, and therefore do not unlawfully impinge on DSNGR's ability to operate under its existing certificate of public convenience and necessity.[10]

c. Need for a Hearing

15. AHR and DSNGR contend the Commission violated DSNGR's constitutionally protected rights by reaching a decision without holding an evidentiary hearing. Quoting language from *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1030 (Colo. 1998), they contend Colorado law requires "'a hearing conducted for the purpose of resolving the particular interests in question.'"[11] They claim the ALJ unlawfully made "findings of fact" and reached legal conclusions based on those facts without considering evidence developed through a hearing. They also repeat their argument that the Petition was properly a complaint under § 40-6-108, C.R.S., and maintain the Commission was therefore required to hold a hearing after the filing of testimony and exhibits by the complainant.

[10] *See* Decision No. C22-0390, issued June 30, 2022, ¶ 54 ("We reject the framing by AHR and DSNGR that La Plata County's attempt to enforce its adopted land use code and the requested Commission declarations in this Proceeding unlawfully impinge on the railroad's ability to operate under its existing CPCN. As the County responds, the County's enforcement efforts concern the physical changes made to Rockwood Station and their effect on local interests.")

[11] Application for RRR, p. 5 (quoting *AviComm, Inc. v. Colo. Pub. Utils. Comm'n*, 955 P.2d 1023, 1030 (Colo. 1998)).

16. The Commission denies this claim on RRR.

17. First, as we explained in Decision No. C22-0390 at ¶¶ 60, no requirement in statute or rule dictates the Commission must hold a hearing on a petition for declaratory order. Colorado courts have expressly allowed the Commission may use abbreviated or informal procedures in its proceedings. *E.g.*, *Pub. Serv. Co. v. Pub. Utils. Comm'n*, 653 P.2d 1117, 1122 (Colo. 1982) (concluding participatory values are better served by allowing Commission to conform its procedures to the exigencies of the case before it). Further, case law affirms the Commission may "hear" opposing interests by asking parties to present arguments through written briefs rather than full adjudicatory hearings. *Pub. Serv. Co. v. Pub. Utils. Comm'n*, 765 P.2d 1015, 1024 (Colo. 1988). Considering the arguments on RRR, we find the quoted statement from *AviComm* fails to establish any sort of precedent that would compel the Commission to hold a hearing in this matter. The issue in *AviComm* was whether the Commission had reached a decision of general applicability through adjudication and had therefore engaged in agency rulemaking without following the requirements of the State Administrative Procedure Act, § 24-4-101, *et seq*., C.R.S. The quoted language is a fragment from the Court's discussion of the differences between agency adjudication versus rulemaking. *See AviComm*, 955 P.2d at 1030 ("An adjudicative proceeding involves a determination of rights, duties, or obligations of identifiable parties by applying existing legal standards to facts developed at a hearing conducted for the purpose of resolving the particular interests in question."). This *dicta* does not speak to the need for a hearing in a petition for declaratory order. It also does not override the direct precedent affirming the Commission is allowed discretion in how it conducts its cases. We thus

find nothing in *AviComm*, or the arguments on RRR, persuades us that the Commission unlawfully proceeded to a decision in this matter without a hearing.

18. Second, we find no merit to AHR and DSNGR's claim that the ALJ improperly relied upon factual findings. They object that the ALJ "made page after page of 'findings of fact,"[12] but fail to identify any specific facts they dispute or explain how they were prejudiced by not having opportunity to develop alternative facts at hearing. We find this case turned on legal determinations, not on the ALJ's findings on disputed facts, for the following reasons.

19. The ALJ's description of the physical changes at issue is based upon the facts as set forth in the Petition and described in the parties' briefing. *See* Recommended Decision, ¶ 78 ("The record of this proceeding shows that DSNGR made physical changes to expand the driveway, significantly expanded the size and use of the parking lot, and installed portable toilets and tents at the Rockwood Station. DSNGR's operation of the Cascade Canyon Express significantly increased the traffic on narrow County Road 200 for the large number of passengers traveling to and from the Rockwood Station, for the increased number of passengers parking in the parking lot, and for the increased number of passengers entering and exiting the train at the Rockwood Station."); Petition, pp. 5, 7-19 and relief requested in ¶ 92 (similarly describing changes to Rockwood Station); La Plata County Reply Brief, filed November 19, 2021, pp. 13-14 (similarly describing changes); AHR/DSNGR Response Brief, filed November 5, 2021, p. 5 (similarly describing changes), p. 12 (discussing County's description of physical changes, without objection).

[12] Application for RRR, p. 6 (citing Decision No. R22-0141, issued March 8, 2022, ¶¶ 21-30).

20. DSNGR has not in this Proceeding directly contested the County's description of the changes to Rockwood Station or offered alternative facts. DSNGR's description in briefing matches the description in the Petition as well as the ALJ's findings. *See* AHR/DSNGR Response Brief, p. 5 ("in 2020 DSNGR made certain changes to its property at Rockwood. It regraded its existing parking lot to provide additional parking space and provide access at both ends of the lot and tie the west end of the lot to an existing graveled road across its tracks. DSNGR also took down a fence on its right-of-way and added portable toilets and tents to accommodate passengers waiting to board the train or exiting from it"). In fact, AHR and DSNGR included with their brief the affidavit of Mr. Jeff Johnson, operations manager for DSNGR, attesting to this description.[13] Further, the brief expressly states the statement of facts "set[s] forth certain facts, supported by affidavit, that are not subject to dispute and are necessary for a proper understanding of the case."[14] In their exceptions, AHR and DSNGR contested the significance of the changes, not whether they occurred. They argued, "the minimal physical alterations" made to Rockwood Station are not the types of public utility improvements that have historically constituted extensions of public utility facilities and that upgrading a parking area, erecting a temporary tent, or installing portable toilets "are too trivial to constitute 'extensions, betterments, or additions'" under § 30-28-127, C.R.S.[15]

21. We find it unsustainable for AHR and DSNGR to now claim the ALJ reached an unlawful result in this Proceeding because he relied upon these admittedly undisputed facts to reach his determination that DSNGR's physical changes to the structures, plant, and other

[13] Exhibit A to AHR/DSNGR Response Brief, filed Nov. 5, 2021, Aff. of Jeff Johnson, ¶ 9.
[14] AHR/DSNGR Response Brief, filed Nov. 5, 2021, p. 2, fn. 1.
[15] AHR/DSNGR Exceptions to Decision No. R22-0141, filed April 8, 2022, pp. 17-18.

equipment at the Rockwood Station constitute "extensions, betterments, or additions" within the meaning of those terms in § 30-28-127, C.R.S. Had AHR and DSNGR believed the facts alleged in the record were in dispute, let alone required an evidentiary hearing, the time to raise that concern and submit any request a hearing was during the proceedings before the ALJ, not after the ALJ issued an unfavorable decision. We thus reject the after-the-fact-argument from AHR and DSNGR that the Commission should have held a hearing in this matter.

2. Jurisdictional Challenges

a. La Plata County Standing

22. AHR and DSNGR contend the Commission incorrectly concluded the County had standing to file the Petition and seek the declaratory relief sought. They cite the language in Rule 1304(f)(II), 4 CCR 723-1, and in § 24-4-105(11), C.R.S., that states the Commission may issue a declaratory order to terminate a controversy or remove an uncertainty "affecting" a petitioner or "as to the applicability to" the petitioners. They argue a party lacks standing to ask an agency to terminate controversies or remove uncertainties as to the applicability of a statute to someone other than itself.[16] They contend, only if the County had been seeking a ruling under Rule 1304(f)(II) as to whether a "tariff, statutory provision, or Commission rule, regulation, or order" applied to the County itself, could the provisions of § 24-4-105(11), C.R.S., and the Commission's rules allowing for petitions for declaratory order have applied in this case.

23. The Commission denies this claim on RRR.

24. As we found previously, *see* Decision No. C22-0390 at ¶¶ 30-32, the County can properly seek resolution of this controversy from the Commission. Consistent with that decision,

[16] Application for RRR, p. 7 (citing *Defend Colorado v. Polis*, 482 P.3d 531, 536 (Colo. App. 2021)).

we once again reject as flawed the reasoning of AHR and DSNGR that only the railroad itself can seek relief from the Commission to resolve this controversy. Such a narrow interpretation of our jurisdiction would unfairly and unnecessarily deprive the other affected party, the County, of its opportunity to seek needed relief from the Commission. Rule 1304(f)(II) authorizes the Commission to issue a declaratory order "to terminate a controversy" affecting a petitioner with regard to any tariff, statute, rule, regulation, or order. Here, the controversy whether the County can enforce its land use code against the physical changes DSNGR made to Rockwood Station is between two parties: the railroad and the County, and directly affects the County's interest in enforcing its land use code as much as the railroad's interest. As we stated in Decision No. C22-0390 at ¶ 31, the County sought this declaratory relief only after DSNGR claimed in response to the County's enforcement efforts that its distinct status as a Colorado public utility places it under the authority of the Commission and outside the reach of local land use regulation. We again find it contradictory for DSNGR to raise this defense but then claim the County is legally precluded from seeking declaratory relief from the Commission.

b. Commission Authority

25. AHR and DSNGR contend the Commission unlawfully usurped judicial power in making a finding that DSNGR's physical changes to Rockwood Station constitute "extensions, betterments, or additions" within the meaning of those terms in § 30-28-127, C.R.S. They contend neither Rule 1304(f), 4 CCR 723-1, nor § 24-4-105(11), C.R.S., gives the Commission authority to determine rights and obligations of parties under statutes that do not relate to utility regulation and do not expressly give the Commission authority. They also argue the Commission, in effect, adjudicated property rights, which they argue the Commission lacks

authority to do.[17] They challenge this reasoning would allow the Commission to interpret how *any* statute applies to a public utility. AHR and DSNGR maintain the power delegated to the Commission under the second sentence of § 30-28-127, C.R.S., is conditional. They contend the Commission's involvement arises only if it has already been established, at the local level, that the utility has made extensions, betterments, or additions that are not in conformity with the county's adopted land use plan or the utility desires to make such changes and the county has refused to approve them. They claim only then, and only upon application by the utility itself, would the Commission have authority to act. They conclude, where there is dispute whether an action constitutes an extension, betterment, or addition under the statute, the resolution of that dispute must occur, initially, at the county level, which would then be subject to review by a district court. They add, even if there had been a basis for the Commission to exercise jurisdiction under § 30-28-127, C.R.S., DSNGR was denied due process by the lack of hearing.

26. The Commission denies this claim on RRR.

27. As we found previously, *see* Decision No. C22-0390 at ¶¶ 38-41, the Petition expressly requested this determination, and the Commission has broad authority to provide the requested relief. Consistent with that decision, the Commission has broad legislative authority under Article XXV of the Colorado Constitution to regulate the facilities, services, and rates and charges of every public utility in this State. The Commission has as much authority to regulate public utilities as the General Assembly possessed prior to adoption of Article XXV in 1954, unless the General Assembly specifically restricts that authority by statute.[18] Nothing in the

[17] Application for RRR, p. 9 (citing *Public Service Co. of Colo. v. Van Wyk*, 27 P.3d 377, 385 (Colo. 2001)).

[18] *Colorado Office of Consumer Counsel v. Mountain States Tel. & Tel. Co.,* 816 P.2d 278, 283 (Colo. 1981); *Colorado-Ute Electric Ass'n., Inc. v. Pub. Utils. Comm'n,* 760 P.2d 627, 636-639 (Colo. 1981); *Mountain States Tel. & Tel. Co. v. Pub. Utils. Comm'n,* 576 P.2d 544, 547-548 (Colo. 1978); and *Miller Brothers v. Pub. Utils. Comm'n,* 185 Colo. 414, 525 P.2d 443, 451 (1974).

plain language of § 30-28-127, C.R.S., or relevant case law, confers exclusive authority on the district court, or specifically deprives the Commission of authority, to determine whether a public utility's physical changes constitute "extensions, betterments, or additions" within the meaning of those terms in § 30-28-127, C.R.S. Further, the Commission has express statutory authority under § 40-3-102, C.R.S., to generally supervise and regulate every public utility and to do all things necessary or convenient in the exercise of such power. In these circumstances, we once again find it is proper, and within the Commission's authority, for the Commission to apply its regulatory expertise in issuing this declaratory ruling.

28. As we noted in Decision No. C22-0390, to the extent AHR and DSNGR have concerns about the implication of the Commission's ruling that the physical changes to the structures, plant, and other equipment at Rockwood Station constitute "extensions, betterments, or additions" within the meaning of those terms in § 30-28-127, C.R.S., those arguments should be directed to the courts. The Commission's intent is to answer the questions raised in the Petition based on the facts and arguments presented in the pleading and parties' briefs. In making this finding, we apply our regulatory expertise to resolve the controversy between the County and DSNGR over whether these changes are strictly within the Commission's purview or can be subject to local land use requirements. We affirm the statutory scheme in Article 28 of Title 30, including § 30-28-127, C.R.S., is clearly set up to allow the County to apply and enforce its land use code to DSNGR's changes to Rockwood Station. We affirm these changes fall within the scope of changes subject to local land use regulation under § 30-28-127, C.R.S., and are not exempt from local requirements simply because they are made by a public utility under our authority.

3. Challenge to Evidentiary Support

29. AHR and DSNGR contend the Commission's disposition of the case is unsupported by evidence and is otherwise unlawful. They argue, citing again the *dicta* in *AviComm*, and the Commission's complaint procedures in Rule 1501 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, that a hearing is statutorily required. They allege the ALJ improperly made extensive findings of fact, including the finding concerning applicability of § 30-28-127, C.R.S. They contend DSNGR was "blindsided" and "trial by ambush is not an acceptable process."[19] They allege the Commission erred in affirming the ALJ's finding as "based on the *undisputed facts* and legal arguments in the record of the pleadings and briefs."[20] They contend "the so-called 'undisputed facts' in this case [are] essentially mythical, spun out of whole cloth, and legally nonexistent."[21]

30. The Commission denies this claim on RRR.

31. We find no basis to this argument. Instead, as discussed above in denying the claim that a hearing was required, we find the ALJ properly relied on undisputed facts to reach his ruling that DSNGR's physical changes to the structures, plant, and other equipment at Rockwood Station constitute "extensions, betterments, or additions" within the meaning of those terms in § 30-28-127, C.R.S. As discussed above, AHR and DSNGR included with their brief an affidavit attesting to the physical changes made to Rockwood Station.[22] They expressly state in their brief the statement of facts "set[s] forth certain facts, supported by affidavit, *that are not*

[19] Application for RRR, p. 13 (citing *People v. Roblas*, 568 P.2d 57, 60 (Colo. 1977)).
[20] Application for RRR, p. 13 (citing Decision. No. C21-0584-I, issued Sept. 17, 2021, ¶ 41(emphasis supplied)).
[21] Application for RRR, p. 13.
[22] Exhibit A to AHR/DSNGR Response Brief, filed Nov. 5, 2021, Aff. of Jeff Johnson, ¶ 9.

subject to dispute and are necessary for a proper understanding of the case"[23] (emphasis added). They ardently contest the existence of "undisputed facts" yet fail to identify any specific facts they dispute or address how they would have proven differing facts at hearing and how that would have altered the outcome of the ALJ's rulings. Consistent with our finding above, we affirm this case turned on the ALJ's legal determinations rather than resolution of contested facts.

4. Claim that County's Enforcement Actions are Unlawful and Not in the Public Interest

32. Finally, AHR and DSNGR contend the County's land use code violation notices constitute an unlawful effort to stop DSNGR from using its existing facilities at Rockwood Station and to stop DSNGR from operating a scheduled passenger train on its railroad line. They challenge the ALJ's finding that, "in the instant proceeding, La Plata County is not attempting to stop AHR and DSNGR from conveying passengers on its railway, nor is it attempting to regulate the time (date or hour), manner (type of railway cars), or compensation paid (price of tickets) for carrying passengers."[24] They likewise challenge the Commission conclusion to "reject the framing by AHR and DSNGR that La Plata County's attempt to enforce its adopted land use code and the requested Commission declarations in this Proceeding unlawfully impinge on the railroad's ability to operate under its existing CPCN."[25] They suggest the ALJ and the Commission err in these findings by improperly attempting to determine how the "public interest" would be served, rather than simply applying the law.

33. AHR and DSNGR go on to argue, to the extent the public interest is relevant, here it favors protecting DSNGR from local interference. They note, when the Commission approved

[23] AHR/DSNGR Response Brief, filed Nov. 5, 2021, p. 2, fn. 1.
[24] Application for RRR, p. 14 (citing Decision No. R22-0141, issued March 8, 2022, ¶ 52).
[25] Application for RRR, pp. 14-15 (citing Decision No. C22-0390, issued June 30, 2022, ¶ 54).

DSNGR's acquisition of the line between Durango and Silverton, the Commission stated this branch is a major tourist attraction and is of significant importance to the local economies.[26] They suggest this local economic interest remains today and outweighs any annoyance that individuals who chose to live in a neighborhood adjacent to a railroad station may have experienced during times when passenger trains were operating.

34. The Commission denies this claim on RRR.

35. Regarding the County's enforcement notices, we find no grounds on RRR to reconsider our determination to reject the framing by AHR and DSNGR that the County's attempt to enforce its adopted land use code and the requested Commission declarations in this Proceeding unlawfully impinge on the railroad's ability to operate under its existing CPCN. We affirm the County's enforcement efforts concern the physical changes to Rockwood Station and their effect on local interests. The central issue of this dispute is the expanded and changed use of Rockwood Station, not the railroad's pre-existing operations or continued use of its established rail line. If AHR and DSNGR continue to contest this point, the proper place to litigate the legality of those notices is in district court between the railroad and the County.

36. To the question of what the public interest requires in this case, we decline to make unnecessary new findings at this late stage on an issue that is not dispositive.[27] The declaratory rulings in this Proceeding resolve primarily questions of law, not policy. As discussed above, the statutory scheme enacted by the legislature in Article 28 of Title 30 expressly provides for local regulation of land use activities—even those activities of public

[26] Application for RRR, p. 16 (citing Decision No. C-80-979, issued May 20, 1980, ¶¶ 4, 23).

[27] The cited Commissioner statement from oral deliberations is not binding on the other Commissioners and is not reflected in the Commission's written order. We also disagree with the suggestion by AHR and DSNGR that this statement raises important questions about the public interest. The statement simply reflects the Commissioner's agreement that, consistent with the statutory scheme discussed by the ALJ, this remains a local issue.

utilities. The question of public interest would only squarely come before the Commission were DSNGR to later appeal a local government decision and seek a Commission order that non-conforming changes should proceed despite conflict with the County's adopted plan.

C. Conclusion

37. Through this Decision, the Commission addresses the procedural and substantive concerns raised in RRR by AHR and DSNGR. Given this decision denying the RRR, the parties have exhausted their administrative processes and should move to other general jurisdiction venues to move this dispute to final resolution. We encourage AHR and DSNGR to use their time and resources to resolve this controversy through those more productive channels rather than continue to challenge the Commission's decision-making processes and rulings

II. ORDER

A. The Commission Orders That:

1. The Application for Rehearing, Reargument, or Reconsideration filed on July 20, 2022, by the American Heritage Railways, Inc. and the Durango and Silverton Narrow Gauge Railway, is denied.

2. This Decision shall be effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING August 17, 2022.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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JOHN GAVAN

MEGAN GILMAN

Commissioners