

Decision No. C24-0420

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 24A-0274R

IN THE MATTER OF THE DEVELOPMENT OF TEMPLATE CONSTRUCTION AND MAINTENANCE AGREEMENTS AND PRELIMINARY ENGINEERING AGREEMENTS FOR USE IN PUBLIC CROSSING PROJECTS IN COLORADO CONSISTENT WITH RULE 4 CODE OF COLORADO REGULATIONS 723-7-7214.

**COMMISSION DECISION OPENING PROCEEDING,
ISSUING NOTICE, REQUESTING INTERESTED PERSONS
TO FILE A NOTICE OF PARTICIPATION, AND REFERRING
MATTER TO ADMINISTRATIVE LAW JUDGE**

Mailed Date: June 14, 2024

Adopted Date: May 29, 2024

TO THE PARTICIPANTS IN THIS PROCEEDING AND ALL INTERESTED PERSONS, FIRMS, OR CORPORATIONS:

I. BY THE COMMISSION

A. Statement

1. The Commission opens this Miscellaneous Proceeding as a forum for participants to develop the template agreements for public crossing projects in Colorado that are required by Rule 7214 of the Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7, starting November 22, 2024.

2. Consistent with the decision directives and final rules adopted in the Commission's recently concluded rulemaking Proceeding No. 21R-0538R, the following entities are required to participate in this Proceeding: road authorities (including the Colorado Department of Transportation to provide their existing templates as a starting point for discussions), and railroads, railroad corporations, rail fixed guideways, transit agencies, and owners of tracks over which the

Commission has jurisdiction. These required participants, along with any other persons interested in participating to develop the required templates, are instructed to file in this Proceeding a notice of participation that includes their contact information. Such notices are requested to be filed no later than July 5, 2024, to facilitate communications and the timely scheduling of workshops and other procedural matters.

3. The Commission refers this matter to an Administrative Law Judge (ALJ) to conduct this Proceeding. The ALJ may establish further procedures for this Proceeding by separate order.

B. Background

4. Rule 7214, adopted in Proceeding No. 21R-0538R and effective April 30, 2024, requires that road authorities and railroads, railroad corporations, rail fixed guideways, transit agencies, or owners of the track use Commission-approved template Construction and Maintenance Agreements and Preliminary Engineering Agreements for public crossing projects over which the Commission has jurisdiction, starting November 22, 2024. As set forth in Rule 7214, subject crossings include the following types of public crossing projects: highway-rail at-grade crossings, grade separated crossings, pathway-rail at-grade crossings, pathway grade separated crossings, utility crossings, existing at-grade crossing modifications, relocating crossings, traffic signal interconnection, crossing status change (private to public or public to private), crossing closures, crossing active warning signal improvements, crossing passive warning improvements, and crossing surface improvements. Rule 7214 specifies that contracts with the Colorado Department of Transportation are exempt from this requirement.

5. In Proceeding No. 21R-0538R, the Commission adopted this requirement for use of template agreements in response to the many concerns raised by rulemaking participants of significant delay in parties executing, in particular, the Construction and Maintenance Agreements necessary for Commission-approved crossing projects to move forward to construction and completion. In its rulemaking decisions, the Commission found the record reflected a variety of reasons for these significant delays, ranging from comments that railroads use the negotiation process to extract unreasonable concessions knowing that road authorities must timely move projects forward or risk losing funding, to comments that railroads insist that road authorities enter into agreements that are unlawful under Colorado law, to comments that road authorities refuse to accept railroads' form agreements and insist on negotiating different terms.¹ The Commission concluded the use of template agreements may not completely solve all potential disputes and delays associated with entering into agreements, but found the public comments from road authorities and railroads suggested that, once templates agreements are in place, they will greatly minimize the delays, disputes, and associated increased costs that have become common in Commission application proceedings.²

6. In its rulemaking decisions in Proceeding No. 21R-0538R, the Commission established the following minimum standards for the template agreements that are to be developed through this process.³ First, the template agreements must allow parties to input details of a specific project, including any special terms and conditions that relate to the unique nature of the project.

¹ Decision No. R23-0618 at ¶ 200, issued September 22, 2023, in Proceeding No. 21R-0538R (Decision No. R23-0618). *See also* Decision No. C23-0780 at ¶ 98, issued November 27, 2023, in Proceeding No. 21R-0538R (Decision No. C23-0780) (discussing these same findings).

² Decision No. R23-0618 at ¶ 203.

³ Decision No. R23-0618 at ¶ 202.

Second, the template agreements may not include terms that violate Colorado law, including but not limited to the following explicit examples.

- a. Consistent with § 29-1-110, C.R.S., template agreements must include the road authorities' maximum financial obligation, but a template agreement could include language stating this maximum financial obligation may be modified by later written amendments as necessary.
- b. Consistent with the General Assembly's clear intent behind the Colorado Governmental Immunity Act (§§ 24-10-101 to 24-10-120, C.R.S.) (Governmental Immunity Act), unless a governmental entity has waived the immunity granted in the Governmental Immunity Act consistent with the requirements of § 24-10-104, C.R.S., template agreements cannot include terms that purport to waive governmental immunity. Likewise, template agreements must avoid language that violates Colo. Const. art., X, § 20.
- c. Template agreements cannot shift crossing-related obligations (financial or otherwise) that the law, rule, or a Commission order places on one party to the other (*e.g.*, crossing maintenance and related costs).
- d. Template agreements must be consistent with the Commission's decision approving the individual crossing project, which means the template agreements must allow parties to input any unique requirements in a Commission decision approving a project and must ensure that no terms in the template agreement conflict with the Commission's decision. An example of potential language meeting this requirement is, "[t]he parties intend that this Agreement be consistent with and not conflict with the Commission's decision approving the subject project. To the extent that an Agreement term is inconsistent with or conflicts with the Commission's decision approving the subject project, such terms are void, and the Commission's requirements control."

7. In addressing rulemaking participants' exceptions to the ALJ's recommended rulemaking decision, the Commission acknowledged that participants in this follow-on proceeding could potentially reach an *impasse* in developing workable template agreements.⁴ To this concern, the Commission noted the ALJ's recommended process contemplates Commission staff involvement and monitoring and that the rule requires the templates to be developed through a

⁴ Decision No. C23-0780 at ¶ 102.

workshop process. The Commission indicated that its decision initiating the miscellaneous proceeding would provide further guidance on how the process will be managed.⁵

C. Findings, and Conclusions

8. The Commission opens this miscellaneous proceeding for the purpose of facilitating the development of the template agreements required by Rule 7214.

9. This Decision serves as notice of this Proceeding to interested persons. As discussed above, required participants in this Proceeding include the following entities: road authorities (including the Colorado Department of Transportation to provide their existing templates as a starting point for discussions), and railroads, railroad corporations, rail fixed guideways, transit agencies, and owners of tracks over which the Commission has jurisdiction. The Commission instructs these and any other interested persons to file in this Proceeding a notice of participation that includes their contact information no later July 5, 2024, in order to facilitate the timely scheduling of workshops and other procedural matters.

10. The Commission refers this matter to an ALJ to conduct this Proceeding. We find the best means of facilitating this essential process to develop workable template agreements is through an administrative proceeding, managed by an ALJ. The assigned ALJ may, by separate order, establish a procedural schedule, set any procedural requirements and deadlines, and put in place an appropriate process for dispute resolution. The ALJ may also assist the participants in convening and facilitating any workshops and assist in other coordination among the participants.

11. The Commission opens this matter as an administrative proceeding pursuant to Rule 1307 of the Rules of Practice and Procedure, 4 CCR 723-1. Consistent with Rule 1307, administrative proceedings are governed by the specific procedures as the Commission may order.

⁵ *Id.*

As an administrative proceeding, this Proceeding does not have parties; persons participating in this matter are referred to as “participants.” Rule 1200(d), 4 CCR 723-1.

12. All filings in this Proceeding should be made pursuant to Rule 1204 of the Rules of Practice and Procedure, 4 CCR 723-1. Participants are strongly encouraged to use the Commission’s E-Filings System for written submissions, which participants can access at: www.dora.state.co.us/pls/efi/EFI.homepage. Written comments in paper form should be addressed to the Public Utilities Commission, 1560 Broadway, Suite 250, Denver, Colorado 80202 and indicate this Proceeding number.

13. Inquiries regarding this Proceeding should be directed to Dr. Fischhaber, Deputy Director of Public Safety (pamela.fischhaber@state.co.us).

II. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, the Commission opens this miscellaneous proceeding as a forum for participants to develop the template agreements for public crossing projects in Colorado that are required by new Rule 7214 of the Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7.

2. This Proceeding is designated as an administrative proceeding under Rule 1004(b) of the Rules of Practice and Procedure, 4 CCR 723-1. This Proceeding shall continue as an administrative proceeding unless and until the Commission designates it to be an adjudicatory proceeding.

3. Persons required to participate, or interested in participating, in this Proceeding are requested to file a notice indicating their intent to participate by July 5, 2024, providing their contact information.

4. The Commission refers this matter to an administrative law judge, consistent with the discussion above.

5. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 29, 2024.**

(S E A L)



ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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Commissioners