

Decision No. R24-0785-I

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0353R

IN THE MATTER OF THE APPLICATION OF THE CITY OF LONGMONT, COLORADO, 80501 FOR AUTHORITY TO CONSTRUCT A NEW AT-GRADE CROSSING OF THE BURLINGTON NORTHERN SANTA FE TRACKS ON THE PROPOSED BOSTON AVENUE EXTENSION AND FOR AUTHORITY TO CLOSE THE EXISTING CROSSINGS OF THE BURLINGTON NORTHERN SANTA FE TRACKS AT FIFTH AVENUE AND TERRY STREET IN LONGMONT, COLORADO.

**INTERIM DECISION
CONSTRUING FILING AS MOTION FOR LATE
INTERVENTION, GRANTING MOTION FOR LATE
INTERVENTION, AND REQUIRING THE FILING OF A
STATUS REPORT**

Issued Date: October 29, 2024

I. STATEMENT

A. Procedural History and Background

1. On June 27, 2023 the City of Longmont (“Longmont” or “City”) filed an Application (“Application”), requesting authority to open a new highway-rail grade crossing at the extension of Boston Avenue with the tracks of the BNSF Railway Company (“BNSF”) at railroad milepost 43.4 of the Front Range Subdivision, no existing National Inventory Number, in Longmont, County of Boulder, in the State of Colorado (“Boston Avenue crossing”), and to close the existing crossings of 5th Avenue at railroad milepost 44.289, National Inventory No. 245003Y and Terry Street, at railroad milepost 43.430, National Inventory No. 244846A, in Longmont, in the State of Colorado. This filing commenced Proceeding No. 23A-0353R.

The Application states that it is the Longmont's desire to start construction of the new crossing at Boston Avenue crossing in the year 2024.¹

2. The Application was deemed complete on August 31, 2023, in accordance with Rule 1303(c)(IV) of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1.

3. By Decision No. C23-0560-I, issued August 31, 2023, the Commission referred this matter to an Administrative Law Judge ("ALJ") for determination of the merits of the Application.

4. By Decision No. R23-0606-I, issued September 11, 2023, the undersigned ALJ provided further opportunity for Longmont to supplement or amend the Application, established Procedures, and scheduled an evidentiary hearing in this matter.

5. On September 19, 2023, Applicant filed three supplemental exhibits to the Application.

6. By Decision No. R23-0709-I, issued October 18, 2023, the undersigned ALJ set a deadline of November 16, 2023 for filing of a notice of settlement and rescheduled the evidentiary hearing in this Proceeding.

7. On December 6, 2023, BNSF filed its Withdrawal of Intervention.

8. By Decision No. R23-0868-I, issued December 27, 2023, the ALJ vacated the evidentiary hearing and required Longmont to either file, or make a filing indicating a date by which Longmont will file: (a) a fully-executed copy of the Settlement and (b) the updated sketch plan ("front sheet"), and cost estimate for the Application filed by Longmont on June 27, 2023,

¹ Application at 7.

as Amended by the Mutual Release and Settlement Agreement and the Memorandum of Understanding (“MOU”), filed by Longmont and BNSF on November 16, 2023.

9. On January 8, 2024, Longmont filed its Notice of Submission of Executed Settlement Agreement (“Settlement Agreement”), Updated Cost Estimate, and Sketch Plan (“Front Sheet”) (“Notice of Submission of Settlement and Updated Sketch Plan”), and attached thereto an executed copy of Settlement Agreement,² cost estimate for signal improvement,³ cost estimate for rail improvement,⁴ and a sketch plan.⁵

10. On July 31, 2024, Longmont filed its Notice of Filing Proposed Schedule and Final Plans, and attached thereto Exhibit A – Proposed Schedule, and Exhibit B – 100 percent Plans Boston Avenue (“Exhibit B”) (collectively, “Proposed Schedule and Final Plans”).

11. On September 25, 2024, BNSF filed its Notice of Re-Intervention (“Notice of Re-Intervention”), seeking to invoke its “statutory right” to re-reintervene as of right in this Proceeding.

12. No pleading was filed by either party following the filing of the Notice of Re-Intervention.

B. Notice of Re-Intervention

13. The Notice of Re-Intervention states that BNSF “re-intervenes in [this Proceeding] as it relates to compliance with and enforcement of BNSF and [Longmont’s] Mutual Release and Settlement Agreement and Memorandum of Understanding...”⁶ The Notice of

² Attachment A to the Notice of Submission of Settlement and Updated Sketch Plan.

³ Attachment B to the Notice of Submission of Settlement and Updated Sketch Plan.

⁴ Attachment C to the Notice of Submission of Settlement and Updated Sketch Plan.

⁵ Attachment D to the Notice of Submission of Settlement and Updated Sketch Plan.

⁶ Notice of Re-Intervention at p. 1.

Re-Intervention further states that BNSF is intervening in order to “to preserve for the record the above issues as it relates to the MOU and the Proceeding.”⁷

14. The ALJ finds and concludes that BNSF cannot notice its re-intervention as a matter of right in this Proceeding.⁸

15. However, given the substance of, and BNSF’s request made in, the Notice of Re-Intervention, the ALJ construes the Notice to Re-Intervene as a motion requesting to intervene out of time (hereinafter “Motion to Intervene Out of Time”).

16. The ALJ finds and concludes that BNSF stated good cause to intervene out of time in this Proceeding. Therefore, BNSF Motion to Intervene Out of Time will be granted, as ordered below.

17. However, the ALJ notes that given the lack of specificity in the Motion to Intervene Out of Time, at this time, the ALJ cannot grant any additional relief beyond that which is granted herein. The ALJ urges the parties to resolve their dispute and make an appropriate filing confirming the same.

18. Consistent with the discussion above, the ALJ will require the parties to file a status report as to the progress of resolution of the issues in this Proceeding within no more than 30 days of the Issued Date of this Decision, as ordered below. Should the parties reach an impasse, the parties are welcome to make and appropriate an appropriate filing requesting a prehearing conference to address the impasse.

⁷ *Id.* at p. 2.

⁸ See Notice of Application Filed (“Notice”), filed July 12, 2023 (requiring persons desiring to participate as a party in this Proceeding to make an appropriate filing within 30 days of the date of the Notice; *see also* Rule 1401, 4 *Code of Colorado Regulations* (“CCR”) 723-1.

II. ORDER**A. It Is Ordered That:**

1. Consistent with the discussion above, the Notice of Re-Intervention filed by BNSF Railway Company on September 25, 2024 is construed as a motion requesting to intervene out of time (“Motion to Intervene Out of Time”).
2. The Motion to Intervene Out of Time is granted.
3. Consistent with the discussion above, the parties shall file a status report as to the progress of resolution of the issues in this Proceeding within no more than 30 days of the Issued Date of this Decision.
4. This Decision shall be effective immediately.

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

AVIV SEGEV

Administrative Law JudgeRebecca E. White,
Director