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SEC

SERVICE DATE - AUGUST 19, 2004

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 34376

CITY OF CREEDE, CO–PETITION FOR DECLARATORY ORDER

Decided: August 18, 2004

On July 2, 2003, the City of Creede, CO (City), filed a petition for declaratory order pursuant to an order of the U.S. District Court for the District of Colorado (District Court)<sup>1</sup> referring to the Board three questions involving federal preemption of the City's zoning laws as applied to the Denver & Rio Grande Railway Historical Foundation (D&RGHF). D&RGHF owns a rail line, which it acquired pursuant to the offer of financial assistance (OFA) procedures under 49 U.S.C. 10904 and 49 CFR 1152.27 in Union Pacific Railroad Company–Abandonment Exemption–in Rio Grande and Mineral Counties, CO, STB Docket No. AB-33 (Sub-No. 132X) (STB served May 11, 1999), that runs through the City.<sup>2</sup> By a decision served on June 22, 2004, in the above-entitled proceeding, the Board instituted a declaratory order proceeding on the preemption issue and set a procedural schedule.

Under the procedural schedule, the City should have filed its opening statement on July 22, 2004. However, the City filed its opening statement on August 11, 2004, with no explanation for why it was filed late or a motion requesting the Board to accept the late filing. On August 17, 2004, D&RGHF filed a motion requesting that the Board reject the City's opening statement and that the procedural schedule be modified. D&RGHF argues that the City's opening statement should be rejected pursuant to 49 CFR 1104.10(a), which permits the Board to reject a document submitted for filing if it fails to comply with the Board's rules. D&RGHF argues that the extreme lateness of the City's filing (more than just a few days) and the lack of any explanation for the lateness warrant rejection of the opening statement.

Rejection of the City's late filing, submitted without explanation, could be justified. Because this declaratory order proceeding was instituted to address questions that have been

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<sup>1</sup> City of Creede v. Denver & Rio Grande Ry. Historical Found., No. 01-RB-318 (CBS) (D. Colo. May 9, 2003).

<sup>2</sup> On October 14, 2003, the City tendered a pleading arguing that the Board should void the authorization in the abandonment exemption proceeding for sale of the line to D&RGHF under the OFA provisions. The Board treated the pleading as a petition to reopen the OFA proceeding and, by a decision served on June 22, 2004, in the STB Docket No. AB-33 (Sub-No. 132X) proceeding, denied the petition.

referred to the Board by the District Court, however, the Board will accept the City's late-filed opening statement. The City's attorney is cautioned to comply with all deadlines in this proceeding.

Because of the lateness of the City's filing, the Board will modify the procedural schedule. In addition to requesting that the reply and rebuttal due dates be extended, D&RGHF has requested that additional parties that plan to intervene in this proceeding be afforded an opportunity to file evidence and arguments. D&RGHF has therefore requested that the procedural schedule also be modified to provide these potential intervenors with a due date for the filing of evidence and arguments. The Board, however, has not yet received any petitions to intervene from any of the potential intervenors. See 49 CFR 1112.4. Thus, it would be premature to modify the procedural schedule to account for these intervenors at this time. However, the Board encourages any intervenors to file both their request to intervene and their evidence and arguments on the same schedule as D&RGHF, so as not to delay any longer the Board's response to the court. Thus, the Board will modify procedural schedule only to the extent that it extends the due dates for D&RGHF's reply and the City's rebuttal.

This action will not significantly affect the quality of the human environment or conservation of energy resources.

It is ordered:

1. D&RGHF's motion to reject the City's opening statement is denied. The City's opening statement is accepted for filing.

2. D&RGHF's motion to modify the procedural schedule is granted in part. The modified procedural schedule is as follows:

September 13, 2004  
October 4, 2004

D&RGHF's reply statement is due.  
The City's rebuttal is due.

3. This decision is effective on the date of service.

4. A copy of this decision will be served on:

The Hon. Robert E. Blackburn  
United States District Judge  
United States Courthouse A741  
909 19th Street  
Denver, CO 80294

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams  
Secretary