

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0315R

IN THE MATTER OF THE APPLICATION OF THE COLORADO DEPARTMENT OF TRANSPORTATION ON BEHALF OF WELD COUNTY FOR AUTHORITY TO REMOVE EXISTING PASSIVE WARNING SIGNS, CROSSING SURFACE, AND ROAD APPROACHES TO CLOSE THE EXISTING CROSSING AT TRACKS OWNED BY UNION PACIFIC RAILROAD COMPANY CROSSING COUNTY ROAD 2.5, USDOT NO. 804-480L, IN WELD COUNTY, STATE OF COLORADO.

**DECISION DENYING APPLICATION FOR
REHEARING, REARGUMENT, AND
RECONSIDERATION, AND DENYING MOTION TO STAY**

Mailed Date: September 19, 2019

Adopted Date: September 18, 2019

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I. BY THE COMMISSION**A. Statement**

1. The dispute over the County Road 2.5 (CR 2.5) crossing abolishment boils down to a disagreement between, on the one hand, Colorado Department of Transportation (CDOT), Weld County, and the Union Pacific Railroad Company (UPRR), who as part of a larger plan involving the U.S. Highway 85 (US 85) corridor applied to abolish this crossing. And on the other hand, various Weld County citizens who reside near or use the crossing (represented here, to some extent, by Monaghan Farms) and who oppose abolishing the crossing as part of the US 85 corridor project or contend that certain mitigating relief should be provided if the crossing is abolished.

2. The Commission's connection to the US 85 corridor project is small and somewhat peripheral. It is only to apply its technical expertise to determine whether abolishing a crossing meets certain standards set forth in statute and rule. Even so, during the evidentiary hearing, Monaghan Farms and its witnesses were able to raise their concerns about how abolishing the crossing would affect them and their concerns with the larger US 85 corridor project. Still, the Commission's review is limited and technical, and opposition to this project is perhaps best raised in other, non-technical forums.

B. Background

3. This proceeding is one of a handful that relate to an ongoing project involving the US 85 corridor. As described in the parties' filings, UPRR, CDOT, and Weld County have come to an agreement whereby CDOT will purchase from UPRR a right-of-way that CDOT views as necessary for the US 85 corridor project. According to the amended application, the agreement reduces the chances that trains in Weld County will be parked where they block railroad

crossings and will reduce the time that trains block crossings when they are being moved. These three parties contend that the agreement also results in better vehicular circulation, improved public safety, and more reliable access routes for emergency services. Monaghan Farms disagrees.

4. The relevant procedural history is set forth in the Administrative Law Judge's (ALJ) recommended decision. For context, we note that an evidentiary hearing was held on December 3 and 4, 2018. The ALJ issued Recommended Decision No. R19-0356 on April 19, 2019. Monaghan Farms filed exceptions to the recommended decision on May 9, 2019 and on June 5, 2019, Monaghan Farms filed a motion to strike. We denied exceptions and the motion to strike in Decision No. C19-0649 that mailed on July 31, 2019.

5. On August 20, 2019, Monaghan Farms filed an Application for Rehearing, Reargument and Reconsideration (RRR) of our exceptions decision and also filed a motion requesting that we stay our July 31 decision. On August 21, 2019, one day after the August 20 deadline to file an application for RRR, Monaghan Farms filed corrected versions of its RRR application and motion to stay.

C. Findings and Conclusions

1. The Corrected Filings

6. We first consider whether to accept Monaghan Farms' corrected motion and corrected RRR application. As Monaghan Farms explains in the Errata it filed alongside these two documents, counsel inadvertently omitted one citation (to § 40-6-114, C.R.S.) as legal grounds for the relief Monaghan Farms requests. Both original filings included a citation to a Commission rule as legal grounds for the relief. The additional citation was the only change included in the corrected documents.

7. We find good cause to accept the corrected motion and corrected RRR application. The correction was minor, was made to comply with Commission Rules, and did not alter any of the substantive arguments Monaghan Farms includes in either filing.

8. Therefore, we will address the corrected motion and corrected RRR application though for the sake of convenience, we will not refer to either as “corrected.”

2. The Application for Rehearing, Reargument, and Reconsideration

9. Monaghan Farms brings three challenges to our exceptions decision. In the alternative, Monaghan Farms requests that we stay this decision if we deny the RRR application. Additionally, Monaghan Farms requests that we set oral argument.

10. Monaghan Farms’ first challenge concerns how we characterized testimony from two hearing witnesses in our exceptions decision. Monaghan Farms contends that the Commission’s decision incorrectly finds that “[witness] Halloran testified that closing the crossing would not affect law enforcement’s ability to respond to calls”¹ However, the transcript supports our description.

11. Halloran, a lieutenant with the Weld County Sheriff’s Office, testified that he did not think that closing the crossing would affect the response time for District 3 of the Weld County Sheriff’s Office (which covers the area including the CR 2.5 crossing). While discussing Exhibit 2—a satellite map overlaid with the locations of emergency responders and highlighting the location of the CR 2.5 crossing—the following exchange took place:

[Question]: If you look at this map, are the majority of citizens’ residences to the south or the north of 168th Avenue?

[Halloran]: To the south.

¹ Monaghan Farms’ RRR at p. 7.

[Question]: And if Weld County Road 2.5 is closed, are the majority of those citizens going to have any effect related to law-enforcement response?

[Halloran]: I can't say to the south of 168th, because that's going to be in the city of Brighton. *But for the sheriff's office in that direct area*, I don't believe -- I don't believe so.²

We read this testimony to indicate that Lieutenant Halloran did not believe that closing the crossing would affect his office's response time to the area north of 168th Avenue. Exhibit 2, along with Halloran's earlier testimony, indicates that Weld County Sheriff District 3 is the local office that covers the area north of 168th Avenue. And the hearing was focused on the area north of 168th Avenue because that is where the CR 2.5 crossing is located and the area to which access would be affected by the closure of the crossing.

12. We recognize that the transcript could be clearer. But when read alongside the rest of Halloran's testimony, the excerpt above is unambiguous. Even if it were ambiguous, we would defer to the ALJ's identical characterization³ because the ALJ heard the testimony as it was offered at the hearing and was therefore in a better position to resolve such an ambiguity. *Cf. People v. Beauvais*, 2017 CO 34, ¶ 31 ("As with any other finding of fact, a highly deferential standard of review precludes an appellate court from substituting its reading of a cold record for the trial court's in-the-moment and better-informed determination."); *Johnson v. Indus. Claim Appeals Office*, 973 P.2d 624, 626 (Colo. App. 1997) ("It is the ALJ's sole prerogative to evaluate the sufficiency, credibility, and probative value of conflicting evidence, including expert testimony. This prerogative extends to resolving the inconsistencies in a particular witness' testimony."). As it is, we are unmoved by Monaghan Farms' contention.

² Transcript of Hearing on December 3, 2018, pp. 163-64.

³ Decision No. R19-0356, Proceeding No. 18A-0315R, p. 24.

13. Monaghan Farms also disputes our characterization of witness Domenico's testimony, asserting that "[Commander Domenico] was not asked whether closing the crossing [permanently] would affect law enforcement's ability to answer calls, nor did he answer those questions."⁴ However, our exceptions decision did not indicate that he was asked those questions or that he answered those questions. Rather, we noted that "Commander Domenico testified that it is common for trains to block the CR 2.5 crossing, which causes traffic backups and creates safety concerns."⁵

14. The second challenge Monaghan Farms raises in its RRR was also raised in its exceptions. This one-paragraph argument contends that the 168th Avenue rail crossing is less safe than the CR 2.5 rail crossing because the former has "high traffic volumes, high traffic queues, and frequent accidents."⁶ Monaghan RRR at p. 8. We rejected this argument when it was raised on exceptions because it highlights *some* of the evidence and testimony on this point, but does not meaningfully engage with the other relevant record evidence. As Monaghan Farms acknowledged in their exceptions, "the [ALJ's] logic appears to be that because WCR 2.5 does not have as many safety measures as 168th Avenue . . . it would be safer to divert traffic across 168th Avenue." Yet its RRR does not argue that the ALJ's finding is unsupported by the evidence or otherwise put forth a substantially different argument than the one it raised and we rejected on exceptions. Accordingly, this challenge is unpersuasive.

⁴ Monaghan Farms' RRR at p. 7.

⁵ Decision No. C19-0649, Proceeding No. 18A-0315R, p. 5.

⁶ The substance of this argument concerns motor vehicle traffic on roads. But the purpose of this proceeding is to determine whether railroad crossing safety is increased by abolishing this particular railroad crossing. Monaghan Farms' argument does little to move us from the ALJ's conclusion that the crossing at 168th Avenue is a safer crossing because it has better warning equipment and therefore train-vehicle collisions at that crossing are less likely.

15. Monaghan Farms' third challenge is titled "The PUC Should Not Waive Its Applicant Rule to Allow CDOT to Meet UPRR's Private Business Interests" but does not articulate why our decision to waive Rule 7203⁷—which we did in our exceptions decision—was in error. Instead, the third challenge incorporates language from Monaghan Farms' previous filings to argue, once again, that CDOT is not a proper applicant. We rejected this argument on exceptions.⁸ And because Monaghan Farms offers no new argument on RRR, we are unmoved from our previous conclusion.

16. In sum, we reject the substantive challenges raised in this RRR application. And, because the record in this proceeding is robust and is clear enough for us to deliberate and to have reached a decision, we find that oral argument would not materially assist our analysis. The parties proceeded through a hearing, the ALJ's recommended decision is thorough, and the parties have had ample time to develop and present well-crafted briefs. Therefore we decline Monaghan Farms' request to set oral argument.

3. Monaghan Farms' Requests to Stay our Decisions

17. In its Motion to Stay, Monaghan Farms requests that we stay our July 31, 2019 decision that, among other things, denied Monaghan Farms' exceptions. The motion states that it incorporates and restates Monaghan Farms' application for RRR as if fully set forth in the

⁷ Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7.

⁸ Decision No. C19-0649, Proceeding No. 18A-0315R, p. 7 n.9 ("In a variation on its earlier-argued theme, that CDOT is "not a proper applicant" to abolish the crossing at CR 2.5, Monaghan Farms argues that the applicants did not "present any testimony of their 'qualifications to undertake, and [their] right to undertake, the requested action" in violation of Commission Rule 7002(b)(VIII)(3). But Rule 7002 does not require a party to present testimony—it requires a party to present evidence. And as the ALJ noted when Monaghan Farms made this argument for a second time during the hearing, CDOT's Exhibit 8 meets this requirement. Exhibit 8 explains that local agencies cannot apply for federal "Section 130" funds, but CDOT can. It further explains that CDOT administers the funds authorized under Section 130. As well, Exhibit 6, the application, and the testimony of Mr. Martindale, CDOT's statewide Railroad-Utility Program manager, indicate that the funding for this project is coming from Section 130 funds.").

motion, and asks that we stay the decision “until any related proceedings in the Weld County District Court and Arapahoe County District Court, including without limitation any appeals to the Colorado Court of Appeals and Colorado Supreme Court, have concluded.”⁹ The motion does not set forth any support for this request, though Monaghan Farms’ RRR application does.

18. As alternative relief, Monaghan Farms contends that we should stay our final decision if we reject the substantive challenges raised in RRR. Monaghan Farms argues that: (1) it is pursuing claims regarding the CDOT/UPRR Purchase Agreement in Weld County District Court; (2) it may appeal this decision to the Arapahoe County District Court; (3) there are multiple appeals pending (though it recognizes that the appeal from Weld County is likely to be dismissed because it is premature); and (4) that staying the decision will avoid any conflict of courts.

19. In our view, Monaghan Farms has not highlighted any proceedings that would result in judgments that conflict with this Decision. For example, in the notice of appeal that Monaghan Farms filed into the record, the issues raised concern the timing and validity of the Weld County Board of County Commissioners’ actions—not this Commission’s jurisdiction or the issues raised in this proceeding. Without evidence that the issue which we have adjudicated in this proceeding—whether abolishing the crossing at CR 2.5 in Weld County meets the standards articulated in statute and rule—is being adjudicated elsewhere, we perceive no danger of conflicting judgments.

20. As well, we decline to stay the Decision because Monaghan Farms may seek review in the Arapahoe County District Court. We see no reason to stay this Decision simply

⁹ Monaghan Farms’ Motion to Stay at p. 2.

because review may be sought. To boot, staying the Decision may raise questions about whether the Decision is final which could complicate judicial review.

21. Accordingly, we deny the Motion to Stay Decision as well as the request to stay this Decision that Monaghan Farms included in its RRR application.

II. ORDER

A. The Commission Orders That:

1. The corrected Motion to Stay Decision and corrected Application for Rehearing, Reargument and Reconsideration filed by Monaghan Farms on August 21, 2019 are accepted.

2. The Application for Rehearing, Reargument and Reconsideration is denied consistent with the discussion above.

3. The Motion to Stay Decision is denied.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 18, 2019.**

(S E A L)



ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners

CHAIRMAN JEFFREY P. ACKERMANN ABSENT.