

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0385R

IN THE MATTER OF THE APPLICATION OF COLORADO PACIFIC RAILROAD FOR AUTHORITY TO CHANGE A GRADE CROSSING FROM ACTIVE WITH FLASHERS AND GATES TO PASSIVE WARNING SIGNS AND PAVEMENT MARKINGS ONLY AT RITTGERS STREET AND COLORADO PACIFIC RAILROAD, IN EADS, KIOWA COUNTY, STATE OF COLORADO.

**COMMISSION DECISION DENYING
APPLICATION WITHOUT PREJUDICE**

Mailed Date: November 5, 2019
Adopted Date: September 25, 2019

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I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission denies, without prejudice, the application filed on July 12, 2019, by Colorado Pacific Railroad (CPR) for authorization to change the active crossing protection from gates and flashers to passive warning only at the crossing at Rittgers

Street and CPR, in Eads, Kiowa County, Colorado (Application). As part of this Decision, the Commission provides instruction to CPR on additional information that CPR should include in any new application for authorization to change the protections at this crossing.

B. Background

2. On July 12, 2019, CPR filed the Application with the Commission. The Application requests an order authorizing changing the active protections from gates and flashers to passive warning only, with the addition of new retroreflective R15-1 crossbuck signs, R1-2 YIELD signs, new ENS signs, new W10-1 advance warning signs, and pavement markings.

3. On July 16, 2019, the Commission issued notice of the Application and set an intervention period of 30 days from the date of the notice.

4. On August 8, 2019, the Town of Eads, Kiowa County, Colorado (the Town), filed an objection to the Application. In its objection, the Town states no trains have passed through the Town for many years. The Town explains that, during this time, its very young citizens have not experienced trains passing through the Town. In addition, the Town indicates a majority of its citizens are elderly and may have sight and hearing issues. Finally, the Town cautions that the general citizenry are not accustomed to stopping at the crossing and may be distracted by radios or other day noises. With these concerns, the Town contends that red lights, safety arms, and/or other stopping devices will be necessary to help ensure the safety of its citizens. The Town cautions that CPR's decision to not install safety features, such as red lights and safety arms, is a financial decision and does not fully address safety issues that the Town has.

5. On August 28, 2019, the Commission deliberated on the Application at its Commissioners' Weekly Meeting. By minute entry, the Commission deemed the Application complete for purposes of § 40-6-109.5, C.R.S., which establishes timelines for a Commission

decision on applications. *See also* the Commission's Rules of Practice and Procedure, Rule 4 *Code of Colorado Regulations* 723-1-1303(c) (setting forth the process by which the Commission determines completeness of an application). However, after discussion, the Commission tabled any further decisions on the Application in order to consult with legal counsel.

6. On September 18, 2019, the Commission deliberated again on the Application at its Commissioners' Weekly Meeting. After discussion among the two Commissioners present, the Commission tabled the matter to its next Commissioners' Weekly Meeting, when all three Commissioners would be present to vote.

7. On September 25, 2019, the Commission deliberated on the Application at its Commissioners' Weekly Meeting. The Commission determined that it would deny the Application without prejudice and provide instruction on additional information that CPR should include in any new application.

C. Application

8. The Application indicates one train per day is anticipated at this crossing, with no projection for additional trains within the next five years. The Application indicates the maximum anticipated timetable speed of trains using the crossing is ten miles per hour. The Application indicates the speed limit for vehicles traveling through the crossing is 25 miles per hour. The Application reports the most recent average daily traffic (ADT) study at the crossing, performed in 1988, accounted for 400 vehicles, 2 percent trucks, and zero school buses. The Application includes an Accident Report from a January 9, 1975 accident at the crossing, when it was used by Missouri Pacific Railroad Company. The report indicates the driver was injured. The report is included as Attachment E to the Application.

9. The Application describes the following proposed changes: The existing signal masts with crossing gates and flashers are to be removed. Two RxR pavement markings and stop bar pavement markings will be added, one on each approach. Two sets of R15-1 retroreflective crossbuck signs will be installed with R1-2 YIELD signs and I-13 ENS signs on retroreflective posts. The existing W10-1 advance warning sign south of the crossing on the north approach will be removed and two new W10-1 advance warning signs will be posted, one on the north approach and one on the south approach of Rittgers Street. The Application states private funding by the railroad owner will cover the cost of signal removal and warning sign and pavement markings installation, estimated at \$5,000.

10. The Application describes the nature and need for these changes as follows:¹

Missouri Pacific stopped running trains in 1999. They ran 10 trains per day, with some of the trains operating at night, at Timetable speed of 55 mph. The CPR will have one train per day, with timetable speed at this location of 10 mph. There are no new traffic counts since 1988. It has been determined that the crossing may be changed from Gates and Flashers to Passive Warning only with no reduction in terms of safety risk. The most recent AADT is from 1988 and is 400, 2% of which is truck traffic. ADT < 500 is classified as a low volume road. Vehicles utilizing this crossing are mostly local traffic and it would be beneficial to change to passive warning. Changing to passive warning will eliminate the risk of a gate or flasher malfunction and will reduce the amount of maintenance required for the crossing, therefore, it is most desirable to change to Passive Warning only. The local road is posted at 25 mph, and the crossing is located at Rittgers St, which has sufficient sight distance in all directions.

11. The Application indicates the Diagnostic Team Review was performed on May 31, 2019 and included Dr. Pam Fischhaber of the Public Utilities Commission, Van Brown (Public Works Director for the Town), Harold Robertson and Donald Oswald (Kiowa County Commissioners), and attendees from Crouch Engineering for CPR. The Grade Crossing Diagnostic Notes are included as Attachment D to the Application.

¹ Application at p. 6, ¶ 7.

D. Findings and Conclusions

12. Section 40-4-106, C.R.S., gives the Commission jurisdiction over the crossings between railroad tracks and public highways. In enacting that statute, the General Assembly charged the Commission with, *inter alia*, promoting and safeguarding health and safety of the public and preventing accidents. *See* §§ 40-4-106(1) and (2)(a), C.R.S. Pursuant to this statute, the Commission has the power to determine the just and reasonable manner, including the particular point of crossing; prescribe the terms and conditions of installation and operation, maintenance, and warning at such crossings; and to allocate the costs of safety signals or devices, among other things. The Commission reviews the crossing safety issues in this Proceeding pursuant to this express statutory authority.

13. Mindful of our statutory charge to promote and safeguard the health and safety of the public and prevent accidents, we do not take lightly a request to remove existing crossing gates and flashers and replace them with passive warning protections. We are particularly concerned when cost savings appear to be the driving force for removing the existing active protections. After reviewing the Application and its attachments, we have significant concerns with the lack of supporting evidence. Although we deemed the Application complete for purposes of § 40-6-109.5, C.R.S., that was a determination that the Application meets the basic requirements in our rules and not a determination that we found the Application would support granting the requested relief.

14. After further review of the Application, we find the Application and its attachments fall short of the information and supporting documentation that we would need to authorize removal of the existing active crossing protections at this crossing. In the Application, CPR states that vehicles using this crossing are mostly local traffic and contends that “it would

be beneficial”² to change from active to passive warning. CPR reasons that “[c]hanging to passive warning will eliminate the risk of a gate or flasher malfunction and will reduce the amount of maintenance required for the crossing, therefore, it is most desirable to change to Passive Warning only.”³ For further support, CPR states the local road is posted at 25 miles per hour and the crossing has “sufficient” sight distance.⁴ In a proceeding of this type concerning public safety at a crossing, we will not rely on mere conclusory statements that it is “most desirable” to remove the existing active crossing protections in order to eliminate the risk of a gate or flasher malfunction and to reduce the amount of maintenance required for the crossing. Nor are we persuaded by the claims and existing support in the Application that the vehicle speed limit of 25 miles per hour and “sufficient” sight distance at the crossing will mitigate safety concerns of removing the existing active crossing protections.

15. Because of the lack of support in the Application, we find it appropriate at this time to deny the Application, without prejudice, and provide instruction on additional information to be included in any new application. In these circumstances, we conclude that denial without prejudice, and the opportunity for CPR to file a new application, provides the most straightforward and efficient avenue of relief for CPR.

16. In preparing any new application for authorization to change the protections at this crossing, we identify for CPR the following areas where we believe additional information is appropriate and would help our decision-making:

- a) The costs and benefits of maintaining the existing crossing protections at this crossing, including hiring sufficient staff to address signal maintenance, compared to removing the existing crossing protections and replacing them with the protections proposed in the Application.

² Application at p. 6, ¶ 7.

³ *Id.*

⁴ *Id.*

- b) The potential for CPR's business operations to change such that the train or speed increases in the short- or long-term, and the impact such changes would have on the hazard index.
- c) The operational expertise of CPR in managing this type of operation including its previous experience and levels of insurance.
- d) How CPR described its proposed business and operational expertise in its filings to the Federal Railroad Authority seeking authority to operate this business in Colorado.
- e) Potential changes in the risk of civil liability for CPR resulting from modifying the crossing protections as proposed in the Application.

17. Finally, we direct that in the event CPR files a new application, Dr. Pamela Fischhaber should participate as Commission Trial Staff, rather than as Commission Advisory Staff. We ask that Dr. Fischhaber intervene in the application proceeding as a party and provide testimony in the record to assist in our decision-making.

II. ORDER

A. The Commission Orders That:

1. The application filed on July 12, 2019, by Colorado Pacific Railroad for authorization to change the active crossing protection from gates and flashers to passive warning only at the crossing at Rittgers Street and Colorado Pacific Railroad, in Eads, Kiowa County, Colorado, is dismissed, without prejudice, consistent with the discussion above.

2. The 20-day period provided by § 40-6-114, C.R.S., to file applications for rehearing, reargument, or reconsideration begins on the first day after the effective date of this Decision.

3. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
September 25, 2019.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners