

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0394R

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 ONLY AT NEPESTA ROAD AND COLORADO PACIFIC RAILROAD IN BOONE, PUEBLO 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 only at the crossing at Nepesta Road and

CPR in Boone, Pueblo 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 crossing protection from gates and flashers to passive only, with the addition of new retroreflective R15-1 crossbuck signs, new R1-2 YIELD signs, new I-13 ENS signs, new W10-2 intersection warning signs, and one new W-10-1 advance warning sign.

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 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.

5. 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.

6. 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

7. 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 speed of trains using the crossing is 25 miles per hour (MPH).¹ The Application indicates the speed limit for vehicles traveling through the crossing is 25 MPH.² The Application reports the most recent average daily traffic (ADT) study at the crossing, performed in 2019, accounted for 54 vehicles, 5 percent trucks, and 0 school buses. CPR states that no accident reports exist for this crossing.

8. The Application describes the following proposed changes at the crossing: The existing signal masts with crossing gates and flashers are proposed to be removed. New R15-1 retroreflective crossbuck signs will be installed with new R1-2 YIELD signs and new I-13 ENS signs on each retroreflective post. New W10-1 advance warning signs will be installed on the north approach and on the south approach, at a distance based on the 35 mph road speed limit. The Application states private funding by the railroad owner will cover the cost to remove the signals and install all necessary signs, estimated at \$5,000.

¹ The Application at p. 6, ¶ 6, and the Diagnostic Notes in Exhibit D, p. 2, state the maximum train speed is "25 MPH." This conflicts with the description at p. 6, ¶ 7 of the Application, which states CPR will have one train daily at a speed of 35 mph.

² The Application at p. 9, ¶ 3 states the speed limit for vehicles is "25 MPH." This conflicts with other statements. *See* Application at p. 6, ¶ 7 (local road posted at 35 mph); p. 7, ¶ 8 (35 mph road speed limit); p. 14, ¶ 1 (35 mph road speed limit); Exhibit D p. 2 (posted speed limit 35 mph).

9. The Application describes the nature and need for these changes as follows:³

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 35 mph. Revised traffic counts have been incorporated in the diagnostic review, and it has been determined that the crossing may be changed from Gates and Flashers to Passive only, with no reduction in terms of the safety risk. The most recent AADT is from 2019 and is 54, 5% 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 35 mph, and the crossing is located at Nepesta Rd, which has sufficient sight distance in all directions.

10. The Application indicates the Diagnostic Team Review was performed on May 31, 2019 and included Dr. Pam Fischhaber of the Public Utilities Commission and attendees from Crouch Engineering for CPR. The Grade Crossing Diagnostic Notes are included as Attachment D to the Application.

D. Findings and Conclusions

11. 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.

³ Application at p. 6, ¶ 7.

12. 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.

13. 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”⁴ 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.”⁵ For further support, CPR states the local road is posted at 35 MPH and the crossing has “sufficient” sight distance.⁶ 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

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

persuaded by the claims and existing support in the Application that the vehicle speed limit of 35 MPH and “sufficient” sight distance at the crossing will mitigate safety concerns of removing the existing active crossing protections.

14. 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.

15. 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.
- 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.

16. 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 only at the crossing at Nepesta Road and Colorado Pacific Railroad in Boone, Pueblo 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