

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0636R

IN THE MATTER OF THE APPLICATION OF THE CITY OF LOUISVILLE FOR AUTHORITY TO INSTALL APPROACH RAILROAD GATES WITH FLASHING LIGHTS, BELLS, CONSTANT WARNING TIME CIRCUITRY, NEW SIGNAL CABIN, AND UPGRADED MEDIAN POST-MOUNTED FLASHERS AT TRACKS OWNED BY BNSF RAILWAY COMPANY CROSSING DILLON ROAD, USDOT NO. 244798M, IN BOULDER COUNTY, STATE OF COLORADO.

**DECISION DENYING APPLICATION FOR REHEARING,
REARGUMENT, OR RECONSIDERATION**

Mailed Date: February 21, 2020
Adopted Date: February 19, 2020

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

1. This matter comes before the Commission for consideration of the application filed on December 30, 2019, by BNSF Railway Company (BNSF) seeking rehearing, reargument, or reconsideration (RRR) of Decision No. C19-0989, issued in this Proceeding on December 11, 2019. Through Decision No. C20-0050, issued January 23, 2020, due to the press of business, we granted the RRR for the sole purpose of tolling the 30-day time limit in § 40-6-114(1), C.R.S., to act upon an application for RRR. By this Decision, we consider and deny the merits of the RRR.

B. Background**1. Decision No. C19-0989**

2. By Decision No. C19-0989, the Commission: (1) granted a final extension to December 31, 2019, for BNSF and the City of Louisville (Louisville) to finalize and submit the signed Construction and Maintenance Agreement (CMA) ordered to be filed by the Commission in Decision No. R19-0640, issued July 29, 2019; and (2) provided notice to BNSF that in the event the signed CMA was not submitted by this deadline, the Commission intended to issue a notice of civil penalty assessment against BNSF of \$2,000 per day for failure to comply with the Commission's order, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S.

3. This is a case of first impression under the Commission's fining authority in § 40-4-106(1)(b), C.R.S. We found that continued delay in filing the signed CMA would postpone the upgrades and installations that were already approved and ordered to proceed by the Commission. We found that failure to file the signed CMA by the Commission's deadline would constitute a violation of a Commission order within the scope of § 40-4-106(1)(b), C.R.S.

4. In making these findings, the Commission concluded that its jurisdiction to prescribe the terms and conditions of installation and operation, maintenance, and warning at crossings is squarely grounded in safety. Section 40-4-106(2)(a), C.R.S., broadly authorizes the Commission to prescribe terms and conditions as may to the Commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted. We determined that, consistent with this safety standard, the Administrative Law Judge found the requirements of public safety and necessity were met by approving Louisville's design plans. *See* Decision No. R19-0640 at ¶ 50. We determined that further delay in filing the signed CMA beyond the extended deadline set by the Commission created a safety issue within the scope of our fining authority.

2. Application for RRR

5. On December 30, 2019, BNSF filed an application for RRR seeking reconsideration of Decision No. C19-0989. BNSF requests the Commission vacate its Decision and withdraw the notice of civil penalty.

6. BNSF takes the position there is no evidence in the record to support the finding that delay creates a safety concern. According to BNSF's line of reasoning, this finding is refuted by the fact that the two motions for extension were unopposed by BNSF and Louisville. BNSF acknowledges that Staff of the Public Utilities Commission objected to the extensions but claims the requests of the contracting parties should control.

7. BNSF posits that because this is a quiet zone project, there are no safety implications. BNSF argues there is no evidence the crossing is currently unsafe without the proposed modifications.

8. BNSF asserts the Commission lacks authority to compel parties to complete negotiations by a deadline. BNSF states the Commission's authority is limited to safety issues. BNSF contends that imposing fines related to deliberative process between BNSF and the road authority is antithetical to safety. BNSF suggests compelling faster reviews could decrease safety.

9. BNSF concludes the Commission's authority to regulate safety issues does not extend to compelling timing and substance of negotiations of agreements that are logistical and operational. BNSF argues the attempt to fine BNSF is an unnecessary and unwarranted intervention in a contractual relationship that potentially intrudes on the freedom to contract.

3. Response

10. On December 31, 2019, Louisville filed a response to BNSF's RRR. Louisville responds that the Commission's decision had no effect on the substance of the parties' negotiations. Louisville states the parties had already come to agreement on all substantive issues prior to the Commission's decision.

11. Louisville did not file a motion for leave to file this response, as required by Rule 4 *Code of Colorado Regulations* 723-1-1506 of the Commission's Rules of Practice and Procedure.

C. Findings and Conclusions

12. We find BNSF's position unavailing and therefore deny the RRR as moot and unripe.

13. A case is moot when any relief granted would have no practical legal effect on the existing controversy. A matter is unripe where the claim supposes speculative injury that may never occur.

14. We find that BNSF's concern of an unlawful penalty assessment is without merit. BNSF's legal and factual challenges in its RRR respond to a contemplated civil penalty. Decision No. C19-0989 provided notice to BNSF that the Commission intended to issue a notice of civil penalty assessment under its statutory authority and duty if the CMA was not filed by the deadline we imposed.

15. The record in this proceeding was cut short by BNSF complying with the Commission's order and filing the signed CMA. The Commission and affected parties can revisit the challenges raised in BNSF's RRR in a future proceeding where a penalty is actually assessed against a railroad company or through a future rulemaking of general applicability. Pre-rulemaking stakeholder outreach was ongoing when this proceeding and others caused the Commission to address the issue of its new fining authority in adjudications.

16. Because we deny the RRR on the bases of mootness and ripeness, we need not decide whether to accept Louisville's response to the RRR. We will therefore not consider the procedurally improper response including any determination of whether to accept the response on the Commission's own motion.

17. We remind BNSF that, pursuant to our statutory and constitutional authority, we have and will continue to determine when safety issues exist and we have the authority to correct those issues or prevent them from occurring in the first instance. That authority includes determining deadlines for filing CMAs when one or both parties are remiss in their duties to file such agreements in a timely manner.

II. ORDER

A. The Commission Orders That:

1. The application filed by BNSF Railway Company on December 30, 2019, seeking rehearing, reargument, or reconsideration of Decision No. C19-0989, is denied.

2. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
February 19, 2020.**

(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