

Decision No. C20-0401

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0809R

IN THE MATTER OF THE APPLICATION OF THE CITY OF LOUISVILLE FOR AUTHORITY TO INSTALL 4-QUADRANT RAILROAD GATES WITH FLASHING LIGHTS, BELLS, CONSTANT WARNING TIME CIRCUITRY, AND NEW SIGNAL CABIN, AT TRACKS OWNED BY BNSF RAILWAY COMPANY CROSSING SOUTH BOULDER ROAD, USDOT NO. 244804N, IN BOULDER COUNTY, STATE OF COLORADO.

**COMMISSION DECISION DENYING RRR
IN PART AND GRANTING RRR IN PART;
GRANTING LOUISVILLE'S MOTION
FOR LEAVE TO FILE RESPONSE;
ORDERING BNSF TO MAKE
CERTAIN FILINGS; AND REMANDING
PROCEEDING TO THE ADMINISTRATIVE
LAW JUDGE FOR A LIMITED PURPOSE**

Mailed Date: June 1, 2020
Adopted Date: May 27, 2020

I. BY THE COMMISSION

A. Statement

1. This proceeding pits the applicant, the City of Louisville (Louisville), against intervenor BNSF Railway Company (BNSF), as Louisville seeks approval for changes to an at-grade crossing on South Boulder Road. This Decision rejects the arguments BNSF raised in its exceptions and reiterates with insufficient discussion or citation in its application for reconsideration (RRR). However, the Decision grants RRR for the sole purpose of ascertaining whether the information BNSF claims it has recently received renders infeasible the crossing design approved in this proceeding. We also order BSNF to make certain filings and deny BNSF's request for oral argument because it is unnecessary.

B. Discussion

2. Louisville filed this application on November 16, 2018, as part of its efforts to eventually obtain permission from the Federal Railroad Administration to implement a quiet zone. Among other things, Louisville's application seeks to install a four-quadrant gate system, a new signal cabin, flashing lights and warning bells, and to maintain the simultaneous preemption system that currently coordinates vehicular and rail traffic at the crossing.

3. BNSF, the other party to this proceeding, owns the rails at the crossing. It intervened on December 19, 2018, and objected to various aspects of Louisville's application.

4. The proceeding was referred to an Administrative Law Judge (ALJ) on January 3, 2019 by Decision No. C19-0035-I. The ALJ held an evidentiary hearing on June 13 and 14, 2019, and then on September 10, 2019, issued Recommended Decision No. R19-0742 granting Louisville's application.¹

5. On September 30, 2019, BNSF filed exceptions challenging two aspects of the recommended decision: (1) its approval of simultaneous signal preemption; and (2) its approval of timed exit gates. As well, BNSF moved for oral argument.

6. The Commission denied BNSF's exceptions in Decision No. C20-0238 on April 13, 2020. We were unpersuaded by BNSF's challenge to the approval of simultaneous signal preemption in part because the challenge was "one-sided" and "largely ignore[d] the record evidence supporting the ALJ's conclusion and instead cho[se] to highlight its own evidence."² Similarly, we concluded that BNSF's challenge to the approval of timed exit gates foundered in part because "BNSF d[id] not provide a single record citation to support its

¹ Decision No. R19-0742 (September 10, 2019).

² Decision No. C20-0238 at ¶ 13.

contention that it is unreasonable to use timed exit gates at this crossing. And it provide[d] no developed challenge to the ALJ's conclusion that timed exit gates are appropriate for this crossing."³

7. BNSF filed an application for rehearing on May 4, 2020.⁴ BNSF argues that the Commission erred when it rejected BNSF's exceptions to approving simultaneous signal preemption and timed exit gates at this crossing. BNSF also asserts that it received certain information during the technical design phase of this crossing that may possibly indicate that the approved design is not feasible. It also requested oral argument on the substance of its RRR, or on the new technical information it recently received.

8. On May 19, 2020, Louisville moved to file a response to BNSF's RRR application and also filed its proposed response. In its proposed response, Louisville contends that oral argument is unnecessary and is unmoved by BNSF's 11th-hour "vague allusion to newly discovered information."⁵ Louisville asserts that "should the City's design prove infeasible at or prior to construction of the improvements granted in the City's application, the City and BNSF are capable of determining whether further Commission involvement is necessary or advisable for approval of alternative plans."⁶ It therefore opposes the opportunity for BNSF to introduce facts not currently in the evidentiary record.

³ *Id.* at ¶ 16.

⁴ In its Response to BNSF's RRR application, Louisville contends that BNSF's application was late by one day, and therefore we are without jurisdiction to hear it. Because the 20-day presumptive RRR deadline fell on Sunday, May 3, the deadline for filing RRR was the following business day: Monday, May 4. *See* § 40-6-121, C.R.S. (2019). BNSF filed its application for RRR on May 4 so it is timely.

⁵ Louisville's Response to RRR at p. 3.

⁶ *Id.*

C. Findings and Conclusions

9. We turn first to Louisville's motion for leave to respond to BNSF's RRR application. Under Commission Rule 1506 of the Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1, the Commission may grant a party's motion for leave to respond to an RRR application if that party shows that the RRR applicant is raising new facts that are not in the evidentiary record. We grant Louisville's motion because BNSF is, at least in part, directing the Commission's attention to newly-received evidence that is not in the record.

10. Next, we consider BNSF's arguments that challenge the approval of simultaneous preemption and timed exit gates at this crossing. To successfully challenge a Commission decision through RRR, the party seeking RRR must demonstrate that our underlying decision is in some respect unjust or unwarranted. *See* § 40-6-114, C.R.S. (2019); Rule 1500, 4 CCR 723-1.

11. In its application for RRR, BNSF presents us with summaries of the two arguments it made in its exceptions and does not cite to any evidence in the record to support its arguments. Instead, BNSF "refers the Commission to pages 5 through 11 for the factual basis for its requested exceptions and the relevant references to the record before the ALJ."⁷ The Commission cannot frame arguments and develop record support for parties in contested matters such as this. To do so would be to abdicate its neutral role. Ultimately, BNSF's brief argument and insufficient presentation of the record evidence fall short of persuading us that we erred when we considered these arguments in more depth on exceptions, or that there was any underlying error in the reasoning contained in the recommended decision. Accordingly, we reject BNSF's arguments challenging simultaneous preemption and timed exit gates.

⁷ Application for RRR at p. 4.

12. However, we are concerned by BNSF's statements that the crossing technology may not be able to meet the approved crossing design specifications. To that end, we grant the RRR in part for the limited purpose of considering the information BNSF references⁸ in its application for RRR and the additional information and filings we order in this Decision.

13. We order BNSF to make three additional filings. First, BNSF must make a filing including a detailed description, explanation, and technical specifications providing an explanation of why it is technologically impossible to maintain simultaneous preemption with a timed exit gate system at this crossing. In that filing BNSF must also indicate the date on which it received the information that may possibly indicate that the approved design is not technologically feasible. Second and third, BNSF must file into the record an estimate and a schematic diagram consistent with Louisville's application as required by and consistent with Rule 7204(a)(X)(C) and (D) of the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 CCR 7. BNSF's three filings shall be limited to the specific information requested, and shall be made within 30 days.

14. We deny BNSF's request for oral argument because the record is clear, the recommended decision is very thorough, and there are not any ambiguous facts that oral argument would help clarify.

15. Finally, we remand this proceeding to the ALJ to consider whether the information contained in the three filings discussed above warrants a hearing, to hold a hearing

⁸ Namely, the information BNSF claims to have received "since issuance of the ALJ's Recommended Decision . . . [and] during the technical design stage that [indicates] the use of timed exit gates at this crossing may not allow for simultaneous preemption." Application for RRR at p. 2.

on that issue if necessary, and to determine ultimately whether that information renders the approved design infeasible as BNSF suggests.

II. ORDER

A. The Commission Orders That:

1. The motion for leave to file response to BNSF's Application for RRR filed by the City of Louisville on May 19, 2020 is granted.

2. The Application for RRR filed by BNSF Railway Company (BNSF) on May 4, 2020, is denied in part and granted in part.

3. The motion for oral argument is denied.

4. BNSF is ordered to make, within 30 days of the mailed date of this Decision, the three filings discussed above.

5. This proceeding is remanded to the Administrative Law Judge for the limited purposes outlined above.

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

7. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
May 27, 2020.**

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

JOHN GAVAN

MEGAN M. GILMAN

Commissioners