

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.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA**

Mailed Date: August 14, 2020

I. STATEMENT, BACKGROUND, FINDINGS, AND CONCLUSIONS

A. Procedural History.

1. Only the procedural history necessary to understand this Decision is included.

This matter concerns the City of Louisville's (City) above-captioned Application to which BNSF Railway Company (BNSF) objected. After a two-day evidentiary hearing, the Administrative Law Judge (ALJ) granted the Application. Decision No. R19-0742 issued September 10, 2019.

2. On September 30, 2019, BNSF filed exceptions to the Recommended Decision, to which the City responded. During its weekly meeting on December 17, 2019, the Commission denied BNSF's exceptions. Decision No. C20-0238 issued April 13, 2020.

3. On May 4, 2020, BNSF filed an Application for Reconsideration of Commission Decision Denying BNSF Company's Exceptions to Recommended Decision No. R19-0742 (Application for Reconsideration), to which the City responded. In its Application for

Reconsideration, BNSF states that it received certain information after the Recommended Decision was issued that may possibly indicate that the use of timed exit gates may not allow for simultaneous preemption at the subject crossing. Application for Reconsideration, 5.

4. During its weekly meeting on May 27, 2020, the Commission denied in part and granted in part BNSF's Application for Reconsideration, and remanded this proceeding to the ALJ for a limited purpose. Decision No. C20-0401 issued June 1, 2020. While the Commission denied the substance of BNSF's Application for Reconsideration, the Commission was concerned with BNSF's statements that the crossing technology may not be able to meet the approved crossing design specifications. *Id.* at ¶¶ 11-12. For that reason, the Commission granted the Application for Reconsideration in part "for the limited purpose of considering the information BNSF references in its application for RRR and the additional information and filings we order in this Decision." (Footnote omitted.) *Id.* at ¶ 12.

5. At the same time, the Commission ordered BNSF to make the following three filings: a filing with 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 the subject crossing, including the date on which it received information that may indicate that the approved design is not technologically feasible; and a cost estimate and schematic diagram for changes to the crossing consistent with the City'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 *Code of Colorado Regulations* (CCR) 723-1. *Id.* at ¶ 13. The Commission ordered that "BNSF's three filings shall be limited to the specific information requested, and shall be made within 30 days." *Id.*

6. The Commission remanded the proceeding for limited and specific purposes, that is: for the ALJ to consider whether the information in the three required filings warrants a hearing; to hold a hearing if necessary; and to determine whether the information in the three required filings renders the approved design not feasible. *Id.* at ¶ 15. Because the Decision was effective upon its mail-date of June 1, 2020, the deadline to make the three filings was July 1, 2020. *Id.* at Ordering ¶ 4; Rule 1203(b) and (c) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1.

7. On July 1, 2020, BNSF filed an Unopposed Motion for Extension of Time to File Required Submission (Motion) seeking to extend the July 1, 2020 deadline to make the three required filings to August 3, 2020. Motion, ¶ 7. The Motion states that BNSF requires additional time to compile the required information, and that the parties are attempting to reach a mutually agreeable solution. *Id.* at ¶ 5. The Motion also notes that the required information may be unnecessary if the parties are able to reach an agreement. *Id.*

8. On July 8, 2020, the ALJ granted the Motion. Decision No. R20-0496-I. The ALJ noted that given the current procedural posture and the nature of the required filings, a settlement between the parties is unlikely to impact the Commission's order mandating that BNSF make the filings. *Id.* at ¶ 11. The Decision also specifically informs BNSF that granting the requested extension does not excuse BNSF from using the additional time allotted to gather the information necessary to make the required filings, even if it resolves its dispute with the City. *Id.* at ¶ 12.

9. BNSF never made the Commission-ordered filings. *See* Decision No. C20-0401, ¶ 13.

10. Instead, on August 3, 2020, BNSF filed a Stipulation of the Parties Concerning Railroad Preemption and Exit Gate Technology (Stipulation) with Exhibit A. The Stipulation

states that the parties have reached an agreement resolving the remaining disputes, which concern the railroad preemption type and exit gate technology. Stipulation, 4. Per the Stipulation, the parties agreed that simultaneous preemption will be maintained at the subject crossing, and that BNSF withdraws its objection to using simultaneous preemption. *Id.* It also provides that “[t]he City and BNSF shall work together to amend the approved Application as necessary and appropriate to reflect the agreement to modify the crossing design and replace the timed exit gate system with a photo radar exit gate system.” *Id.* Per the Stipulation, the City will fund the “installation of the photo radar exit gate monitoring system” and BNSF will maintain it once installed. *Id.*

11. In addition, the Stipulation states that it “shall not constitute an admission on the part of the City that it is technologically impossible, infeasible, or unsafe to maintain simultaneous preemption with a timed exit gate system at the subject crossing.” *Id.* The parties also note that they “never reached the point in the design process where technological impossibility or infeasibility was determinable.” *Id.* at 4-5. The Stipulation asks the ALJ to approve or recommend that the Commission approve the Stipulation. *Id.* at 5.

12. On August 13, 2020, BNSF filed a Notice of Filing of Revised Cost Estimate (Notice) and a Cost Estimate. The Notice states that BNSF’s cost estimate (filed contemporaneously with the Notice), is a revised cost estimate for the subject crossing to reflect changes based on the parties’ Stipulation.

B. Findings, Discussion, and Conclusions.

13. The Commission’s remand is narrow and limited. Decision No. C20-0401. On remand, the ALJ is to consider whether the information in the three required filings warrants a

hearing; to hold a hearing if necessary; and to determine whether the information in the three required filings renders the approved design not feasible. *Id.* at ¶ 15.

14. The Commission has not authorized the ALJ to consider, decide, or make recommendations on the parties' Stipulation, or to excuse BNSF from making the required filings. *See* Decision No. C20-0401. For that reason, the ALJ does not decide or make recommendations on either issue.

15. BNSF failed to make the required filings. As such, the ALJ concludes that the record lacks information establishing that the approved design is not feasible. Indeed, the parties acknowledge that they never determined whether the approved design was impossible or infeasible. Stipulation, 5. Based on the foregoing, the ALJ concludes that the record does not establish that it is necessary to hold an evidentiary hearing on the feasibility of the approved design. The ALJ recommends that no such evidentiary hearing be held.

16. Based on the foregoing, the ALJ transmits the record of this proceeding, this recommended decision containing findings of fact and conclusions thereon, and a recommended order to the Commission as provided under § 40-6-109, C.R.S.

II. ORDER

A. The Commission Orders That:

1. Consistent with the above discussion, an evidentiary hearing on the feasibility of the approved design will not be held.
2. Proceeding No. 18A-0809R is closed.
3. This Recommended Decision will be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

4. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision will be served upon the parties, who may file exceptions to it.

5. If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision will become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

6. If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

7. If exceptions to this Recommended Decision are filed, they may not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director