

Decision No. C23-0387

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 23A-0199R

IN THE MATTER OF THE APPLICATION OF BNSF RAILWAY COMPANY TO CONSTRUCT A REMOTE CROSSING BUNGALOW AT MILEPOST 70.41 AND UPGRADE THE TRACK CIRCUITRY FROM MOTION DETECTION TO CONSTANT WARNING TIME AT THE CROSSING AT MILEPOST 70.170 ON COLORADO AVENUE IN THE TOWN OF MERINO, LOGAN COUNTY, COLORADO (DOT #805305Y).

**COMMISSION DECISION DISMISSING APPLICATION
WITHOUT PREJUDICE**

Mailed Date: June 13, 2023

Adopted Date: June 7, 2023

I. BY THE COMMISSION

A. Statement, Findings, and Conclusions

1. On April 18, 2023, BNSF Railway Company (BNSF or Applicant) filed an application to upgrade the track circuitry from Motion Detection to Constant Warning Time, and replace all equipment at the crossing at Milepost 70.170 on Colorado Avenue in the Town of Merion, Logan County, Colorado (DOT #805305Y).

2. The Applicant filed its application pursuant to 4 *Code of Colorado Regulations* (CCR) 723-7-7002(b)(I-IX), 4 CCR 723-7204(a)(I), and 4 CCR 723-7-7204(a)(II) – (XVIII) and 4 CCR 723-7-7205.

3. The Commission noticed this application to all interested persons, firms, and corporations pursuant to § 40-6-109.5, C.R.S., on May 3, 2023.

4. Upon review of the Application, the Commission found several portions of the Application were missing or incomplete.

5. In particular, the Applicant did not include pursuant to 4 CCR 723-7-7204(a)(I)(K), the names and mailing addresses of all persons, including adjacent property owners, public utilities, and local government agencies that may be interested in or affected by the application. On page 27, the Applicant lists this information as “N/A.” It is necessary for an applicant to include this information so that the Commission can ensure interested parties are notified of the filing of the Application.

6. Further, on page five of the Application, the Applicant states: “BNSF requests a waiver of the requirement of a safety diagnostic due to the fact that the project involves BNSF scheduled maintenance and upgrades and no opposition is anticipated to the proposed work.” BNSF makes this waiver request of Commission Rule 4 CCR 723-7-7204(a)(I)(E).

7. The Commission construes BNSF’s request on page five as a request for waiver made pursuant to Commission Rule CCR 723-1-1003, which allows the Commission, for good cause shown, to grant waivers or variances from Commission rules if appropriate. However, we deny this waiver request of Commission Rule 4 CCR 723-7-7204(a)(I)(E) because we do not find good cause exists to waive this requirement. Pursuant to Commission Rule 4 CCR 723-7-7204(a)(I)(E), an applicant must include either a statement of the date that the required crossing safety diagnostic occurred, or a copy of written correspondence from Commission staff that a crossing safety diagnostic was not required. Because no correspondence with Commission staff occurred, the Commission cannot rule on the Application without further information regarding the need for a crossing safety diagnostic. The rule contemplates a safety diagnostic or

at least correspondence with Commission staff regarding a safety diagnostic occur prior to the filing of an Application. We do not see a need to waive this requirement in this instance.

8. Due to the foregoing, we deem the application incomplete and dismiss the application without prejudice pursuant to Commission Rule 4 CCR 723-1-1303(c), which allows the Commission to consider whether more information is necessary before deeming the application complete. Here, we cannot request a supplementation of the Application because the conferral required by Commission Rule 4 CCR 723-7-7204(a)(I)(E) must occur prior to the filing of an Application and cannot occur while the Application is before the Commission.

9. In this instance, because the missing information required pursuant to Commission Rule 4 CCR 723-7-7204(a)(I)(E) cannot be cured by a supplementation, we find it necessary to deem this application incomplete and dismiss it without prejudice.

II. ORDER

A. It Is Ordered That:

1. The application of BNSF Railway Company is deemed incomplete, within the meaning of § 40-6-109.5, C.R.S., and Rule 1303(c)(III) of the Commission's Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1, and is dismissed without prejudice.

2. The request for waiver of Rule 7204(a)(I)(E) of the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7, is denied.

3. The 20-day time period provided by § 40-6-114(1), C.R.S., to file an application for rehearing, reargument, or reconsideration shall begin on the first day after the Commission mails or serves this Order.

4. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING
June 7, 2023.**

(S E A L)



ATTEST: A TRUE COPY

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

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TOM PLANT

Commissioners

Rebecca E. White,
Director

COMMISSIONER MEGAN M. GILMAN
ABSENT