

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0389R

IN THE MATTER OF THE APPLICATION OF COLORADO PACIFIC RAILROAD FOR
AUTHORITY TO CHANGE A GRADE CROSSING FROM ACTIVE WITH FLASHERS AND
GATES TO ACTIVE WITH FLASHERS ONLY AT COLORADO STATE HIGHWAY 71 AND
COLORADO PACIFIC RAILROAD (SH 96) IN ORDWAY, CROWLEY 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 flashers only at the crossing at Colorado State

Highway 71 and CPR (SH 96) in Ordway, Crowley 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 existing 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 flashers only, with the addition of new retroreflective R15-1 crossbuck signs, new I-13 ENS signs, and other advance warning signs.

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 14, 2019, the Department of Transportation, State of Colorado (CDOT), filed a notice of intervention of right and an entry of appearance. In its notice, CDOT does not contest the Application but requests notice of any hearing so that it may participate if necessary.

5. 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.

6. 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.

7. 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

8. 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 ten miles per hour. The Application indicates the speed limit for vehicles traveling through the crossing is 35 miles per hour. The Application reports the most recent average daily traffic study at the crossing, performed in 2017, accounted for 2,300 vehicles, 16 percent trucks, and 0 school buses. CPR states that no accident reports exist for this crossing.

9. The Application describes the following proposed changes: The existing crossing gates are to be removed. The two signal masts will be replaced. Cantilevered signal bridges and a pair of 12" LED flashers will be erected over the traffic lanes. Four sets of crossing flashers are to be upgraded to 12" LED flashers. Two back-to-back R15-1 retroreflective crossbuck signs will be installed on each mast. Two pairs of flashers will be installed beneath each railroad crossbuck sign pair. A new I-13 ENS sign will be installed on each mast. A new W10-4 grade crossing and intersection advance warning sign will be installed. The Application states private funding by the

railroad owner will cover the cost of new signal installation. CPR reports it has a bid from RJ Corman Railroad Construction of \$157,780 for this work. CDOT will be responsible for the cost of installing the W10-4 advance warning sign, anticipated to be \$400.

10. The Application describes the nature and need for these changes as follows:¹

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 10 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 Flashers only, with no reduction in terms of the safety risk. At this remote location, and because there will not be a full time signal maintainer on the line, in the event of a power failure or gate malfunction, the gates could get stuck in the down position. Due to the remote location, it may take up to a day to repair and fix the gates. Meanwhile, local traffic will be faced with the choice of breaking the law as driving around railroad crossing gates is illegal in Colorado. It is most desirable to change to Flashers only. The local road is posted at 35 mph, and the crossing location is at an intersection of CO 96 and SH 71C (SH96), with very good sight distance.

11. The Application indicates the Diagnostic Team Review was performed on May 31, 2019 and included Dr. Pam Fischhaber of the Public Utilities Commission; Tobe Alumbaugh, Roy Elliott, and Blaine Arbuthnot (Crowley County Commissioners); Pepper Whittlef and Todd Ausbun (CDOT); and attendees from Crouch Engineering for CPR. The Grade Crossing Diagnostic Notes are included as Attachment D to the Application.

D. Findings and Conclusions

12. 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,

¹ Application at p. 6, ¶ 7.

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.

13. 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. We are particularly concerned when cost savings appear to be the driving force to remove the gates. After reviewing the Application and its attachments, we therefore 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 the Application would support granting the requested relief.

14. 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 crossing gates at this crossing. In the Application, CPR concludes it is “most desirable” to change from gates and flashers, to flashers only, in order to prevent drivers from having to choose whether to break the law and drive around gates that have become stuck in the down position.² CPR states that, because there will not be a full time signal maintainer on the line, it may take up to a day to repair and fix gates stuck that have become stuck in the down position because of a power failure or gate malfunction. CPR states the local road is posted at 35 miles per hour and the crossing has “very good” sight distance. In a

² Application at p. 6, ¶ 7.

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 gates so drivers do not have to circumvent them if broken. We are not persuaded by the claims and existing support in the Application that the posted vehicle speed of 35 miles per hour and the “very good” sight distance at the crossing will mitigate safety concerns of removing the crossing gates.

15. 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.

16. 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.

17. 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 flashers only at the crossing at Colorado State Highway 71 and Colorado Pacific Railroad (SH 96) in Ordway, Crowley 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