

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.

DECISION DENYING BNSF’S EXCEPTIONS

Mailed Date: April 13, 2020
Adopted Date: December 17, 2019

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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. Through this Decision we examine, and reject, both arguments BNSF raises in its exceptions. We also deny BNSF's request for oral argument because it is unnecessary on this record.

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. The ALJ held an evidentiary hearing and then issued a recommended decision granting Louisville's application.¹

5. 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.

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

C. Conclusions and Findings

6. The applicant (here, Louisville) bears the burden of proof by a preponderance of the evidence.² See §§ 13-25-127(1), 24-4-205(7), C.R.S.; Rule 1500, 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure. Louisville must show that its proposed changes to the crossing are reasonable and necessary "to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted." § 40-4-106(2)(a), C.R.S. To meet this burden, Louisville must show that its proposal meets the Commission's standard; it need not disprove each alternate design put forth by intervenors.³

7. To successfully challenge a recommended decision through exceptions, a party must show that a preponderance of the record evidence supports their position. *Cf.* Rule 1500, 4 CCR 723-1. So, while Louisville had the burden of persuasion before the ALJ, BNSF now has the burden of persuasion to show through its exceptions how the record evidence falls short of supporting the ALJ's findings and conclusions.

1. The Record Supports the ALJ's Conclusion that Simultaneous Preemption Is Appropriate

8. BNSF challenges the approval of simultaneous preemption at the crossing. In large part, BNSF asserts that the evidence it put forth at the hearing shows that a different preemption approach—advance preemption—is the industry standard for crossings like this and

² Proof "by a preponderance of the evidence" demands only that the evidence must "preponderate over, or outweigh, the evidence to the contrary." *Mile High Cab, Inc. v. Colo. Pub. Utils. Comm'n*, 2013 CO 26, ¶ 14. The widely accepted formula for expressing this burden of persuasion is "more probable than not." *City of Littleton v. Indus. Claim Appeals Office*, 2016 CO 25, ¶ 38 (citation omitted).

³ This does not mean that the ALJ or Commission ignores the evidence and testimony that BNSF added to the record during the hearing. For example, if BNSF had persuasive evidence that timed exit gates at this crossing would cause accidents each year, the Commission could credit that evidence and deny Louisville's application. Still, because this is Louisville's application Louisville does not need to address or introduce evidence to counter alternative designs BNSF puts forth. It can stand on the evidence it put forth, and on the record on the whole, and (like it does here) contend that it has met its burden to show that its proposal is reasonable.

the better choice at this crossing. As the recommended decision lays out, the record evidence more strongly supports simultaneous preemption (Louisville's approach) than advance preemption (BNSF's approach).

9. The ALJ concluded that Louisville met its burden to show that simultaneous preemption is a reasonable preemption approach to use for this crossing. The ALJ found that Louisville's expert witness, Mr. Lang, was credible and persuasive because on several occasions he observed the crossing operation and traffic during peak time (BNSF's report authors did not); he studied the actual operations at the crossing; analyzed the potential for traffic queuing in light of the crossing geometry and related intersections; and considered which preemption approach would be appropriate for the crossing in light of the specific preemption phasing for traffic at the crossing.⁴ He explained how he reached his conclusions.⁵ Coupled with Louisville's plan to install multiple signs that will remind drivers where to stop and warn drivers not to stop on the tracks, and noting that simultaneous preemption has operated well at this crossing for years, the ALJ found the evidence for simultaneous preemption compelling.⁶

10. The ALJ also concluded that BNSF's evidence did not show that advanced preemption was preferable at this particular crossing, largely because BNSF's supporting evidence was less compelling.⁷ The ALJ weighed the evidence and testimony supporting simultaneous preemption and advance preemption and found that much of the evidence BNSF marshalled to support advance preemption at this crossing "lack[ed] information [that would] establish [the evidence's] reliability."⁸ For example, one of BNSF's two third-party consultant

⁴ See Decision No. R19-0742 ¶¶ 71-74 and 86.

⁵ *Id.* at ¶ 86.

⁶ *Id.* at ¶¶ 87-91.

⁷ *Id.* at ¶¶ 87-94.

⁸ *Id.* at ¶ 87.

reports, the Campbell Technology Corporation report, “does not identify its authors, or their qualifications,” “fails to provide the basis for its conclusions,” and the ALJ found that “the report’s conclusion about simultaneous preemption suggests that its authors did not account for the actual preemption operation at the intersections and crossing.”⁹ The ALJ concluded that “the evidence concerning RailPros’ involvement [another third-party consultant] with the crossing is even less helpful.”¹⁰

11. Despite the ALJ’s findings that BNSF’s evidence was unpersuasive, on exceptions BNSF chooses to put a positive gloss on its reports rather than engaging with the record and addressing each negative finding from the ALJ. It asserts that at the hearing it established advance preemption is “industry standard” and “superior” to simultaneous preemption and, therefore, that advance preemption should be used at the crossing.¹¹ As Louisville’s response points out, BNSF did not establish either point.

12. BNSF’s argument relies on its own internal policy that indicates BNSF’s preference for advance preemption and also points to the American Railway Engineering Maintenance-of-Way Association Manual as well as the Institute of Transportation Engineers Report, both of which merely support the proposition that advance preemption should be considered as an option; not that it is the standard. Crossing applications are adjudicated on a crossing-by-crossing basis because the geometry and conditions at each crossing makes certain

⁹ *Id.*

¹⁰ The ALJ found that “RailPros ask[ed] the City to explain its preference for simultaneous preemption, and to consider advance preemption. ... The City complied. ... Even if RailPros’s comments are construed as a recommendation to use advance preemption, the record lacks evidence explaining RailPros’s conclusions and the methodology used to reach them. For example, the record lacks information as to whether RailPros performed a field review; observed traffic signal and railroad operations at the crossing; considered the geometry of the crossing; considered or observed traffic queuing over the crossing; or performed any calculations to reach its conclusions. ... No one from RailPros testified to explain the significant gaps in information.” Decision No. R19-0742, ¶ 90.

¹¹ BNSF Railway Company’s Exceptions to Recommended Decision No. R19-0742 and Request for Oral Argument, p. 13.

technologies better or worse options. What's more, even if BNSF had demonstrated that advance preemption is an industry standard, that showing alone would not demonstrate that simultaneous preemption is unreasonable much less that it is unreasonable at this crossing.

13. We are unmoved by BNSF's challenge to the ALJ's conclusion that simultaneous preemption is reasonable at this crossing. BNSF's argument challenges evidence that is not critical to the ALJ's ultimate conclusion. It largely ignores the record evidence supporting the ALJ's conclusion and instead chooses to highlight its own evidence. Such a one-sided approach does little to persuade us that the ALJ's thoughtful balancing of the record evidence should be disturbed. Therefore we reject the argument BNSF presents in its exceptions. Taken as a whole, the record evidence supports the ALJ's findings and conclusions regarding simultaneous preemption. We will not disturb them.

2. Timed Exit Gates

14. BNSF's second challenge is that the "ALJ erroneously concluded that a timed exit gate system was preferable, despite no objection from the City to the proposed radar design [presence detection] from BNSF."¹²

15. To begin, Louisville correctly responds that it need not object to the crossing designs that BNSF files into this proceeding. This is **Louisville's** application, not BNSF's application. Louisville only needs to show (by a preponderance of the evidence) that its proposed design is reasonable. Assuming for the sake of argument that BNSF's proposed design was reasonable, that would not make Louisville's design unreasonable. There may be multiple reasonable designs.

¹² BNSF's Exceptions at p. 15.

16. In its argument, BNSF does not provide a single record citation to support its contention that it is unreasonable to use timed exit gates at this crossing. And it provides no developed challenge to the ALJ's conclusion that timed exit gates are appropriate for this crossing. BNSF asserts—with no support—that the ALJ misinterpreted the relevant federal regulation, but even the excerpt BNSF puts forth only goes as far as to suggest that under certain site-specific circumstances, the use of presence detection may be advisable.

17. BNSF has not made a persuasive argument that the findings and conclusions in the ALJ's recommended decision approving timed exit gates (§§123-27) are unsupported or incorrect. We decline to disturb the recommended decision on that ground alone. And our independent review of the record indicates that the ALJ's findings and conclusions are well supported. We will not disturb them on this record.

3. Oral Argument

18. 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.

II. ORDER

A. The Commission Orders That:

1. The exceptions filed by BNSF Railway Company on September 30, 2019, are denied.

2. The motion for oral argument is denied.

3. 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.

4. This Decision is effective upon its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 17, 2019.**

(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

Commissioners

COMMISSIONER FRANCES A. KONCILJA'S
TERM EXPIRED MARCH 13, 2020.