

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.

**INTERIM DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
GRANTING UNOPPOSED MOTION
FOR EXTENSION OF TIME**

Mailed Date: July 8, 2020

I. STATEMENT, BACKGROUND, FINDINGS, AND CONCLUSIONS

1. Only the procedural history necessary to understand this Decision is included.
2. 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.
3. 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.
4. 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.

5. 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.

6. 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.*

7. The Commission remanded the proceeding to 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 is July 1, 2020. *Id.* at Ordering ¶ 7; Rule 1203(b) and (c) of the Commissions Rules of Practice and Procedure, 4 CCR 723-1.

8. 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. As grounds, BNSF states that it requires additional time to compile the required information, and that the parties are attempting to reach a mutually agreeable solution. *Id.* at ¶ 5. BNSF submits that the required information may be unnecessary if the parties are able to reach an agreement. *Id.* The Motion states that it is unopposed, and that it is not made for purposes of delay or other improper purposes. *Id.* at ¶ 8.

9. Because the Motion is unopposed, the ALJ finds good cause to waive the response time to it, and will do so. Rule 1400(b) 4 CCR 723-1.

10. The ALJ is skeptical of BNSF's statements that it requires more time to compile the required information and that the Motion is not made for purposes of delay. BNSF made allegations that the approved design may not be feasible in its Application for Reconsideration, nearly two full months *before* the July 1, 2020 deadline to file the information. And, over a year before the Commission ordered BNSF to provide a cost estimate and schematic diagram consistent both with the City's Application and Rule 7204, 4 CCR 723-7, the ALJ ordered BNSF

do so.¹ Decision No. R19-0352-I issued April 22, 2019. Given all the time that has elapsed since BNSF was first ordered to provide the cost estimate and diagram, BNSF's continued failure to gather the necessary information is unreasonable. For all of these reasons, the ALJ is unmoved by BNSF's assertion that it requires more time to compile the required information.

11. In support of its Motion, BNSF also states that it is working with the City to resolve their disputes, and argues that if they resolve their dispute, the required filings may not be necessary. Motion, ¶¶ 3 and 5. This assumption is unwarranted in the circumstances. 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.

12. Nonetheless, the ALJ finds that granting the requested extension allows the parties additional time to continue to discuss a resolution, while BNSF works *on a parallel track* to compile the information necessary to make the required filings. Granting the extension under the circumstances is also consistent with the Commission's policy of encouraging settlement in contested proceedings. Rule 1408, 4 CCR 723-1. For these reasons, the ALJ will grant the Motion. Granting the Motion 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.

13. No further extensions of time will be granted.

¹ As noted in the Recommended Decision, the cost estimate and diagram that BNSF provided was not consistent with the City's Application or the referenced Commission Rule. Decision No. R19-0742, ¶ 134.

II. ORDER

A. It Is Ordered That:

1. The response time to BNSF Railway Company's Unopposed Motion for Extension of Time to File Required Submission is waived and is granted.
2. The deadline for BNSF to make the filings required by Decision No. C20-0401 is extended to August 3, 2020.
3. This Decision is effective immediately.

(S E A L)



ATTEST: A TRUE COPY

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge