

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 20A-0142R

IN THE MATTER OF THE APPLICATION OF BNSF RAILWAY COMPANY FOR
AUTHORITY TO MODIFY AND UPGRADE ACTIVE WARNING DEVICES AT THE
CROSSING AT COUNTY ROAD 88 IN DELHI, LAS ANIMAS COUNTY, COLORADO
(DOT # 003299G).

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
STEVEN H. DENMAN
GRANTING APPLICATION IN PART
AND ALLOCATING COSTS**

Mailed Date: August 25, 2020

I. STATEMENT

1. On March 31, 2020, the BNSF Railway Company (BNSF) filed an Application, requesting authority to replace the last wig-wag signal in Colorado with flashing lights and bells at the crossing of Las Animas County Road 88 with the tracks of the BNSF, at railroad milepost 591.27 of the Raton Subdivision, National Inventory No. 003299G, in Delhi, County of Las Animas, State of Colorado.

2. On April 17, 2020, the Commission gave notice of this Application to all interested parties, including adjacent property owners, pursuant to § 40-6-108(2), C.R.S.

3. No interventions were filed in this proceeding.

4. The Application is unopposed. BNSF is the only party to this proceeding.

5. By Decision No. C20-0399-I (issued on May 28, 2020), the Commission deemed the Application complete, within the meaning of § 40-6-109.5, C.R.S., and referred the Application to an Administrative Law Judge (ALJ) for determination of the merits of the

Application and an appropriate allocation of costs of this project. Subsequently, the undersigned ALJ was assigned to preside over this proceeding.

6. In the Application, BNSF requested funding from the Highway-Rail Crossing Signalization Fund (HRCSF) with BNSF paying for 50 percent of the costs and the HRCSF paying for 50 percent of the costs. Because of this funding request by BNSF, § 40-4-106(2)(b), C.R.S., required a hearing on the Application and the determination of the appropriate allocation of the costs of the project.

7. Decision No. R20-0439-I (issued on June 12, 2020) scheduled a remote hearing by videoconference for July 30, 2020 at 9:30 a.m. The Decision also ordered BNSF to file on or before July 16, 2020, as prehearing disclosures, a list of its witnesses, a written summary of the testimony of each witness, and copies of the exhibits that BNSF intended to present at the hearing.

8. On July 16, 2020, BNSF filed its Witness and Exhibit List with its prehearing disclosures.

9. On July 30, 2020 at 9:30 a.m., the remote hearing was convened via the GoToMeeting videoconference platform. BNSF appeared through counsel. Amber Stoffels, BNSF's Manager of Public Projects, testified on behalf of BNSF. Hearing Exhibits 1 through 5 were admitted into evidence.¹ During the hearing, the sufficiency of the HRCSF to pay for 50 percent of the costs of the project became an issue. As a result, Dr. Pamela Fischhaber, the Commission's Deputy Director of Public Safety and Chief of the Rail and Transit Section,

¹ The Hearing Exhibits admitted into evidence were Hearing Exhibit 1 – DOT Crossing Inventory; Hearing Exhibit 2 – BNSF Plans; Hearing Exhibit 3 – Aerial Photo of CR 88 and crossing; Hearing Exhibit 4 – Signal Estimate; and Hearing Exhibit 5 – Application.

testified as a fact witness, without objection from BNSF. At the conclusion of the hearing, the matter was taken under advisement.

10. In accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission, the record and exhibits in this proceeding along with a written Recommended Decision.

II. FINDINGS AND CONCLUSIONS

11. The Commission has jurisdiction in this matter pursuant to §§ 40-4-106(2)(a) and 40-4-106(3)(a), C.R.S.

12. BNSF is a Delaware Corporation with its principal office located in Fort Worth, Texas. Its local Division office is located at 3700 Globeville Road, Denver, Colorado 80216.

13. The crossing of tracks with County Road 88 at railroad milepost 591.269 is a two-track crossing – a mainline track and a siding. BNSF owns both tracks, which are located in the Raton Subdivision of the Powder River Division, National Inventory No. 003299G, in Delhi, Las Animas County, State of Colorado.

14. Las Animas County is the roadway authority that owns the roadway affected by the Application. The roadway traverses the crossing from east to west.

15. The Application (Hearing Exhibit 5) and Ms. Stoffels' testimony describe the crossing depicted in Hearing Exhibit 2, the proposed signalization upgrades, and the proposed allocation of costs. Hearing Exhibit 3 is an aerial photo of the crossing at CR 88. Hearing Exhibit 4 is an estimate of the total project costs to upgrade signalization at the crossing.

16. As of November 7, 2019, the updated National Inventory Form reflects there are an estimated two though daytime Amtrak passenger trains. There are zero switching trains. All

traffic is intercity passenger. The maximum timetable speed of trains using the crossing is 75 miles per hour (MPH). *See* Hearing Exhibit 1.

17. The crossing is characterized as a local rural crossing, is at grade, and is located on a two-lane unpaved road, which sees very little traffic. There are no traffic signals at this crossing. According to the National Inventory Form, as of 1987, the annual average daily traffic was 40 vehicles per day; the crossing was not regularly used by school buses; and the estimated percentage of truck traffic was 0 percent. The posted speed limit at the crossing is 20 MPH. *See* Hearing Exhibit 1, page 2, and Hearing Exhibit 5, page 11.

18. The current protection at the crossing consists of one crossbuck assembly and a wig-wag signal with bells. There are no gates, flashing lights, or other warning devices. *See* Hearing Exhibit 1, page 1. The wig-wag signal is older technology with a light that goes back and forth when a train approaches. The wig-wag signal sits on a pedestal located on the east side of the crossing for approaching westbound vehicles and the wig-wag motion warns vehicles that a train is approaching the crossing.² *See* Hearing Exhibit 2. Once a westbound vehicle travels over the crossing, County Road 88 immediately turns to the south. *See* Hearing Exhibit 3.

19. Since the wig-wag signal is an older piece of equipment, it no longer meets BNSF's standards or the American Railway Engineers and Maintenance of Way (AREMA) standards. Moreover, there is a concern with the sight distance at the crossing. There is a curve in the mainline track to the north of the crossing. A driver of a vehicle approaching the crossing could have difficulty seeing a southbound train approaching the crossing. *See* Hearing Exhibit 3.

² Ms. Stoffels testified that the wig-wag signal has been at this crossing for many decades, and it is the last wig-wag signal on the BNSF system. Once the wig-wag signal is retired, Ms. Stoffels said that BNSF would refurbish it and donate the wig-wag signal to the Colorado Railroad Museum in Golden, Colorado.

BNSF would like to remove the wig-wag signal and bring the crossing into compliance with the AREMA standards.

20. BNSF proposes to upgrade the existing active warning system at the crossing. BNSF requests authority to upgrade the wig-wag style crossing currently in place and add flashers with a motion detector control device, including installation of an instrument house, bell, meter, crossing control connections, bidirectional crossing controls, and unidirectional crossing control as depicted in Hearing Exhibit 2 and Exhibit 3. Ms. Stoffels testified that the flashing lights would be additional warning for vehicles approaching the crossing, which will meet the BNSF and current AREMA standards.

21. The estimated total cost for the installation of the protection devices is \$389,742. *See* Hearing Exhibit 4. Ms. Stoffels testified that no federal funds would be used in the project. She testified further that she was not aware of any federal funds available for this project.

22. BNSF seeks an allocation of funds for the cost of the crossing of 50 percent from the HRCSF, 50 percent to BNSF, and 0 percent to Las Animas County.³ The amount proposed to be paid each by the HRCSF and BNSF would be \$194,871.

23. Dr. Pamela Fischhaber testified about the status of the HRCSF and regarding an outstanding BNSF project that has not yet been paid out to date. Because of the shortfall in the state budget due to impacts of the coronavirus (COVID-19) pandemic, the Colorado Legislature (Legislature) took about \$1 million from the HRCSF. As of July 30, 2020, the current balance in the HRCSF was \$256,479.

³ Ms. Stoffels testified that BNSF did not seek any allocation of the costs of the project to Las Animas County, because BNSF believed that Las Animas County probably did not have a lot of funding available.

24. In Proceeding No. 19A-0440R, a previous BNSF crossing upgrade application, Decision No. R19-0904 (issued on November 5, 2019) authorized BNSF to upgrade the warning devices at the crossing of U.S. Highway 34 across the tracks of the BNSF at railroad milepost 149.060 in Brush, Colorado. The Decision ordered that costs of the crossing upgrade, then estimated at \$212,069, should be allocated and paid as follows: the HRCSF, 70 percent (\$148,448); BNSF, 20 percent (\$42,414); and the Colorado Department of Transportation, 10 percent (\$21,207). Dr. Fischhaber testified that BNSF has not yet filed anything with the Commission advising completion of the project approved in Proceeding No. 19A-0440R or the final amount of cost for that project.

25. Dr. Fischhaber testified that, if the actual cost of the crossing upgrade ordered in Proceeding No. 19A-0440R were accurate, the remaining balance of the HRCSF to be allocated to pay for the upgrade proposed in this proceeding would be only \$108,030. If the actual cost of the Brush crossing upgrade were more than the estimate, the balance left in the HRCSF to pay for the upgrade proposed in this proceeding would be less than \$108,030. If the actual cost of the Brush crossing upgrade were less than the estimate, the balance left in the HRCSF to pay for the upgrade proposed in this proceeding would be more. Dr. Fischhaber concluded that, once the Commission knows the final payout from the HRCSF for the project approved in Proceeding No. 19A-0440R, the remainder of funds in the HRCSF would be available for the project in this proceeding.⁴

⁴ Dr. Fischhaber testified that for fiscal year 2021 to 2022 she expected the Legislature to appropriate approximately \$245,000 to the HRCSF. However, due to the uncertainties created by the COVID-19 pandemic on the State's budget, whether the Legislature would replenish the HRCSF with that amount of funding is uncertain.

26. Ms. Stoffels testified that if less than 50 percent of the cost of the project (estimated to be \$194,871) were available to be paid from the HRCSF, she would have to get approval from BNSF. However, her opinion was that BNSF would move forward with the crossing upgrade project.

27. Based upon substantial evidence in the record as a whole, the ALJ finds and concludes that approving the proposed upgrades to the crossing is reasonable and necessary to prevent accidents and to promote the safety of the public. The Application will be granted in part. The upgrades to the protection of the crossing will be approved as proposed by BNSF in the Application.

28. At this time, however, the ALJ cannot approve the proposed allocation of costs between the HRCSF and BNSF. A proper and reasonable allocation of the total cost of the upgrades to the crossing shall be as follows: Las Animas County, 0 percent; the HRCSF, up to 50 percent depending on the balance in the HRCSF when BNSF files actual final costs of the project with the Commission; and BNSF, 50 percent or more depending on the balance in the HRCSF when BNSF files actual final costs of the project with the Commission.

29. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. The application (Application), filed by the BNSF Railway Company (BNSF) on March 31, 2020, requests authority to replace the last wig-wag signal in Colorado with flashing lights and bells at the crossing of Las Animas County Road 88 with the tracks of the BNSF, at railroad milepost 591.27 (crossing) of the Raton Subdivision, National Inventory No. 003299G, in Delhi, County of Las Animas, State of Colorado, is granted in part.

2. The upgrades to the protection of the crossing as proposed by BNSF in the Application are approved. BNSF is authorized and ordered to upgrade the crossing of Las Animas County Road 88 with the tracks of the BNSF, at railroad milepost 591.27, in Delhi, County of Las Animas, State of Colorado.

3. Improvements authorized in ordering paragraph 2 above shall be in accordance with the plans and specifications introduced into evidence at the hearing in this proceeding.

4. The allocation of funding from the Highway-Rail Crossing Signalization Fund with BNSF paying for 50 percent of the costs and the Highway-Rail Signalization Fund paying for 50 percent of the costs, as proposed by BNSF in the Application shall be denied.

5. The costs of the crossing upgrade, currently estimated at \$389,742, shall be allocated and paid as follows: Las Animas County, 0 percent; the Highway-Rail Signalization Fund, up to 50 percent depending on the balance in the Highway-Rail Signalization Fund when BNSF files actual final costs of the project with the Commission; and BNSF, 50 percent or more depending on the balance in the Highway-Rail Signalization Fund when BNSF files actual final costs of the project with the Commission.

6. BNSF is required to inform the Commission in writing that the authorized improvements are complete and operational within ten days after completion. The Commission shall expect this letter by February 28, 2021. However, the Commission understands this letter may be provided earlier or later than this date depending on changes or delays to the construction schedule.

7. BNSF shall file the actual final costs of the project with the Commission with the letter to be filed by BNSF in Ordering Paragraph No. 6.

8. Proceeding No. 20A-0142R is closed.

9. This Recommended Decision shall 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.

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

- a. 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 shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.
- b. 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.

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

STEVEN H. DENMAN

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director