

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
ESTABLISHING DEADLINES AND PROCEDURES, AND
SCHEDULING REMOTE EVIDENTIARY HEARING**

Mailed Date: September 28, 2020

I. STATEMENT, BACKGROUND, FINDINGS, AND CONCLUSIONS

A. Procedural History.

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

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 City's Application on September 10, 2019. Decision No. R19-0742. Since that time, the Commission upheld the Recommended Decision granting the Application, and twice remanded the matter the ALJ. Decision Nos. C20-0238 issued April 13, 2020, C20-0401 issued June 1, 2020, and C20-0643-I issued September 2, 2020.

2. While the matter was before the ALJ on the first remand, the parties filed a Stipulation of the Parties Concerning Railroad Preemption and Exit Gate Technology (Stipulation) (on August 3, 2020). The ALJ issued a recommended decision consistent with the authority provided to her in the remand order, Decision No. C20-0401. Decision No. R20-0596

issued August 14, 2020. The ALJ did not rule on the parties' Stipulation, as being outside her remand authority. *Id.*

3. In its most recent remand order, the Commission reviewed the parties' Stipulation and determined that it "materially changes the crossing design by replacing timed exit gates with a photo radar exit gate system." Decision No. C20-0643-I, ¶ 6. The Commission stayed the most recent recommended decision, remanded the proceeding to the undersigned ALJ and ordered: (a) the City to file an amended application within 20 days; (b) BNSF to file an estimate and schematic diagram consistent with the amended application, as required by Rule 7204(a)(X)(C) and (D), 4 *Code of Colorado Regulations* 723-7 of the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, within 20 days; and (c) BNSF to make a signal engineer available to provide testimony about the modified design. *Id.* at ¶¶ 8-11.

4. Because the Stipulation materially changes the approved design, the ALJ determined that evidence would be necessary to decide whether the proposed design change meets the relevant legal standards, including whether the proposed change reasonably promotes safety at the crossing. Decision No. R20-0660-I issued September 11, 2020. As such, the ALJ scheduled a status conference for September 24, 2020 to determine a procedure and timeline for receiving evidence. *Id.*

5. On September 22, 2020, the City filed an Unopposed Amendment to Application, consistent with its Stipulation. That same day, BNSF filed Exhibits A and B, a cost estimate and schematic design consistent with the City's proposed amendment to its Application.

6. The ALJ called the matter for the status conference as noticed on September 24, 2020. All parties appeared through counsel. The parties agreed that the most efficient way to

provide the ALJ with evidence in support of their Stipulation and the related amendment to the Application is to file written testimony. The ALJ accepted this approach, but also scheduled an evidentiary hearing so that the parties may supplement written testimony should the ALJ determine that is necessary. The ALJ will vacate the hearing after the parties file written testimony if she determines that the parties have submitted sufficient evidence in support of their proposed design change. To facilitate this, during the status conference, the ALJ also established a deadline to file and serve written testimony and exhibits (as set forth below).

7. The evidentiary hearing will be held by video-conference using the web-hosted service, GoToMeeting, for the same reasons outlined in Decision No. R20-0660-I.

8. Because the hearing will be held remotely, all exhibits must be presented electronically. The Public Utilities Commission Administrative Hearings Section uses box.com to receive and manage exhibits presented at remote hearings of this nature.¹ As such, it is essential that the parties ensure they can access and use box.com *before* the hearing. The ALJ is entering orders to facilitate using box.com to manage exhibits during the hearing. The parties will be provided box.com links and instructions by email in order to: (a) upload documents and exhibits for use during the hearing; and (b) download documents and exhibits once they are presented during the hearing.

9. This Decision and Attachment A explains the procedures, requirements, and instructions to participate in the video-conference hearing using GoToMeeting, and are intended to ensure that the video-conference hearing proceeds efficiently without technical problems. As

¹ Box.com is a web-based document sharing service. When exhibits are presented during the hearing, the Commission will receive them electronically from each party's box.com folder for display.

such, the parties must carefully review and follow all requirements in this Decision and Attachment A.

10. The procedures developed for the video-conference evidentiary hearing are intended to replicate, as practicable, evidence presentation as it occurs when parties and witnesses are present in the hearing room. For example, when a party presents an exhibit, it will be displayed on the video-conference screen live so that parties and witnesses may view them together while the exhibits are being testified to and offered into evidence.

11. To minimize the potential that the status conference may be disrupted by non-participants, the link and meeting ID or access code² will be provided to the parties by email before the hearing, and the parties will be prohibited from distributing that information to anyone not participating in the hearing.

12. The ALJ may hold an informal GoToMeeting practice session before the hearing. The ALJ will informally contact the parties about this prior to the hearing.

II. ORDER

A. It Is Ordered That:

1. Consistent with the above discussion, a remote evidentiary hearing on whether to approve the Stipulation and amendment to the Application is scheduled as follows:

DATE: October 12, 2020

TIME: 9:00 a.m.

METHOD: Join by video-conference online at the meeting link to be sent to parties before the hearing.

² The parties will be emailed this information approximately one week before the hearing using the email addresses on file with the Commission for the parties and counsel. The ALJ anticipates that the hearing will be webcast, consistent with Commission practice; this means that those wishing to observe the hearing may do so without the need to join the hearing as a participant.

2. The parties are responsible for sharing the GoToMeeting Link, access, and ID code to witnesses and others participating in the hearing. Participants in the hearing may not distribute the GoToMeeting link, access, or ID code to anyone not participating in the hearing. Unless otherwise ordered, the parties and witnesses may not appear in person at the Commission for the above-scheduled hearing. Instead, parties and witnesses will participate in the hearing from remote locations, consistent with the requirements of this Decision.

3. All participants must comply with the requirements in Attachment A to this Decision, which is incorporated into this Decision.

4. **Video-Conference Participation.** The parties and witnesses are required to participate in the evidentiary hearing by video-conference using GoToMeeting. The parties must ensure that they and their witnesses are ready and able to participate in the evidentiary hearing by video-conference.

5. **Evidence Presentation at the Evidentiary Hearing.** Because the hearing will be held remotely by video-conference, all evidence must be presented electronically. All parties are responsible for ensuring they and their respective witnesses have access to all exhibits, and are able to download and view documents from box.com *during the hearing*. At minimum, this requires parties and witnesses to have internet access during the hearing.

6. **Deadline to File Written Testimony and Exhibits.** The parties must file and serve pre-marked written testimony and any other exhibits on or by October 6, 2020. The parties must upload all pre-marked exhibits (including written testimony) into each party's respective designated box.com folder prior to presenting them during the hearing.

7. **Exhibit Number Assignments.** The City of Louisville is assigned hearing exhibit numbers 200 to 299, and BNSF Railway Company is assigned hearing exhibit numbers 300 to

399. The parties may use either of their exhibit number blocks for exhibits that are jointly sponsored.

8. **Exhibit Identification and Titling Requirements.** Each type of a witness's testimony, including any attachments, (*e.g.*, direct and answer testimony) must be marked with one hearing exhibit number and must include in its title, the type of testimony (*e.g.*, direct testimony) and the name of the person providing written testimony. For example, if Hearing Exhibit 200 is the direct testimony of witness John J. Doe, the following title should be used: "Hearing Exhibit 200, Direct Testimony of John J. Doe." Anything accompanying a pre-filed hearing exhibit that is written testimony (*e.g.*, exhibits, appendices, or attachments) must be referred to as an "attachment" to the testimony and identified by the designated hearing exhibit number, the witness's initials, and a number sequence.³ For example, if Hearing Exhibit 300, Direct Testimony of Albert B. Cooke includes an attachment, the attachment must be marked and titled as "Hearing Exhibit 300, Attachment ABC-1." The attachment should not be referred to as Exhibit ABC-1 or Appendix A.

9. **Exhibit Formatting Requirements.** To ensure that electronic pagination matches the page numbers appearing on exhibits, the first page of *each* hearing exhibit must be numbered as page 1, with each additional page numbered in succession. For example, the cover page must be numbered page 1, and all following pages must be numbered sequentially, including blank pages, executive summaries, tables of contents, and lists of attachments. Page-numbering exhibits consistent with this requirement will facilitate electronic exhibit navigation during the

³ While marked for identification with one hearing exhibit number, the testimony and each attachment should be filed in compliance with Rule 1202 of the Commission's Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, which provides that the primary document and each secondary document must be separately uploaded in the Commission's E-Filing system. Exhibits should be uploaded into box.com in the same manner.

hearing. As to attachments to hearing exhibits (such as written testimony), the parties must likewise mark the first page as 1, with each additional page numbered in succession.

10. There shall be only one page number shown on each page of all hearing exhibits and attachments. Page numbers should be included in the header of each page-numbered hearing exhibit (*e.g.*, placed at the top right corner of each page of the hearing exhibit, as demonstrated in Attachment A). The top line of the header must include the title of the document (*e.g.*, “Hearing Exhibit 300, Answer Testimony of Albert B. Cooke, Page 1,” or “Hearing Exhibit 300, Attachment ABC-1, Page 1.”).

11. This Decision is effective immediately.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director