

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0315R

IN THE MATTER OF THE APPLICATION OF THE COLORADO DEPARTMENT OF TRANSPORTATION ON BEHALF OF WELD COUNTY FOR AUTHORITY TO REMOVE EXISTING PASSIVE WARNING SIGNS, CROSSING SURFACE, AND ROAD APPROACHES TO CLOSE THE EXISTING CROSSING AT TRACKS OWNED BY UNION PACIFIC RAILROAD COMPANY CROSSING COUNTY ROAD 2.5, USDOT NO. 804-480L, IN WELD COUNTY, STATE OF COLORADO.

**DECISION DENYING MOTION TO STRIKE,
EXCEPTIONS, AND MOTION FOR ORAL ARGUMENT**

Mailed Date: July 31, 2019
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I. BY THE COMMISSION

A. Statement

1. The dispute over the County Road 2.5 (CR 2.5) crossing abolishment boils down to a disagreement between, on the one hand, Colorado Department of Transportation (CDOT),

Weld County, and the Union Railroad Company (UPRR), who as part of a larger plan involving the U.S. Highway 85 (US 85) corridor applied to abolish this crossing. And on the other hand, various Weld County citizens who reside near or use the crossing (represented here, to some extent, by Monaghan Farms) and who oppose abolishing the crossing as part of the US 85 corridor project or contend that certain mitigating relief should be provided if the crossing is abolished.

2. The Commission's connection to the US 85 corridor project is small and somewhat peripheral. It is used only to apply its technical expertise to determine whether abolishing a crossing meets certain standards set forth in the statute and the rule. Even so, during the evidentiary hearing, Monaghan Farms and its witnesses were able to raise their concerns about how abolishing the crossing would affect them and their concerns with the larger US 85 corridor project. Still, the Commission's review is limited and technical, and opposition to this project is perhaps best raised in other, non-technical forums.

B. Background

3. This proceeding is one of a handful that relate to an ongoing project involving the US 85 corridor. As described in the parties' filings, UPRR, CDOT, and Weld County have come to an agreement whereby CDOT will purchase from UPRR a right-of-way that CDOT views as necessary for the US 85 corridor project. According to the amended application, the agreement reduces the chances that trains in Weld County will be parked where they block railroad crossings and will reduce the time that trains block crossings when they are being moved. These three parties contend that the agreement also results in better vehicular circulation, improved public safety, and more reliable access routes for emergency services. Monaghan Farms disagrees.

4. The relevant procedural history is set forth in the Administrative Law Judge's (ALJs) recommended decision. For context, we note that Monaghan Farms, the party that filed the Motion to Strike and the Exceptions that are the subject of this Decision, moved to intervene in this proceeding on July 5, 2018. The ALJ granted that motion on August 9, 2018 by Decision No. R18-0662-I on August 9, 2018. The evidentiary hearing was held December 3 and 4, 2018. The ALJ issued Recommended Decision No. R19-0356 on April 19, 2019. Monaghan Farms filed exceptions to the recommended decision on May 9, 2019. UPRR and CDOT responded to the exceptions on May 23, 2019. On June 5, 2019, Monaghan Farms filed its Motion to Strike.

C. Motion to Strike

5. We turn first to Monaghan Farms' June 5 Motion to Strike because granting the motion would remove certain statements from the record that we examine when addressing Exceptions.

6. The Motion to Strike challenges various statements UPRR and CDOT made in their responses to Monaghan Farms' Exceptions. Monaghan Farms asserts that some of the challenged statements result in additional evidence being introduced into the record and that others incorrectly characterize the evidentiary record or Monaghan Farms' arguments. We disagree with Monaghan Farms' contention that the statements result in additional evidence being introduced into the record. The Commission is aware that statements of counsel, particularly in responses to Exceptions, are not record evidence. We also decline Monaghan Farms' invitation to strike the other challenged statements in the responses. Counsel may offer reasonable characterizations of the evidence in any proceeding. However, the Commission independently reviews and evaluates the record and is not bound by counsel's characterizations of the record. In our view, the challenged statements are within the bounds of reasonable

advocacy, are reasonable characterizations of the record, and have not confused the Commission's independent review of the record. Accordingly, we deny the Motion to Strike.

D. Exceptions

7. Monaghan Farms enumerates nine challenges to the Recommended Decision. It also challenges the ALJ's determination that he was without jurisdiction to consider some relief that Monaghan Farms advocates should be attached to the crossing's abolishment. We have considered Monaghan Farms' Exceptions and for the reasons below we deny them.

8. Monaghan Farms' first challenge is that CDOT failed to meet its burden because it "presented no evidence that closing the crossing" would "prevent accidents or promote public safety."¹ But our review of the record indicates that testimony from CDOT's witnesses as well as the hazard index and exposure factor calculations in Exhibits 6 and 8 are sufficient to support a finding that closing the crossing will prevent accidents and promote public safety.² This is largely because traffic would be routed through two safer crossings, and because emergency responders would not attempt to travel CR 2.5 only to find it blocked by a train. So, the record contradicts the assertion underlying this first challenge. We recognize that Monaghan Farms introduced evidence contrary to CDOT's evidence. But that does not mean that CDOT failed to meet its own burden.

9. The second challenge asserts that closing the crossing would impede emergency vehicle access and that the ALJ ignored testimony from Monaghan Farms' witnesses on this

¹ Monaghan Farms' Exceptions at p. 9.

² Pages 34-35, 38-39, and 43 of the Recommended Decision contain the ALJ's relevant findings and conclusions.

point.³ Monaghan Farms points to testimony from its witnesses as support for this challenge but the ALJ acknowledged that testimony in his Recommended Decision. We recognize that some of Monaghan Farms' witnesses testified to their opinion of the condition of CR 2.5. In particular, Chief Bodane testified that emergency vehicle access will be impeded by the closing, that one alternate route for CR 2.5 is poorly maintained, and that emergency responders would have slightly longer response time and travel distance from stations 51 and 52. Balanced against this is testimony from CDOT's witnesses, Lieutenant Sheriff Halloran and Commander Domenico. Halloran testified that closing the crossing would not affect law enforcement's ability to respond to calls, and that when trains block crossings along the US 85 corridor it creates a safety issue. Commander Domenico testified that it is common for trains to block the CR 2.5 crossing, which causes traffic backups and creates safety concerns. The ALJ credited this testimony as supporting CDOT's contention that closing the crossing will prevent accidents and promote public safety, and found that any increase in emergency vehicle response time was reasonable. We agree.

10. The third challenge argues that diverting traffic from the CR 2.5 crossing (if it were abolished) to the alternate crossings at 168th Avenue and at CR 4 "would be more dangerous,"⁴ although Monaghan Farms acknowledges the ALJ's logic in finding the opposite, noting that "[t]he logic appears to be that because WCR 2.5 does not have as many safety

³ Monaghan Farms also contends that while this Commission has not previously denied an application to close a crossing on these grounds, it should follow other jurisdictions that have. On these facts, we are not persuaded that the increases in emergency response time warrant denying this application. We are also unpersuaded by the decisions from other Commissions cited by Monaghan Farms. Those decisions are distinguishable on their facts, and were applying the law of other states, whatever that may be, not Colorado law.

⁴ Monaghan Farms also argues that the ALJ's use of hazard indices and exposure factor calculations is a violation of due process. We do not address the claim because it is undeveloped, and because the ALJ, as the factfinder, may apply to the facts in evidence the very basic hazard index and exposure factor formulas in Exhibits 6 and 9.

measures as 168th Avenue . . . it would be safer to divert traffic across 168th Avenue.”⁵ In our view, that logic is sound. As we see it, this third challenge highlights **some** of the evidence in the record, but does not address why that evidence, balanced against the contrary evidence in the record, supports the conclusion Monaghan Farms urges on us, that diverting traffic through the other two crossings would be more dangerous.

11. The fourth challenge is that the ALJ erred by ignoring what Monaghan Farms characterizes as a reasonable alternative: that “CDOT . . . install active warning devices at [the crossing]”⁶ rather than abolishing the crossing. Monaghan Farms contends that the cost of this alternative solution would be “approximately \$300K to \$400K” and that this “is only a few hundred thousand dollars more than the project budget of \$150K.”⁷ Monaghan Farms notes that “CDOT refuses to do th[is] because UPRR is requiring CDOT to completely close the crossing as part of the Purchase Agreement.”⁸ In light of the budgetary constraints for this project and the larger purpose driving the agreement between CDOT and UPRR, we do not view this as a reasonable alternative.

12. Monaghan Farms’ fifth challenge asserts that closing the CR 2.5 crossing would adversely impact the environment and air quality. It offers no support for this assertion in its argument on exceptions, however. Monaghan Farms also comments that the ALJ took “an overly narrow view” of the PUC’s rules, but offers no alternate interpretation. Accordingly, we are unmoved by this challenge.

⁵ Monaghan Farms’ Exceptions at p. 17.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at p. 18.

13. The sixth challenge concerns the applicants' motive for abolishing the crossing. But by law, the Commission's role is simply to use its technical expertise to analyze the effects of closing the rail crossing—not the motive behind the application. Similarly, the seventh challenge, pointing out that Weld County had prematurely closed the crossing, plays no part in the Commission's crossing abolishment analysis.

14. We do not address the merits of the eighth and ninth challenges. The eighth contends that CDOT failed to comply with a commission rule,⁹ but does not explain how Monaghan Farms was harmed by the alleged deficiency or request a remedy for any harm. Still, because this issue continues to be raised and rejected, because the parties have already proceeded to the hearing, and because the Recommended Decision properly analyzes why CDOT is a proper applicant, we find good cause exists to waive Rule 7203 of the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7 (which appears to be at the root of this quibble) and do so now. Monaghan Farms makes a strong statement—that CDOT improperly alienated its police power—its ninth challenge. However, the sparse argument and factual citations supporting that statement fall short of presenting a viable and properly developed legal argument. Therefore, we do not address it.

⁹ In a variation on its earlier-argued theme, that CDOT is “not a proper applicant” to abolish the crossing at CR 2.5, Monaghan Farms argues that the applicants did not “present any testimony of their ‘qualifications to undertake, and [their] right to undertake, the requested action’ in violation of Commission Rule 7002(b)(VIII)(3). But Rule 7002 does not require a party to present testimony—it requires a party to present evidence. And as the ALJ noted when Monaghan Farms made this argument for a second time during the hearing, CDOT's Exhibit 8 meets this requirement. Exhibit 8 explains that local agencies cannot apply for federal “Section 130” funds, but CDOT can. It further explains that CDOT administers the funds authorized under Section 130. As well, Exhibit 6, the application, and the testimony of Mr. Martindale, CDOT's statewide Railroad-Utility Program manager, indicate that the funding for this project is coming from Section 130 funds.

15. Because we have not set aside the ALJ’s conclusion that the crossing at CR 2.5 should be abolished, we turn to the conditions that Monaghan Farms contends we should place on the abolishment of the CR 2.5 crossing. The first condition is that the Commission order UPRR to convert UPRR’s private frontage road to a public road. The ALJ concluded that he did not have jurisdiction to order UPRR to convert its private property into a public road. For the reasons outlined in the recommended decision, we agree. In our view, none of the decisions cited in exceptions stand for the proposition that this Commission can order a private frontage road like the one in question—over which we have no jurisdiction—to be converted to a public road to improve vehicle access for nearby property owners.

16. Monaghan Farms also asks this Commission to order the “improve[ment], paving and widening [of] WCR 2.5 from the railroad crossing heading east to WCR 29” and the “improve[ment], paving and widening [of] WCR 29 from the intersection with WCR 2.5 heading south to WCR 2 (E. 168th Avenue) . . . [and] requiring regular maintenance of these three roadways including adequate snowplowing and drainage of same.”¹⁰ Monaghan Farms does not articulate which entity should be ordered to provide these benefits though it would likely be a hodgepodge of state and local entities. While we would not order such relief on this record if we could, we agree with the ALJ that granting this request, which would require us direct state and local entities to undertake significant roadwork along miles of local and state roadway, is outside of our purview.

17. Finally, Monaghan Farms suggests that a bridge or viaduct might be constructed at this crossing if CDOT and UPRR “cannot find another way to mitigate the public safety

¹⁰ Monaghan Farms’ Exceptions at p. 29.

issues”¹¹ Monaghan Farms perceives. It notes that it did not previously make this request “because it seemed prohibitively expensive and less expensive forms of relief appeared available.”¹² We are skeptical that ordering construction of a bridge or viaduct at a lightly used rural rail crossing would constitute reasonable relief. In any event, the record before us does not support this request, which Monaghan Farms has made for the first time in its exceptions, so we decline to order a bridge or viaduct at the CR 2.5 crossing.

18. For the reasons outlined above we deny these Exceptions. As perhaps implied by now, we also deny the motion for oral argument included in Exceptions. The sizable record, the ALJ’s Recommended Decision, and the parties’ briefing on Exceptions were sufficient to allow us to deliberate and reach a decision.

II. ORDER

A. The Commission Orders That:

1. The Motion to Strike filed by Monaghan Farms on June 5, 2019 is denied.
2. The Exceptions filed by Monaghan Farms on May 9, 2019, are denied.
3. Monaghan Farms’ motion for oral argument is denied.
4. This Decision is effective upon its Mailed Date.

¹¹ *Id.* at p. 26.

¹² *Id.*

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
June 19, 2019.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

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Commissioners