

Decision No. C19-0989

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0636R

IN THE MATTER OF THE APPLICATION OF THE CITY OF LOUISVILLE FOR AUTHORITY TO INSTALL APPROACH RAILROAD GATES WITH FLASHING LIGHTS, BELLS, CONSTANT WARNING TIME CIRCUITRY, NEW SIGNAL CABIN, AND UPGRADED MEDIAN POST-MOUNTED FLASHERS AT TRACKS OWNED BY BNSF RAILWAY COMPANY CROSSING DILLON ROAD, USDOT NO. 244798M, IN BOULDER COUNTY, STATE OF COLORADO.

**COMMISSION DECISION: (1) GRANTING, IN PART,
MOTION FOR EXTENSION TO FILE AGREEMENT; AND
(2) PROVIDING NOTICE OF CIVIL PENALTY**

Mailed Date: December 11, 2019

Adopted Date: December 4, 2019

I. BY THE COMMISSION

A. Statement

1. By this Decision, the Commission grants, in part, the Partially Unopposed Motion for Extension of Time For Submission of Construction and Maintenance Agreement, filed by BNSF Railway Company (BNSF) on November 20, 2019 (Motion). In the Motion, BNSF requests an extension to January 31, 2020, for BNSF and the City of Louisville (Louisville) to finalize and submit the signed Construction and Maintenance Agreement (Agreement), required to be filed before construction can commence at the crossing. The Agreement was ordered to be filed in this Proceeding by the Commission in Decision No. R19-0640, issued July 29, 2019. By Decision No. C19-0779, issued September 20, 2019, the Commission granted an initial extension of 30 days, to October 20, 2019, to file the signed Agreement. Through this Decision, the Commission grants a further extension to **2:00 p.m. on December 31, 2019**, to file the signed Agreement.

2. Through this Decision, the Commission provides notice to BNSF that in the event the signed Agreement is not submitted by the Commission-ordered deadline of 2:00 p.m. on December 31, 2019, the Commission intends to issue a notice of civil penalty assessment against BNSF for failure to comply with the Commission's order, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. The civil penalty amount shall be \$2,000 for each day the signed Agreement is not timely filed with the Commission after the deadline of 2:00 p.m. on December 31, 2019.

B. Background

3. This proceeding involves an application filed by Louisville on September 17, 2018, requesting authority to upgrade the active warning equipment at the crossing of Dillon Road and BNSF tracks including flashing lights, entrance gates, bells, constant warning time detection circuitry, railroad signal cabin, relocation of advance warning signs, median extension, installation of pavement markings, interconnection with and preemption of the traffic signal at Pierce Avenue and Dillon road, and addition of "No Train Horn" plaques. Louisville requested this authority because it desires to obtain a quiet zone at this crossing from the Federal Railroad Administration. By Decision No. C19-0429-I, issued May 23, 2019, the Commission referred the matter to an Administrative Law Judge (ALJ).

4. Pursuant to § 40-4-106, C.R.S., the Commission has jurisdiction over the crossings in this state between railroad tracks and public highways. As relevant here, § 40-4-106(2)(a), C.R.S., authorizes the Commission to prescribe the terms and conditions of installation and operation, maintenance, and warning at crossings between railroad tracks and public highways as may to the Commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted.

5. By Decision No. R19-0640, issued July 29, 2019, the ALJ granted Louisville's application, as amended by Louisville on September 24, 2018, and July 15, 2019. The ALJ found and concluded that good cause exists and that the requirements of public safety and necessity are met by approving Louisville's design plans. Decision No. R19-0640 at ¶ 50. The ALJ authorized and ordered Louisville to proceed with the approved upgrades and installations. The ALJ's decision became a final decision of the Commission pursuant to § 40-6-109(2), C.R.S.

6. In its application, as amended, Louisville proposed to start construction on September 1, 2019, and be completed by November 30, 2020. Through Decision No. R19-0640, the Commission required Louisville to file a copy of the signed Agreement by September 1, 2019, prior to starting construction work at the crossing.

7. On August 30, 2019, Louisville filed an Unopposed Motion for Extension of Time, requesting a four-month extension to file the signed Agreement. Trial Staff of the Public Utilities Commission (Staff) filed a response questioning whether a full four months was needed. Staff responded that it believed the parties were capable of resolving differences more quickly and urged the parties should be proceeding with greater urgency. By Decision No. C19-0779, issued September 20, 2019, the Commission granted an extension to October 20, 2019. The Commission ordered that if the Agreement was not timely filed, BNSF must file an affidavit explaining what negotiation has been completed and what open issues remain.

8. On October 25, 2019, BNSF filed an affidavit from Amber Stoffels, Manager of Public Projects for Colorado, New Mexico, and Wyoming. Ms. Stoffels provides a history of the exchange of drafts between the parties. She reports the Agreement was provided to the BNSF Law Department for review on October 7, 2019. She reports no disagreements are known to exist and the Agreement is awaiting internal review. In its notice of submission filed with the affidavit,

BNSF explains that it and Louisville agreed to schedule a conference call to identify and resolve remaining issues. BNSF states drafting and follow-up communications would likely be required. BNSF explains that it endeavors to negotiate these agreements within a reasonably expedient timeframe, but its system is large and its resources are limited. BNSF notes there are over 17,000 public highway-rail grade crossings in its network, including 550 in Colorado.

9. Staff filed a response on November 8, 2019, opposing BNSF's request for additional time to file the Agreement. Staff notes the initial September 1, 2019, deadline was proposed by Louisville on July 15, 2019. Staff questions why negotiations are taking so long, given there is no indication of disagreement between the parties on any substantive issue. Staff questions why BNSF has not engaged outside counsel in order to accelerate the process and meet the Commission's filing deadline. Staff contends the October 25, 2019, affidavit and notice suggest a casual indifference by BNSF and Louisville to the Commission's ordered deadlines. Staff suggests the parties view Commission deadlines as merely aspirational.

10. On November 20, 2019, BNSF filed the instant Motion requesting an extension to January 31, 2020, to file the signed Agreement. BNSF explains that it and Louisville held their scheduled conference call to review and discuss the Agreement. BNSF reports the parties have resolved all known substantive issues. BNSF states certain prerequisite activities to filing a signed agreement remain, including review of the easement document by BNSF and drafting of the scope of work by BNSF. BNSF states that once the estimate for the scope of work is complete, it must be approved by the Louisville City Council, which meets only twice a month. BNSF states the most significant factor impacting finalization of the Agreement is the availability of personnel required to approve and execute the Agreement from both BNSF and Louisville.

C. Findings and Conclusions

11. We will grant the Motion, in part, and allow a limited extension to **2:00 p.m. on December 31, 2019**, to submit the signed Agreement ordered by the Commission in Decision No. R19-0640.¹ We will waive remaining response time to the Motion.

12. Through this Decision, the Commission provides notice to BNSF that in the event the signed Agreement is not submitted by the Commission-ordered deadline of 2:00 p.m. on December 31, 2019, the Commission intends to issue a notice of a civil penalty assessment against BNSF for failure to comply with the Commission's order, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. The civil penalty amount shall be \$2,000 for each day the signed Agreement is not timely filed with the Commission after the deadline of 2:00 p.m. on December 31, 2019.

13. Section 40-4-106(1)(b), C.R.S., as amended by the 2019 Colorado General Assembly, provides that if the Commission issues an order or promulgates a rule requiring a railroad company to comply with railroad crossing safety regulations, the Commission may impose a civil penalty against a railroad company that fails to comply with the order or rule. Pursuant to Rule 4 *Code of Colorado Regulations* 723-1-1302(b) of the Commission's Rules of Practice and Procedure, the Commission may impose a civil penalty, when provided by law. Although we have initiated pre-rulemaking stakeholder engagement in Proceeding No. 19M-0379R to consider adopting rules specific to this new statutory authority, we find the instant Proceeding requires the Commission to act in this individual adjudication before rules can be adopted. We find § 40-4-106(1)(b), C.R.S., does not require that the Commission adopt rules in order to use the fining authority conferred in this statute.

¹ The Commission's offices will close at 2:00 p.m. on December 31, 2019, for the New Year's holiday.

14. In this Proceeding, we find that failure to submit the signed Agreement by the Commission-ordered deadline will further delay implementing the upgrades and installations already authorized and ordered by the Commission in Decision No. R19-0640. These upgrades and installations include flashing lights, entrance gates, bells, constant warning time detection circuitry, railroad signal cabin, relocation of advance warning signs, median extension, installation of pavement markings, interconnection with and preemption of the traffic signal, and addition of “No Train Horn” plaques. Consistent with our jurisdiction to take actions reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted at the crossing, we have already found the requirements of public safety and necessity are met by approving Louisville’s design plans. § 40-4-106(2)(a), C.R.S.; Decision No. R19-0640 at ¶ 50. We find that continued, significant delay in commencing construction creates a safety concern as these upgrades and installations are further postponed.

15. We find this Proceeding is thus an appropriate circumstance in which to exercise the statutory authority in § 40-4-106(1)(b), C.R.S., that authorizes the Commission to assess a civil penalty against a railroad company for failure to comply with a Commission order.

16. In light of the lengthy extension allowed by this Decision (four months from the original deadline) and our concern explained above with further delay in the start of construction, we expect the parties to endeavor to finalize the Agreement and timely meet the final Commission-ordered deadline established in this Decision. This will allow these installations and upgrades to proceed as ordered and to avoid assessment of a civil penalty.

II. ORDER

A. It Is Ordered That:

1. The Partially Unopposed Motion for Extension of Time For Submission of Construction and Maintenance Agreement (Motion) filed by BNSF Railway Company (BNSF) on November 20, 2019, is granted, in part, consistent with the discussion above.

2. Response time to the Motion is waived.

3. The signed Construction and Maintenance Agreement (Agreement) between BNSF and the City of Louisville, ordered to be filed by the Commission in Decision No. R19-0640, issued July 29, 2019, shall be filed by **2:00 p.m. on December 31, 2019.**

4. The Commission provides notice to BNSF that in the event the signed Agreement is not submitted by the Commission-ordered deadline of 2:00 p.m. on December 31, 2019, the Commission intends to issue a notice of civil penalty assessment against BNSF for failure to comply with the Commission's order, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. The civil penalty amount shall be \$2,000 for each day the signed Agreement is not timely filed with the Commission after the Commission-ordered deadline of 2:00 p.m. on December 31, 2019.

5. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
December 4, 2019.**

(S E A L)



ATTEST: A TRUE COPY



Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners