

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0532R

IN THE MATTER OF THE APPLICATION OF BOULDER COUNTY, FOR AUTHORITY TO INSTALL 4-QUADRANT RAILROAD GATES WITH FLASHING LIGHTS, BELLS, CONSTANT WARNING TIME CIRCUITRY, AND RAILROAD SIGNAL CABIN, AT TRACKS OWNED BY BNSF RAILWAY COMPANY CROSSING INDEPENDENCE ROAD, USDOT NO. 244822L, IN BOULDER COUNTY, STATE OF COLORADO.

**COMMISSION DECISION
GRANTING EXCEPTIONS IN PART**

Mailed Date: December 13, 2019
Adopted Date: November 13, 2019

I. BY THE COMMISSION

A. Statement

1. This Decision grants, in part, the Exceptions to Decision No. R19-0732 (Recommended Decision) filed by BNSF Railway Company (BNSF or Company) on September 25, 2019. In its exceptions, BNSF requests modification of deadlines set forth in the Recommended Decision to file the Construction and Maintenance Agreement and to inform the Commission in writing that the authorized improvements are complete and operational.

2. Through this Decision, the Commission modifies deadlines set forth in the Recommended Decision, changing the deadline for filing the Construction and Maintenance Agreement from December 1, 2019 to January 31, 2020, and the deadline for informing the Commission that improvements are complete and operational from April 15, 2020 to July 15, 2020. Additionally, we modify the Recommended Decision to require BNSF to file with the Commission updates on construction progress on February 18, 2020, April 15, 2020, and June 15, 2020, as discussed below. The Recommended Decision is adopted as modified by this Decision.

B. Findings and Conclusions

3. On August 2, 2018, the County of Boulder (Boulder County) filed an application (Application) seeking approval of design plans to upgrade the active warning equipment to flashing lights with four-quadrant gates, bells, constant warning time circuitry, and railroad signal cabin; relocation of advance warning signs; installation of pavement markings; and the addition of “No Train Horn” plaques at the existing crossing of Independence Road crossing of BNSF, at railroad milepost 32.329 on the Front Range Subdivision, National Inventory No. 244822L, near the City of Boulder, Boulder County, State of Colorado.

4. Boulder County amended the Application on August 7, 2018. In the amendment, Boulder County waived the applicable statutory period found at § 40-6-109.5, C.R.S., regarding the time limit for decisions.

5. Boulder County and BNSF are the only parties in this Proceeding.

6. By Decision No. C18-0826-I, issued September 18, 2018, the Commission approved preliminary design plans filed by Boulder County. Final design plans were expected to be filed by October 1, 2018.

7. On September 27, 2018, October 31, 2018, January 16, 2019, and April 29, 2019, Boulder County filed amendments to the Application, each time requesting an extension of time to file the final design plans and cost estimate for Commission review and approval, and each time stating that it did not yet have final design plans or cost estimates from BNSF. Following Boulder County’s fourth request for an extension of time filed on April 29, 2019, the Commission referred the matter to an Administrative Law Judge (ALJ). Decision No. C19-0459-I, issued June 3, 2019. In Decision No. C19-0459-I, the Commission stated that it was referring the matter to an ALJ to

hold a status conference on issues including “why BNSF has been unable to provide a cost estimate and plans to Boulder for over ten months” and for a disposition on the merits.

8. On June 18, 2019, in compliance with Decision No. R19-0485-I, issued June 7, 2019, by ALJ G. Harris Adams, BNSF filed a cost estimate and schematic design. Boulder County filed a Submission of Cost Estimates and Request for Application Approval on June 21, 2019.

9. On September 5, 2019, the ALJ issued the Recommended Decision approving final design plans filed by Boulder County on August 2, 2018 and amended on August 7, 2018, and acknowledging and approving Boulder County’s Submission of Cost Estimates filed June 21, 2019, to the extent consistent with the remainder of the Application. The ALJ stated that Boulder County is funding 100 percent of the project through funds allocated by the Denver Regional Council of Governments. The ALJ required Boulder County to file a copy of the signed Construction and Maintenance Agreement by December 1, 2019. The ALJ also required Boulder County to inform the Commission in writing that the improvements are complete and operational within ten days after completion, and stated that the Commission shall expect this letter by April 15, 2020.

10. On September 25, 2019, BNSF filed Exceptions to the Recommended Decision. BNSF seeks to move the deadline for filing the Construction and Maintenance Agreement to March 5, 2020, an approximate three-month extension. It states that it has concerns that the December 1, 2019 deadline cannot be met, given that an easement must be negotiated as part of the Construction and Maintenance Agreement. BSNF also seeks to move the deadline for filing notice of completion with the Commission to September 5, 2020, with the understanding that the letter may be filed earlier or later than this deadline. It states that project completion will likely

not occur by April 15, 2020 because of the additional time needed to prepare and file the Construction and Maintenance Agreement.

11. On October 15, 2019, Boulder County filed a response to BNSF's exceptions. Boulder County does not oppose some extension of time for filing the Construction and Maintenance Agreement and for informing the Commission in writing that improvements are complete and operational. However, it states that the vast majority of its funding for this project is from the Colorado Department of Transportation (CDOT), and per CDOT's requirements, the project must be completed by July 15, 2020. Boulder County also states that it and BNSF have already engaged in some negotiation regarding the easement and Construction and Maintenance Agreement. Boulder County requests that the deadline for filing the signed Construction and Maintenance Agreement be January 31, 2020, that the Commission require BNSF to complete the project by July 15, 2020, and that BNSF be required to file documentation that the improvements are complete and operational by August 15, 2020.

12. Pursuant to Rule 1505(a) of the Commission Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, in proceedings where the applicant has waived the applicable statutory period for the Commission to issue a decision, parties may file responses to exceptions within 14 days following service of the exceptions. BNSF served the exceptions on September 25, 2019; therefore, Boulder County's response filed on October 15, 2019 was not timely. However, we find good cause to consider Boulder County's response. On its own motion, the Commission waives Rule 1505(a) and its time limit to file responses with respect to Boulder County's response.

13. We find good cause to grant some extension of time for filing the Construction and Maintenance Agreement and for informing the Commission that improvements are complete and

operational, but we are not persuaded that the extensions of time requested by BNSF are appropriate and necessary in this circumstance. Therefore, we require Boulder County to file a copy of the signed Construction and Maintenance Agreement ordered by Decision No. R19-0732 by January 31, 2020. We also require that BNSF complete the authorized improvements approved by Decision No. R19-0732 by July 15, 2020. Boulder County is required to inform the Commission in writing that the authorized improvements are complete and operational within ten days after completion.

14. Additionally, noting that the Application was filed over one year ago and noting the extensive delay regarding final design plans and cost estimate that led us to refer this proceeding to an ALJ, we are concerned that additional delay may jeopardize funding for the authorized improvements. We are also concerned, given this proceeding's history, that BNSF may not be adequately prioritizing moving the improvements to completion. We therefore require BNSF to file with the Commission updates on construction progress by the close of business on February 18, 2020, April 15, 2020, and June 15, 2020. Each construction update should be brief but must include the following information: (1) whether and what necessary equipment has been ordered; (2) construction progress since the last update was filed; (3) the current estimated completion date; and, (4) whether BNSF has identified any risks to the approved improvements' scope, construction schedule, or estimated cost, and an explanation of any such risks.

15. Finally, we caution that the Commission has already accepted significant delay in this proceeding. In the future, we will consider all options to encourage compliance with Commission-imposed deadlines.¹

¹ These options could include award of attorneys' fees, requiring parties to post bonds, imposing fines pursuant to §§ 40-1-406(1)(b) and 40-7-105(1), C.R.S., and, as relevant in this proceeding in the event additional delay results in loss of funding, determining cost allocation for crossing improvements pursuant to § 40-4-106, C.R.S.

II. ORDER

A. It Is Ordered That:

1. On its own motion, the Commission waives Rule 1505(a) of the Commission Rules of Practice and Procedure, 4 *Code of Colorado Regulations* 723-1, with respect to the Response to BNSF Railway Company’s Exceptions to Recommended Decision No. R19-0732 filed by Boulder County on October 15, 2019.

2. The Exceptions to Decision No. R19-0732 filed by BNSF Railway Company on September 25, 2019 are granted, in part, consistent with the discussion above.

3. Decision No. R19-0732 shall become the decision of the Commission as modified by this Decision.

4. The 20-day period provided for in § 40-6-114, C.R.S., within which to file application for rehearing, reargument, or reconsideration, begins on the first day following the effective date of this Decision.

5. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
November 13, 2019.**

(S E A L)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

FRANCES A. KONCILJA

JOHN GAVAN

Commissioners