

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 18A-0631R

IN THE MATTER OF THE APPLICATION OF THE CITY OF BOULDER FOR AUTHORITY TO INSTALL NEW 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 55TH STREET, USDOT NO. 244813M, IN THE CITY OF BOULDER, BOULDER COUNTY, STATE OF COLORADO.

**COMMISSION DECISION: (1) DENYING
REQUEST FOR STATUS CONFERENCE;
AND (2) GRANTING EXTENSION OF TIME TO FILE
SIGNED CONSTRUCTION AND MAINTENANCE
AGREEMENT THROUGH MARCH 2, 2020**

Mailed Date: February 3, 2020

Adopted Date: January 15, 2020

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I. BY THE COMMISSION**A. Statement**

1. Through this Decision, we deny the request for a status conference made by the City of Boulder (Boulder or the City) through its motion filed October 31, 2019. In addition, this Decision requires that the signed Construction and Maintenance Agreement (Agreement) ordered by Decision No. C19-0220, issued March 7, 2019, be filed no later than **March 2, 2020**.

2. If this deadline is not met due to the failure to negotiate in good faith on behalf of BNSF Railway Company (BNSF), as discussed below: (1) the Commission, in its discretion, intends to consider show cause proceedings and issuance of a notice of civil penalty assessment given parties' ongoing failure to comply with the Commission's order, or pursue show cause proceedings; and (2) Boulder is reminded of its option to pursue and support a complaint at any time alleging that BNSF is the cause of noncompliance with the Commission's orders, and requests that civil penalties be assessed.

B. Background

3. This proceeding involves an application filed by Boulder on September 17, 2018, seeking authority to upgrade the active warning equipment to flashing lights with entrance gates, bells, constant warning time circuitry, and railroad signal cabin; relocate advance warning signs; install pavement markings; and the addition of "No Train Horn" plaques at the existing crossing of 55th Street with the tracks of BNSF at railroad milepost 26.379 on the Front Range Subdivision, National Inventory No. 244813M, in Boulder, County of Boulder, Colorado (Application).

4. On October 17, 2018, BNSF filed a "Passive Notice of Intervention" that stated BNSF does not oppose or contest the granting of the Application. Further, if no other

interventions were filed, BNSF stated it had no objection to the Application being handled by modified proceedings under § 40-6-109(5), C.R.S., and the Commission may treat its appearance and intervention as withdrawn. No other interventions were filed. BNSF has made no subsequent material filings in the proceeding.

5. Through Decision No. C18-0948-I, issued October 29, 2018 (October 2018 Decision), the Commission deemed the Application complete. Because the Application was unopposed, the Commission found that it would determine this matter upon the record, without a formal hearing under § 40-6-109(5), C.R.S., and Rule 1403, 4 *Code of Colorado Regulations* (CCR) 723-1 of the Commission's Rules of Practice and Procedure.

6. Through the October 2018 Decision, the Commission approved Boulder's preliminary design plans, finding that the "requirements of public safety and necessity are met by approving Boulder's preliminary plans..."¹ and required final design plans by November 1, 2018. At Boulder's request, the Commission subsequently granted an extension to file the final design plans no later than February 15, 2019.²

7. Boulder submitted its final design plans on February 14, 2019, for Commission review and approval. Through Decision No. C19-0220, issued March 7, 2019, the Commission found that the requirements of public safety and convenience are met by granting Boulder's Application with the final design plans submitted. Among its determinations, Decision No. C19-0220 required Boulder to file a signed Agreement for the project by April 30, 2019, prior to starting work at the crossing.

¹ Decision No. C18-0948-I, issued October 29, 2018, at ¶ 18.

² Decision No. C18-0999-I, issued November 9, 2018.

8. No filings were made requesting rehearing, reargument, or reconsideration of Decision No. C19-0220, as permitted in § 40-6-114, C.R.S. However, on April 29, 2019, and July 31, 2019, respectively, Boulder sought unopposed extensions of time to file the required Agreement. Each request declared that negotiations were ongoing with BNSF. The Commission granted each request. Most recently, through Decision No. C19-0674 issued August 8, 2019, the Commission granted Boulder's requested extension filed on July 31, 2019, and permitted the deadline for Boulder to file a signed Agreement though no later than November 1, 2019.

C. Motion for Status Conference and Additional Filing Extension

9. On October 31, 2019, Boulder filed a motion requesting a status conference and an additional extension of time to file the Agreement. Boulder represents in its latest motion that BNSF "wishes to reach agreement" on the Signal Agreement at the 47th Street crossing considered in Proceeding No. 19A-0300R, and use that agreement as a template for the required Agreements in both this proceeding and Proceeding No. 18A-0629R (establishment of a quiet zone at the BNSF – Pearl Parkway crossing). It further represents that "press of other business, requests for information, documents, or submissions of modifications in draft agreements proposed by the City, and circulating documents within BNSF for review and signatures, take weeks or months for BNSF to respond."³ The Signal Agreement discussed is not required by Commission order.

10. The City therefore requests that the Commission set a status conference for this matter, along with the City's Applications in Proceeding Nos. 18A-0629R and 19A-0300R. Boulder includes that the "purpose of this status conference would be to establish commitments

³ October 31, 2019 Motion at ¶ 4.

by and deadlines for the parties to complete the required agreements related to the quiet zones at those crossings.”⁴ Contemporaneous motions were filed in each proceeding.

D. Findings and Conclusions

11. Parties are reminded that safety concerns remain with ongoing delay and noncompliance with Commission orders. Section 40-4-106, C.R.S., grants the Commission jurisdiction over the crossings in Colorado 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.

12. Failure to submit the signed Agreement by the Commission-ordered deadlines further delays implementing the crossing changes authorized and ordered by the Commission in Decision No. C19-0220. 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 found the requirements of public safety are met by approving the Application.⁵

13. Pursuant to Rule 4 CCR 723-1-1302(b) of the Commission’s Rules of Practice and Procedure, the Commission may impose a civil penalty, when provided by law. 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

⁴ *Id.* at ¶ 5.

⁵ Decision No. C19-0220, issued March 7, 2019, at ¶ 18.

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.

14. In addition, we remind Boulder that Rule 4 CCR 723-1-1302(a) provides that it may file a formal complaint at any time. As required by the rule, the complaint shall set forth sufficient facts and information to adequately advise the respondent and the Commission of the relief sought and how a statute, rule, decision, or agreement memorialized, accepted, or approved by a Commission decision is alleged to have been violated. A complaint filing must be filed as a separate proceeding, but may allege violations – including noncompliance with Commission orders – combined from multiple prior proceedings. Relief requested must be clear, including without limitation, whether the complainant requests the Commission pursue civil penalties.

15. If Boulder cannot obtain signed Agreements from BNSF in Proceeding Nos. 18A-0629R and 18A-0300R, and seeks resolution from this Commission, a complaint proceeding rather than continuing this proceeding through a status conference is appropriate.

16. Therefore, we decline Boulder's request to set a status conference. While we agree that the Commission's requirement to file Agreements remain unmet in Proceeding Nos. 18A-0629R and 18A-00300R, we see little value in continuing these proceedings through a "status conference" given the record here. Continuing these proceedings for Boulder's stated purpose of simply resetting dates certain, yet again, for the Agreement filings is unnecessary.

17. To that end, we grant Boulder's request for an additional extension to file the Agreement. Boulder's pleading filed October 31, 2019, indicates that negotiations remain ongoing. We find good cause to permit an extension to file the Agreement through no later than March 2, 2020. This additional extended deadline permits nearly four months from Boulder's

October 2019 request for extension for negotiations to conclude, and nearly a *year* from the Commission's final approval provided in Decision No. C19-0220, issued March 7, 2019.

18. If the Agreement is not filed as required by Decision No. C19-0220 on or before the additional extended deadline of March 2, 2020, the Commission will consider pursuing a show cause proceeding, such that it can address the parties' failure to comply with Decision No. C19-0220 and each subsequent extension, and issuing a notice of a civil penalty assessment against BNSF, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. Boulder, at any time, may file a complaint against BNSF as discussed above, and consistent with Rule 4 CCR 723-1-1302(a).

II. ORDER

A. The Commission Orders That:

1. The Motion for Extension of Time to File the Signed Construction and maintenance Agreement and Request to Schedule a Status Conference filed on October 31, 2019, by the City of Boulder is denied, in part, and granted, in part, as discussed above.

2. The signed Construction and Maintenance Agreement between BNSF Railway Company and the City of Boulder, ordered to be filed by the Commission in Decision No. C19-0220, issued March 7, 2019, shall be filed no later than **March 2, 2020**.

3. 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.

4. This Decision is effective on its Mailed Date.

**B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING
January 15, 2020.**

(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