

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO**

PROCEEDING NO. 18A-0809R

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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.

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**INTERIM DECISION OF  
ADMINISTRATIVE LAW JUDGE  
MELODY MIRBABA  
SCHEDULING STATUS CONFERENCE**

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Mailed Date: September 11, 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 Application. Decision No. R19-0742 issued September 10, 2019.

2. On September 30, 2019, BNSF filed exceptions to the Recommended Decision, to which the City responded. During its weekly meeting on December 17, 2019, the Commission denied BNSF's exceptions. Decision No. C20-0238 issued April 13, 2020.

3. On May 4, 2020, BNSF filed an Application for Reconsideration of Commission Decision Denying BNSF Company's Exceptions to Recommended Decision No. R19-0742 (Application for Reconsideration), to which the City responded. In its Application for

Reconsideration, BNSF states that it received certain information after the Recommended Decision was issued indicating that the approved crossing design changes concerning timed exit gates may not allow for simultaneous preemption at the subject crossing. Application for Reconsideration, at 5.

4. The Commission denied in part and granted in part BNSF's Application for Reconsideration, and remanded this proceeding to the ALJ for a limited purpose. Decision No. C20-0401 issued June 1, 2020. While the Commission denied the substance of BNSF's Application for Reconsideration, the Commission was concerned with BNSF's statements that the crossing technology may not be able to meet the approved crossing design specifications. *Id.* at ¶¶ 11-12. For that reason, the Commission granted the Application for Reconsideration in part "for the limited purpose of considering the information BNSF references in its application for RRR and the additional information and filings we order in this Decision." (Footnote omitted.) *Id.* at ¶ 12.

5. At the same time, the Commission ordered BNSF to make the following three filings: a filing with a detailed description, explanation, and technical specifications providing an explanation of why it is technologically impossible to maintain simultaneous preemption with a timed exit gate system at the subject crossing, including the date on which it received information that may indicate that the approved design is not technologically feasible; and a cost estimate and schematic diagram for changes to the crossing consistent with the City's Application, as required by and consistent with Rule 7204(a)(X)(C) and (D) of the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7. *Id.* at ¶ 13.

6. The Commission remanded the proceeding for limited and specific purposes, that is: for the ALJ to consider whether the information in the three required filings warrants a hearing; to hold a hearing if necessary; and to determine whether the information in the three required filings renders the approved design not feasible. *Id.* at ¶ 15. Because the Decision was effective upon its mail-date of June 1, 2020, the deadline to make the three filings was July 1, 2020. *Id.* at Ordering ¶ 4; Rule 1203(b) and (c) of the Commission’s Rules of Practice and Procedure, 4 CCR 723-1.

7. On the deadline to make the filings (July 1, 2020), BNSF filed an Unopposed Motion for Extension of Time to File Required Submission (Motion) seeking to extend the July 1, 2020 deadline to make the three required filings to August 3, 2020. Motion, ¶ 7. The ALJ granted the Motion, extending the deadline to August 3, 2020. Decision No. R20-0496-I issued July 8, 2020. The Decision specifically informs BNSF that granting the requested extension does not excuse BNSF from using the additional time allotted to gather the information necessary to make the required filings, even if it resolves its dispute with the City. *Id.* at ¶ 12.

8. BNSF never made the referenced Commission-ordered filings. Instead, on the new deadline to make the filings (August 3, 2020), BNSF filed a Stipulation of the Parties Concerning Railroad Preemption and Exit Gate Technology (Stipulation) with Exhibit A. Exhibit A is described as “a schematic diagram reflecting the maintenance of simultaneous preemption and use of the photo radar exit gate monitoring system” at the crossing. Stipulation, at 4. Per the Stipulation, the parties agreed that BNSF withdraws its objection to simultaneous preemption, which will be maintained at the crossing; with a photo radar exit system rather than the approved timed exit gate system; and that the parties agree to work together to amend the Application to reflect that change. *Id.*

9. In addition, the Stipulation states that it “shall not constitute an admission on the part of the City that it is technologically impossible, infeasible, or unsafe to maintain simultaneous preemption with a timed exit gate system at the subject crossing.” *Id.* The parties also note that they “never reached the point in the design process where technological impossibility or infeasibility was determinable.” *Id.* at 5. The Stipulation provides no information to indicate whether the proposed modification promotes public safety or is in the public interest.

10. On August 13, 2020, BNSF filed a Notice of Filing of Revised Cost Estimate (Notice) and a Cost Estimate. The Notice states that BNSF’s cost estimate (filed contemporaneously with the Notice), is a revised cost estimate for the subject crossing to reflect changes based on the parties’ Stipulation.

11. On August 14, 2020, the ALJ issued a Recommended Decision finding that the Commission’s remand order does not authorize the ALJ to consider, decide, or make recommendations on the parties’ Stipulation, or to excuse BNSF from making the filings required by Decision No. C20-0401. Decision No. R20-0596, ¶ 14. The Recommended Decision also finds that BNSF failed to make the filings required by Decision No. C20-0401, and as a result, the record lacks information establishing that the approved design is not feasible. *Id.* at ¶ 15. The Decision concludes that the record does not establish that it is necessary to hold an evidentiary hearing on the feasibility of the approved design, and that no such hearing should be held. *Id.*

12. During its weekly meeting on September 2, 2020, the Commission stayed Recommended Decision No. R20-0596 on its own motion. Decision No. C20-0643-I issued September 2, 2020. The Commission found that the parties’ Stipulation “materially changes the crossing design by replacing timed exit gates with a photo radar exit gate system.”

*Id.* at ¶ 6. The Commission 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 CCR 723-7, within 20 days; and (c) BNSF to make a signal engineer available to provide testimony about the modified design. *Id.* at ¶ 9. Finally, the Commission remanded the proceeding to the undersigned ALJ.

### **B. Findings, Discussion, and Conclusions.**

13. The ALJ reviewed Exhibit A to the Stipulation, and BNSF's cost estimate filed on August 13, 2020. The cost estimate shows the estimated costs for the crossing design with a radar detection system (rather than a timed exit gate system). Exhibit A to the Stipulation is a schematic design for the crossing showing a radar detection exit gate system. As with every other schematic design that BNSF filed in this proceeding, this one also does not provide the information required by Rule 7204(a)(X)(C) and (D), 4 CCR 723-7. Specifically, it fails to identify the equipment response time, minimum warning time, clearance time, buffer time, and total warning time.<sup>1</sup> The ALJ expects BNSF to make the required filings *with* the missing information, as ordered. If it fails to do so, the ALJ may not approve the Stipulation, and may recommend that the Commission not authorize any further changes to the design already approved in this proceeding.

14. Given that the Stipulation proposes to materially change the approved design from a timed exit gate system to a photo radar exit gate system, the ALJ anticipates the need to take evidence on whether that change meets relevant legal standards, including whether the

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<sup>1</sup> It should be unnecessary to highlight the information lacking from BNSF's latest schematic design; the ALJ does so given BNSF's history of failing to comply with multiple orders in this proceeding to provide the missing information. BNSF should be under no illusions that it has already complied with the Commission's order to file a schematic design.

proposed change is “reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted” at the subject crossing. § 40-4-106(2)(a), C.R.S. (2019). To this end, the ALJ is scheduling a status conference so the parties may provide input on how to submit that evidence (*e.g.*, hold an evidentiary hearing, submit written testimony, or both), and to identify any other requirements that should be implemented (*e.g.*, deadlines to file exhibits). As such, the parties must be prepared to address such issues, including a potential hearing date at which their witnesses will be available to testify. The parties must confer with each other on these issues before the status conference.

15. This proceeding has been pending since November 16, 2018, and it has been over one year since the ALJ issued the recommended decision addressing the merits of the Application. Decision No. R19-0742 issued September 10, 2019. This proceeding needs to reach a full and final conclusion without further delay. For these reasons, the parties are on notice that the ALJ anticipates that: (a) if an evidentiary hearing is scheduled, that it will likely be scheduled to take place within 20 days of the status conference; and (b) no extensions of time to make the filings required by Decision No. C20-0643-I will be granted.

16. Due to the COVID-19 pandemic, in-person hearings at the Commission’s offices are currently not permitted. By way of background, on March 10, 2020, Colorado Governor Jared Polis declared a state of emergency over COVID-19, the novel coronavirus pandemic. Executive Order D-2020 003. Since then, Colorado State government and the Commission have been working diligently to address how to safely and effectively manage the challenges presented by COVID-19. As relevant here, these efforts focus on limiting the

disruption to the Commission's services, while attempting to mitigate the risks to State employees and the public. For example, the Commission has been conducting its Weekly Meetings remotely, and the Commission has asked members of the public not to attend meetings in person, but to view them by webcast. Finally, public access to the building containing the Commission's offices and hearing rooms has been restricted. Based on all of this, the Commission will use the web-hosted video conferencing service GoToMeeting to hold the status conference. Doing so is also consistent with public health advisories to prevent the spread of COVID-19.

17. To minimize the potential that the status conference may be disrupted by non-participants, the link and meeting ID or access code<sup>2</sup> 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.

18. The parties are on notice that it is also likely that if an evidentiary hearing is held, it will also be held by video-conference.

19. This Decision and Attachment A hereto includes requirements to facilitate holding the status conference using GoToMeeting. As such, it is vitally important that the parties carefully review and follow all requirements in this Decision and Attachment A.

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<sup>2</sup> 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.

**II. ORDER**

**A. It Is Ordered That:**

1. Consistent with the above discussion, a remote status conference is scheduled as follows:

DATE: September 24, 2020

TIME: 11:00 a.m.

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

2. The parties are prohibited from distributing the link and access code for the GoToMeeting status conference to anyone not participating in the hearing.

3. Attachment A to this Decision is incorporated herein.

4. Before the status conference, the parties must be prepared to discuss the matters identified in this Decision and must confer with each other as required by this Decision.



5. 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