

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE  
SAN FRANCISCO, CA 94102-3298**FILED**09/09/19  
10:52 AM

September 9, 2019

**Agenda ID #17727**  
**Ratesetting**

TO PARTIES OF RECORD IN APPLICATION 15-05-014:

This is the proposed decision of Administrative Law Judge Debbie Chiv. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's October 10, 2019 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, *ex parte* communications are prohibited pursuant to Rule 8.2(c)(4)(B).

/s/ ANNE E. SIMON

Anne E. Simon

Chief Administrative Law Judge

AES:gp2

Attachment

Decision PROPOSED DECISION OF ALJ CHIV (Mailed 9/9/2019)

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

Application of the City of Santa Rosa for Approval to Construct a Public Pedestrian and Bicycle At-Grade Crossing of the Sonoma-Marin Area Rail Transit (SMART) Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.

Application 15-05-014

**DECISION GRANTING PETITION FOR MODIFICATION OF THE CITY OF SANTA ROSA**

**Summary**

This decision grants the petition for modification of Decision 16-09-002 filed by the City of Santa Rosa.

This proceeding is closed.

**1. Background**

On May 14, 2015, the City of Santa Rosa (City or Petitioner) filed an application for approval of an at-grade crossing of the Sonoma-Marin Area Rail Transit (SMART) track at Jennings Avenue in Santa Rosa, California. On September 20, 2016, the Commission issued Decision (D.) 16-09-002, approving the City’s application to construct an at-grade pedestrian and bicycle crossing. The decision provided that “authorization shall expire if not exercised within

three years of the issuance of this decision unless time is extended or if the above conditions are not satisfied.”<sup>1</sup>

On April 19, 2019, the City filed a petition for modification of D.16-09-002 (petition) requesting a modification of Ordering Paragraph 7 to extend the Commission’s authorization from September 20, 2019 to September 20, 2021.

Responses to the petition were filed on or before May 20, 2019 by the Commission’s Safety and Enforcement Division (SED), SMART, Northwestern Pacific Railroad Company (NWP), James L. Duncan, individually, and Stephen C. Birdlebough, individually and on behalf of the Sonoma County Transportation and Land Use Coalition, the Sierra Club, and the Friends of SMART (collectively, the Joint Parties). Replies were filed on June 14, 2019 by the City, the Joint Parties, and James L. Duncan.

A publicly noticed site visit was held on August 1, 2019 at the Jennings Crossing and was attended by the assigned Administrative Law Judge (ALJ), parties to the proceeding, and others. On August 8, 2019, the ALJ issued a ruling inviting additional comments on the site visit and any other remaining issues. On August 23, 2019, additional comments were filed by James L. Duncan and the Joint Parties.

## **2. Discussion**

### **2.1. Standard of Review**

Public Utilities (Pub. Util.) Code § 1708 gives the Commission authority to "rescind, alter, or amend any order or decision made by it." Modifying an existing decision, however, is an extraordinary remedy that must be carefully applied to keep with the principles of res judicata since “Section 1708 represents

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<sup>1</sup> D.16-09-002 at 42, Ordering Paragraph 7.

a departure from the standard that settled expectations should be allowed to stand undisturbed.”<sup>2</sup>

The Commission has consistently held that a petition for modification is not a substitute for legal issues that may be raised in an Application for Rehearing.<sup>3</sup> The Commission “will not consider issues which are simply re-litigation of issues that were decided in [the original decision].”<sup>4</sup> However, as permitted under Rule 16.4 of the Commission’s Rules of Practice and Procedure (Rules), allegations of new or changed facts may be raised in a petition for modification if properly supported by the appropriate declaration or affidavit.

A petition for modification must be filed within one year of the effective date of the decision proposed to be modified, and if past one year, the petition “must also explain why the petition could not have been presented within one year of the effective date of the decision.”<sup>5</sup>

## **2.2. Parties’ Positions**

Parties raise a wide range of factual and legal issues in responses and replies to the petition for modification. We summarize the major arguments relevant to the petition, as follows.

Petitioner states that following the issuance of D.16-09-002, the City and SMART began a several months long process of “developing a cooperative agreement that would allow the City to compensate SMART for constructing the crossing.”<sup>6</sup> An agreement was executed by the City in June 2017 but was not

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<sup>2</sup> 1980 Cal. PUC LEXIS 785, 24; *see also* 2015 Cal. PUC LEXIS 278, 7.

<sup>3</sup> *See* 2011 Cal. PUC LEXIS 483, 4.

<sup>4</sup> *Id.*

<sup>5</sup> Rule 16.4(d) of the Commission’s Rules of Practice and Procedure.

<sup>6</sup> Petition of the City of Santa Rosa to Modify D.16-09-002 (Petition) at 2.

executed by SMART. Following the City's execution of that agreement, Petitioner states that the 2017 Tubbs Fire affecting the City of Santa Rosa led to further delays in the process. In August 2018, SMART sent a letter to the City stating "it no longer supported an at-grade crossing at Jennings Avenue, stating that the proposed crossing design did not provide adequate safety for the public."<sup>7</sup> In an effort to address SMART's safety concerns, Petitioner states that it engaged an engineering firm. In April 2019, Petitioner sent correspondence to SMART informing SMART "of the City's willingness to incorporate additional safety measures in an effort to obtain SMART's concurrence to proceed" with the approved crossing.<sup>8</sup>

In filing the petition for modification, the City contends that it "remains firmly committed to construction of the at-grade crossing as approved by the Commission" and seeks an extension of the authorization period in order to "reach a satisfactory resolution with SMART by adding safety enhancements at the Jennings Ave. at-grade crossing..."<sup>9</sup>

SMART, NWP, and SED oppose the City's petition. SMART notes that it was not a party to the City's underlying application but clarifies that its prior support for the approved crossing was limited. SMART asserts that it in fact does not support an at-grade crossing as it is unnecessarily dangerous, consistent with SED's position.<sup>10</sup> SMART also argues that since the issuance of D.16-09-002, conditions have changed significantly in the area surrounding the approved crossing, as follows: (1) SMART constructed a multi-use path parallel to the

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<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3.

<sup>9</sup> *Id.*

<sup>10</sup> SMART's Response to Petition at 3.

SMART tracks, (2) SMART reconstructed the at-grade crossing at the nearby Guerneville Road crossing (approximately a quarter mile north of the Jennings Avenue crossing), and (3) the City established a Quiet Zone in an area that includes the Jennings Avenue crossing that the Commission “did not fully consider” at the time of the application filing.<sup>11</sup> SMART also disagrees with Petitioner’s characterization of its discussions with SMART stating that “the parties initiated discussions for a passthrough funding and construction agreement” but that the parties have not negotiated or reached agreement on numerous aspects of the agreement, including responsibilities of ownership, costs of operation, maintenance and repair, liability, etc.<sup>12</sup> SMART states that it has repeatedly requested a proposal from the City for a grade-separated crossing and the City has not provided one.

In NWP’s opposition to the petition, NWP states that it was not a party to the underlying application but that it is the exclusive freight operator on the Northwestern Pacific Line on which the proposed crossing is located.<sup>13</sup> NWP states that it “would adamantly object” to a proposal for an at-grade crossing at Jennings Avenue because it is unnecessarily dangerous.

SED filed an opposition to the petition arguing generally that the City has not provided sufficient justification for requesting a two-year extension and that the City is making substantial changes to the warning devices at the crossing which would constitute a new proposal for the crossing.<sup>14</sup>

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<sup>11</sup> SMART’s Response to Petition at 4.

<sup>12</sup> *Id.* at 5.

<sup>13</sup> NWP’s Response to Petition at 2.

<sup>14</sup> SED’s Response to Petition at 1.

The City's petition is supported by the Joint Parties and James Duncan. Both the Joint Parties and Mr. Duncan take issue with SMART's opposition to the at-grade crossing as unsafe, citing correspondence and statements made by SMART at public meetings to the contrary.<sup>15</sup> The Joint Parties and Mr. Duncan also assert that the claims made by SMART, NWP, and SED as to the safety of the at-grade crossing have already been considered and litigated in D.16-09-002.<sup>16</sup>

In its reply, Petitioner disputes SMART's claim that the facts and circumstances relied upon by the Commission in D.16-09-002 have changed. The City argues that SMART's construction of the multi-use path and reconstruction of the Guerneville Road crossing were considered in the underlying application.<sup>17</sup> Petitioner states that at no point during the proceeding "did SMART submit comments during either the Environmental Impact Report [EIR] or Commission public hearing processes expressing concern or opposition to an at-grade crossing at Jennings Avenue."<sup>18</sup> Petitioner also contends that NWP's opposition should be discredited given NWP's failure to participate at any point in the proceeding. Lastly, the City states that SED's arguments opposing the at-grade crossing "have been well-considered and rejected by the Commission in D.16-09-002 and upon rehearing."<sup>19</sup>

### **2.3. Relitigated Issues**

The Commission finds that many of the legal and factual issues raised in parties' responses and replies to the City's petition for modification involve

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<sup>15</sup> Joint Parties' Reply to Petition at 3, Duncan's Response to Petition at 4.

<sup>16</sup> *Id.*

<sup>17</sup> Petitioner's Reply to Responses at 3.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 5.

issues that have been considered and litigated in the proceeding prior to the issuance of D.16-09-002. As stated above, in a petition for modification, the Commission will not consider arguments that relitigate issues decided in D.16-09-002, without allegations of changed or new facts as supported by a declaration or affidavit.

In particular, SMART opposes the City's petition by raising arguments both in opposition to the approved at-grade crossing, citing safety concerns, and in favor of a grade-separated crossing.<sup>20</sup> We note that prior to the issuance of D.16-09-002, a voluminous record was developed through, among other things, extensive briefing by parties and multiple hearings, including evidentiary hearings and a public participation hearing that involved more than 100 members of the public.<sup>21</sup> A robust inquiry was made into the safety hazards and risks of the at-grade crossing at Jennings Avenue, as compared to the grade-separated crossing. The Commission concluded in D.16-09-002 that "[t]he City has made a convincing showing that it has eliminated all potential safety hazards" and that "[t]he design includes protection and warning devices in compliance with federal and State regulations (including General Order (GO) 75-D, Caltrans Highway Design Manual path standards, California Manual of Uniform Traffic Control Devices, and Federal Highway Administration Railroad-Highway Grade Crossing Handbook)."<sup>22</sup> Moreover, in approving the City's application, the Commission rejected SED's position opposing the at-grade crossing.<sup>23</sup>

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<sup>20</sup> SMART's Response to Petition at 5.

<sup>21</sup> D.16-09-002 at 6.

<sup>22</sup> *Id.* at 30.

<sup>23</sup> *See, e.g.*, D.16-09-002 at 25, 26, 27, 31, 35, 36.



Further, SMART and NWP were not parties to the proceeding, other than to oppose the City's petition for modification. However, D.16-09-002 explicitly references SMART's position: "SMART supports the at-grade pedestrian crossing" and "[a]s part of the design process, the City consulted with SMART and SED."<sup>24</sup> In their responses, neither SMART nor NWP address why they opted not join the proceeding as parties, or file an application for rehearing following the issuance of D.16-09-002, despite their apparent opposition to the approved crossing.

The Commission expects that SMART shall comply with D.16-09-002 and cooperate in good faith with the City to reach an agreement regarding the construction of the approved crossing at Jennings Avenue. While SMART argues that facts and circumstances relied upon by the Commission in D.16-09-002 have changed, SMART has not supported any allegations of new or changed facts with specific citations to the record or to matters that may be official noticed, or via a declaration or affidavit, as required by Rule 16.4. SMART may provide support for any allegations of new or changed facts by filing a petition for modification of D.16-09-002.

Therefore, the Commission finds that the arguments made by parties related to the safety and the risks of the approved at-grade crossing at Jennings Avenue have been thoroughly considered and litigated in this proceeding and will not be considered anew.

#### **2.4. Request for Extension**

In its petition, the City provides a chronology of events undertaken in an effort to reach an agreement with SMART following the issuance of D.16-09-002.

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<sup>24</sup> D.16-09-002 at 30-31.

Despite these efforts, the City and SMART have yet to reach an agreement as to the approved at-grade crossing and the City thus requests an extension of the authorization expiration date. While the petition was filed more than one year after the effective date of D.16-09-002, the petition is deemed justifiably filed given that D.16-09-002 ordered a three-year authorization period.<sup>25</sup>

The Commission finds that the City has worked diligently and cooperatively with SMART to construct the at-grade crossing and that an extension of the authorization expiration date is reasonable. Accordingly, the Commission grants the City's petition to modify D.16-09-002 to extend the expiration of the authorization to September 20, 2021.

### **3. Comments on Proposed Decision**

The proposed decision of ALJ Debbie Chiv in this matter was mailed to the parties in accordance with Section 311 of the Pub. Util. Code and comments were allowed under Rule 14.3. Filed comments on \_\_\_\_\_, and \_\_\_\_\_ filed reply comments on \_\_\_\_\_.

### **4. Assignment of Proceeding**

Liane M. Randolph is the assigned Commissioner and Debbie Chiv is the assigned ALJ in this proceeding.

### **Findings of Fact**

1. Petitioner's request for extension of the Commission's authorization to construct an at-grade crossing at Jennings Avenue is reasonable.

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<sup>25</sup> See Rule 16.4(d).

**Conclusions of Law**

1. Petitioner has demonstrated good cause to modify D.16-09-002.
2. The Petition for Modification of D.16-02-002 should be granted.

**O R D E R**

**IT IS ORDERED** that:

1. The City of Santa Rosa's Petition for Modification of Decision 16-09-002 is granted.
2. Ordering Paragraph 7 of Decision 16-09-002 is modified as follows:

This authorization shall expire if not exercised within five years of the issuance of this decision unless time is extended or if the above conditions are not satisfied. Authorization may be revoked or modified if public convenience, necessity or safety so require.

3. This proceeding is closed.

This order is effective today.

Dated \_\_\_\_\_, 2019, at San Francisco, California.