

**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-329809/02/21
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September 2, 2021

Agenda ID #19830
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 7, 2021 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).

/s/ ANNE E. SIMONAnne E. Simon
Chief Administrative Law JudgeAES:sgu
Attachment

Decision PROPOSED DECISION OF ALJ CHIV (Mailed 9/2/2021)**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, as modified by Decision 19-10-002, 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.”¹

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. In D.19-10-002, the Commission granted the petition for modification and extended the Commission’s authorization to September 20, 2021. In D.19-10-002, the Commission stated:

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 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 officially noticed, or via a declaration or affidavit, as required by Rule 16.4.²

On July 16, 2021, the City filed a second petition for modification of D.16-19-002 requesting to further extend the Commission’s authorization from September 20, 2021 to September 20, 2023.

Responses to the petition were filed on August 16, 2021 by: the Commission’s Rail Safety Division (RSD); SMART; 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 Friends of SMART (collectively, the Joint Parties).

¹ D.16-09-002 at 42, Ordering Paragraph 7.

² D.19-10-002 at 8.

Replies were filed on August 26, 2021 by: the City of Santa Rosa, Mr Duncan, and the Joint Parties.

2. 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 a departure from the standard that settled expectations should be allowed to stand undisturbed."³

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.⁴ The Commission "will not consider issues which are simply re-litigation of issues that were decided in [the original decision]."⁵ 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."⁶ If the Commission determines a late

³ 1980 Cal. PUC LEXIS 785, 24; *see also* 2015 Cal. PUC LEXIS 278, 7.

⁴ *See* 2011 Cal. PUC LEXIS 483, 4.

⁵ *Id.*

⁶ Rule 16.4(d) of the Commission's Rules of Practice and Procedure.

submission is not justified, it may issue a summary denial of the petition on that ground.⁷

3. Discussion

3.1. Parties' Positions

In its petition, the City of Santa Rosa asserts that "all City efforts to work with SMART to address its concerns and to proceed with construction of the Jennings Ave. crossing previously approved by the Commission have been rejected by SMART."⁸ Petitioner states that SMART has failed to comply with the Commission's expectation that SMART cooperate in good faith with the City. Petitioner states that "the City remains fully committed to construction of the Jennings Ave. crossing."⁹ Petitioner asserts that it seeks a two-year extension of D.16-09-002, as modified by D.19-10-002, to work towards "preserving the possibility of construction of a project that the City feels is in the public interest..."¹⁰

Petitioner further asserts that the "essential facts and conditions that were found by the Commission to support the authorization granted in D.16-09-002 remain unchanged."¹¹ Petitioner states that following the certification of the 2015 Final Environmental Impact Report (FEIR), "relatively minor project modifications have resulted," including: slight modification of the proposed pedestrian path to align with sidewalks on the north and south sides of

⁷ *Id.*

⁸ City of Santa Rosa's Petition for Modification (Petition) at 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

Jennings Avenue and preservation of three trees on the east side of the rail corridor that were previously anticipated to be removed.

The City's petition is supported by the Joint Parties and Mr. Duncan. The Joint Parties state that the need for an extension is due to SMART's insistence on safety measures beyond those that were approved in D.16-09-002.¹² Mr. Duncan asserts that SMART's Board of Directors has taken no action to reach an agreement with the City, nor provided direction to SMART's employees to do so.¹³ Mr. Duncan points out several proceedings currently pending against SMART related to this proceeding, including a taxpayer lawsuit against SMART filed in Sonoma County Superior Court, SCV-266092, and a complaint proceeding before the Commission in Case 21-06-011. Mr. Duncan advocates for a three-year extension to provide time for disposition in the related proceedings and to account for the COVID pandemic's continued impacts.

SMART and RSD oppose the City's petition. SMART states that it has made repeated, diligent, and good faith attempts to meet with the City regarding the crossing. SMART states that following the issuance of D.19-10-002, it met with the City on November 25, 2019 to continue discussions of the rail crossing but have not been approached by the City since that date.¹⁴ SMART states that "any agreement between SMART and the City requires the City to agree to important terms on ownership, operation, maintenance, repairs, insurance and liability" and that the City has failed to engage or discuss these terms.¹⁵

¹² Joint Parties Response to Petition at 3.

¹³ Duncan Response to Petition at 9.

¹⁴ SMART Response to Petition at 4.

¹⁵ *Id.* at 4, 5.

RSD states that the petition is not timely since it was not filed within one year from the effective date of the decision.¹⁶ RSD states that new information and evidence has arisen since the issuance of D.16-09-002, which supports that the crossing is unsafe. RSD cites several accidents that occurred on SMART's rail line property since SMART began operating in 2017. RSD further states that it is not clear what modifications the City has made to the plans for the Jennings Avenue crossing.

3.1.1. Replies to SMART and RSD

In reply comments, the City, Joint Parties, and Mr. Duncan dispute SMART's account that it has acted in good faith to negotiate with the City.

The City recounts a meeting with SMART that occurred on November 25, 2019, facilitated by Senator Mike McGuire, "at which time both Senator McGuire and the City representatives agreed that SMART was not interested in reaching any agreement to see the at-grade project move forward."¹⁷ In addition, the City provides the following events that occurred since the issuance of D.19-10-002:

- Through October and November 2019, the City redirected staff efforts to deal with the Kincade Fire.
- Throughout 2020, the City's resources were primarily devoted to handling the COVID pandemic. In September/October 2020, the City's resources were diverted to deal with the Glass Fire impact as well.
- On March 19, 2021, Jason Nutt (the City's Director of Transportation and Public Works) contacted Bill Gamlen (Chief Engineer for SMART) "regarding additional safety measures the City could implement to facilitate further

¹⁶ RSD Response to Petition at 3.

¹⁷ City of Santa Rosa Reply to Responses at 3.

discussions with SMART...” According to the City, Mr. Gamlen explained that “SMART’s position had not changed that they do not consider any at-grade crossing configuration to be safe at Jennings Avenue.”¹⁸

The City further states that:

...SMART has refused to engage in any discussion of a Jennings Ave. at-grade crossing and related City duties and responsibilities with respect to ownership, cost for ongoing and future operation, maintenance and repair, insurance, liability, and assumption of risk relating to an at-grade crossing.¹⁹

The City believes that “it is SMART’s position that the only crossing at Jennings Avenue that it will consider is a separated-grade crossing” and that this position directly conflicts with D.16-09-002, in which the Commission determined that a grade-separated crossing is impracticable.²⁰

Mr. Duncan also objects to SMART’s response and contends that SMART demands certain terms to move forward with the agreement, such as indemnification, insurance, and liability, based on SMART’s “continuing premise that the Commission was wrong in approving the safety of the Jennings Crossing...”²¹

In reply comments, the City, Mr. Duncan, and Joint Parties dispute RSD’s response to the petition.

The City states that throughout this proceeding, RSD has taken the position that at-grade crossings are inherently unsafe and should be not be

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 4.

²¹ Duncan Reply to SMART’s Response at 13.

authorized.²² The City argues that the Commission takes a broader view when evaluating whether a proposed crossing is in the public interest through a seven-factor test, which was applied in D.16-09-002 to approve the at-grade crossing. The City contends that RSD's arguments regarding safety issues with at-grade crossings were rejected by the Commission in D.16-09-002 when they were initially raised.

The Joint Parties take issue with RSD's list of accidents, arguing that four were apparent suicides and five occurred prior to August 2020, which suggests that SMART has not experienced a pedestrian or bicycle incident over the last twelve months.²³ The Joint Parties state that RSD's response does not indicate that the approved at-grade crossing presents an unusual danger.

Mr. Duncan argues that RSD attempts to relitigate the Commission's decision to approve the at-grade crossing by presenting "new information or evidence" while circumventing the requirement to file a petition for modification under Rule 16.4.²⁴ Even if RSD had filed a petition for modification, Mr. Duncan states that the incidents are not new or changed conditions that were not known at the time of authorization and should be disregarded.²⁵

3.2. Discussion

As a preliminary issue, in SMART's response, it states that it "was not a party to the underlying application" and that "SMART in no way intends to be made a party to the underlying application."²⁶ The Commission disagrees with

²² *Id.* at 5.

²³ Joint Parties Reply to Responses at 3.

²⁴ Duncan Reply to RSD's Response at 7.

²⁵ *Id.* at 9.

²⁶ SMART Response to Petition at 2.

SMART's claim. Pursuant to Rule 1.4(a), a person becomes a party to a proceeding by filing a response to a petition. SMART filed a response to the City's first petition for modification on May 17, 2019. As such, SMART is a party to this proceeding.

Next, the Commission disagrees that the City's petition is untimely. Although it was filed more than one year from the effective date of D.19-10-002, the Commission granted a two-year extension of the authorization period in D.19-10-002. As such, it is reasonable that the City would make use of much of the two-year authorization period before seeking a further extension from the Commission through a petition. The petition is deemed timely filed.

Petitioner states that it is fully committed to construction of the Jennings Ave. crossing and that SMART has failed to cooperate in good faith with the City. The City seeks a two-year extension to work towards preserving the possibility of construction of a project that the City believes is in the public interest. SMART states that it has made repeated, good faith attempts to meet with the City.

In D.19-10-001, the Commission stated that it "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."

Given the shortness of time before the authorization's expiration, there is insufficient time to fully ascertain whether SMART has indeed cooperated with the City. Based solely on parties' filings in response to the petition, however, the Commission is not convinced that SMART has been cooperating in good faith with the City to reach an agreement regarding construction of the approved at-

grade crossing. If in fact SMART is proved to have not been cooperating in good faith with the City, SMART may be in violation of D.16-09-002 or D.19-10-001.

RSD alleges that there is new information and evidence that was not known at the time of the authorization in D.16-09-002, and that this new information and evidence should bar extending the authorization period. Parties argue that the information cited by RSD is not relevant, or is not a new or changed condition that was not known at the time of the Commission's authorization. The incidents cited by RSD date back to 2017 and the bulk of the incidents occurred in 2019. It is unclear why RSD waited to inform the Commission of this information one month before the authorization's expiration and only in response to this petition, rather than through its own petition for modification.

Given the impending expiration of the Commission's authorization in this proceeding, there is insufficient time and opportunity to litigate the cited 2017-2019 incidents. Should RSD (or any party) seek to modify D.16-09-002 and cite allegations of new or changed facts in support, it should file a petition for modification pursuant to Rule 16.4(b). This will ensure that parties are afforded a full and fair opportunity to respond.

At this time, the Commission finds an extension of the authorization expiration date to be 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, 2023.

The Commission is aware of the pending actions against SMART related to this proceeding, including C.21-06-011, and will continue to monitor these proceedings. Subject to the outcome of these proceedings, we note that the

Commission can take enforcement action against any regulated utility for failure to comply with a Commission decision.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

5. Assignment of Proceeding

Genevieve Shiroma is the assigned Commissioner and Debbie Chiv is the assigned Administrative Law Judge in this proceeding.

Finding of Fact

1. On May 14, 2015, the City filed an application for approval of an at-grade crossing of the SMART track at Jennings Avenue in Santa Rosa, California.
2. On September 20, 2016, the Commission issued 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."
3. On April 19, 2019, the City filed a petition for modification of D.16-09-002 requesting a modification of Ordering Paragraph 7 to extend the Commission's authorization from September 20, 2019 to September 20, 2021.
4. In D.19-10-002, the Commission granted the petition for modification and extended the Commission's authorization to September 20, 2021.

5. On July 16, 2021, the City filed a second petition for modification of D.16-19-002 requesting to further extend the Commission's authorization from September 20, 2021 to September 20, 2023.

6. Although it was filed more than one year from the effective date of D.19-10-002, in D.19-10-002, the Commission granted a two-year extension of the authorization period; as such, it is reasonable that the City would make use of much of the two-year authorization period before seeking a further extension from the Commission through a petition.

7. Petitioner states that it is fully committed to construction of the Jennings Avenue crossing and that SMART has failed to cooperate in good faith with the City. SMART seeks a two-year extension to work towards preserving the possibility of construction of a project that the City believes is in the public interest.

Conclusions of Law

1. The City's second petition for modification in this instant proceeding is timely.

2. Petitioner's request for extension of the Commission's authorization to construct an at-grade crossing at Jennings Avenue, as requested in its second petition in this instant proceeding, is reasonable.

3. Petitioner has demonstrated good cause to modify D.16-09-002.

4. Motions made in this proceeding that are not expressly ruled upon are deemed denied.

5. The Petition for Modification of D.16-02-002 should be granted.

6. The proceeding should be closed.

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 seven 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 _____, at San Francisco, California.