

**PUBLIC UTILITIES COMMISSION**

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298

09/08/21
10:17 AM

September 8, 2021

Agenda ID #19868
Ratesetting

TO PARTIES OF RECORD IN APPLICATION 21-05-012:

This is the proposed decision of Administrative Law Judge Yacknin. 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 21, 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. SIMON

Anne E. Simon

Chief Administrative Law Judge

AES:mph

Attachment

Decision **PROPOSED DECISION OF ALJ YACKNIN (Mailed 9/8/2021)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of BNSF Railway Company
for an Order Granting an Exemption
from the Requirements of California
Public Utilities Code Section 7662.

Application 21-05-012

**DECISION DENYING EXEMPTION FROM
PUB. UTIL. CODE SECTION 7662**

Summary

This decision denies BNSF Railway Company an exemption from the requirements of Pub. Util. Code § 7662.

This proceeding is closed.

1. Background

By this application, BNSF Railway Company (BNSF) seeks an exemption from Public Utilities Code¹ § 7662(b)(1) through (3) in the portions of its rail network in which BNSF has installed Positive Train Control (PTC). Sections 7662(b)(1) through (3) require the placement of flags in advance of speed restrictions. PTC is technology that uses a wireless communications system to monitor the train's position and speed and activate braking as necessary to enforce speed restrictions and redirect unauthorized train movement into new

¹ All further references are to the Public Utilities Code.

sections of track; monitor railroad track signals, switches and track circuits to communicate movement authorization to the locomotive; and to transmit authorization for individual trains to move into new segments of track. BNSF maintains that PTC obviates the need to physically place flags on tracks in advance of a speed restriction.

Rail Safety Division (RSD) filed a protest on June 21, 2021, asserting that the PTC does not obviate the need for track flag protections and arguing that the Commission lacks authority to grant an exemption from Section 7662.

A prehearing conference was held on July 8, 2021. The assigned commissioner's July 19, 2021, scoping memo and ruling identified the issues to be determined as:

1. Whether the Commission has authority to exempt BNSF from the requirements of Section 7662(b)(1) through (3); and
2. Whether BNSF's PTC accomplishes the public safety protections afforded by Section 7662(b)(1) through (3).

BNSF filed a brief on August 2, 2021, responding to RSD's argument on issue no. 1. RSD filed a reply brief on August 12, 2021, upon which the record on the issue was submitted.

2. Discussion

Sections 7662(b)(1) through (3) require a railroad corporation to use flags of specified colors and at specified placements to warn employees of temporary speed restrictions due to track conditions, structures or the presence of persons or equipment. The Commission does not have the authority to exempt BNSF from these specified statutory requirements.²

² See, e.g., *BNSF Railway Co. v. Public Utilities Commission*, 218 Cal. App. 4th 778, 781 (Cal. Ct. Appeals 2013).

BNSF argues that granting it the exemption “would not contravene the Legislative mandate because it would not prohibit BNSF from following the specifics of the statute.”³ That argument is without merit. The issue is not whether BNSF is prohibited from complying with the statute but, rather, whether BNSF may deviate from it. It may not.

BNSF cites to the settlement of a federal lawsuit brought by BNSF and Union Pacific Railroad Company against the Commission as precedent for the Commission’s authority to grant BNSF’s requested relief. Specifically, shortly after the passage of Assembly Bill 3032 adopting Section 7662 and other rail safety requirements, BNSF and Union Pacific Railroad Company filed a lawsuit challenging the newly enacted statutes on federal preemption grounds.⁴ The Commission and the railroads entered into a settlement of the lawsuit wherein the Commission agreed to certain specific deviations from Section 7762(b).⁵ BNSF argues that the Commission may grant the exemption BNSF now seeks under the same authority that the Commission exercised in entering into that settlement.

To the contrary, while the Commission has the authority to interpret and implement Section 7662(d) as it did when it entered into the settlement of the federal lawsuit, the Commission does not have the authority to exempt a railroad from the statute. When the Commission entered into the settlement, it acted within its authority by agreeing to the implementation of the statute on points where the statute was silent or where compliance was not practicable. For

³ BNSF brief, at 4.

⁴ *Union Pacific Railroad Company v. California Public Utilities Commission*, No. 1:07-cv-00001-OWW-TAG (E.D. Cal. 2006).

⁵ BNSF brief, Attachment A (Settlement Agreement).

example, as BNSF points out, the Commission agreed that Section 7662(b) applies only to main tracks, even though the statute is silent on that issue.⁶ Similarly, while Section 7662(d) specifies that whistle-post signs be placed on the right side of a main track one-quarter mile from the entrance to any grade crossing, it does not address the situation where two or more tracks run parallel or where it is not feasible to place a sign precisely at the one-quarter mile mark; the Commission agreed to reasonable interpretations of how to implement the statute in such circumstances.⁷ Here, in contrast, BNSF asks the Commission to exempt it from specific statutory requirements that present no ambiguity or impossibility of implementation.

BNSF cites to the provisions of the settlement agreement wherein the Commission recognized that future changes in railroad technology may significantly alter or eliminate the need for the current requirements and agreed to negotiate in good faith in the event that the relevant federal agencies approve such changes.⁸ BNSF asks that the Commission consider the change in railroad technology that is PTC pursuant to this commitment. However, BNSF does not identify any federal approval of PTC in lieu of the measures identified in Section 7662(d) that would invoke this commitment or require our consideration of how to reconcile State and federal law.

For all these reasons, BNSF's request for an exemption from the requirements of Section 7662 is denied.

⁶ BNSF brief, at 5. In its brief, RSD suggests that this interpretation reasonably recognizes that such restrictions are essential on tracks where the train moves through populated areas but not in rail yards away from the public. (RSD reply brief, at 7.)

⁷ BNSF brief, Attachment A (Settlement Agreement), Section II.A.1, at 2-4.

⁸ BNSF brief, at 6, citing to its attached Settlement Agreement, Section IV.A, at 11.

3. Comment on Proposed Decision

The proposed decision of Administrative Law Judge Hallie Yacknin 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 _____.

4. Assignment of Proceeding

Commissioner Darcie L. Houck is the assigned Commissioner and Hallie Yacknin is the assigned Administrative Law Judge and presiding officer for the proceeding.

Conclusions of Law

1. The Commission does not have authority to exempt BNSF from the requirements of Section 7662.
2. The proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. BNSF Railway Company is denied exemption from the requirements of Pub. Util. Code § 7662.
2. Application 21-05-012 is closed.

This order is effective today.

Dated _____, at San Francisco, California.