

Decision 23-03-045

March 16, 2023

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-Marín Area Rail Transit (SMART) Track at Jennings Avenue Located in Santa Rosa, Sonoma County, State of California.

Application 15-05-014

**ORDER MODIFYING DECISION 22-11-025 AND DENYING REHEARING OF THE DECISION, AS MODIFIED**

**I. SUMMARY**

This Order addresses the applications for rehearing of Decision (D.) 22-11-025 (or Decision) filed by the Commission’s Rail Safety Division (Rail Safety) and Sonoma-Marín Area Rail Transit District (SMART).<sup>1</sup> In the Decision, we denied Rail Safety’s petition for modification of D.16-09-002 (Petition), which approved an at-grade crossing at Jennings Avenue in Santa Rosa (Jennings Crossing).

Rail Safety and SMART allege that the Decision is unlawful because: (1) it incorrectly applies the seven-factor test for grade separation practicability rather than considering safety; (2) even if the seven-factor test is applicable, analysis of the factors demonstrates that Jennings Crossing presents an unreasonable risk of harm; and (3) it erroneously finds that the incident history has no bearing on the Jennings Crossing. Separately, SMART alleges that the Decision is unlawful because it: (1) incorrectly

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<sup>1</sup> Unless otherwise noted, citations to Commission decisions are to the official pdf versions, which are available on the Commission’s website at: <http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx>.

applies the seven-factor test to petitions for modification, which are governed by Public Utilities Code section<sup>2</sup> 1708 and our Rules of Practice Procedure,<sup>3</sup> Rule 16.4; (2) fails to consider new evidence supporting safety concerns aside from the incident history; and (3) violates SMART's due process rights. SMART also requests oral argument.

Sonoma County Transportation and Land Use Coalition, Sierra Club, Friends of SMART, and Stephen C. Birdlebough (collectively, Joint Parties), and James L. Duncan filed responses to the rehearing applications. The responses oppose the applications for rehearing and recommend their denial in entirety.

We have carefully considered the arguments raised in the applications for rehearing and do not find grounds for granting rehearing or oral argument. Instead, we modify D.22-11-025 to clarify that Rail Safety was not required to address the seven-factor test of impracticability in its Petition. Rehearing of D.22-11-025, as modified, and SMART's request for oral argument are denied.

## **II. BACKGROUND**

In Application (A.) 15-05-014, the City of Santa Rosa (City) requested Commission approval for an at-grade crossing over SMART's rail tracks at Jennings Avenue in Santa Rosa. In D.16-09-002 (or 2016 Decision), the Commission approved the City's request for a three-year period.

On April 19, 2019, the City filed a petition for modification of the 2016 Decision (2019 Petition) to extend the period for constructing the Jennings Crossings. The Commission's Safety and Enforcement Division (SED)<sup>4</sup> and SMART opposed the 2019 Petition. SED argued that the petition made significant changes to the proposals approved in the 2016 Decision that had not been adequately reviewed for their potential

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<sup>2</sup> Unless otherwise indicated, all subsequent section references are to the California Public Utilities Code.

<sup>3</sup> Unless otherwise indicated, all subsequent Rule references are to the California Public Utilities Rules of Practice and Procedure.

<sup>4</sup> Rail Safety explains that it was a part of SED at the time of the original application in this proceeding. (Rail Safety Response to 2021 Petition (Aug. 16, 2021) at fn. 1.)

safety impact. (SED Response to 2019 Petition (May 10, 2019) at 1-2.) SMART argued that conditions had changed after our approval in the 2016 Decision, including the construction of a multi-use path parallel to the right-of-way connecting the College Avenue and Guerneville Road crossings and the reconstruction of the pedestrian and bicycle at-grade crossing at Guerneville Road. (SMART Response to 2019 Petition (May 17, 2019) at 4-6.)

In D.19-10-002, we granted the City's request and extended authorization for the Jennings Crossing to September 20, 2021. (D.19-10-002 at 9, 10-11 (Ordering Paragraph 1 & 2).) In doing so, we rejected the arguments of SED and SMART. We noted that we made a robust inquiry into the comparative safety hazards and risks of an at-grade and a grade-separated crossing at Jennings Avenue and thoroughly considered the parties' positions before the issuance of the 2016 Decision. (*Id.* at 7-8.)

On July 16, 2021, the City filed a second petition for modification (2021 Petition) to extend the authorization expiration date for Jennings Crossing to September 20, 2023. The City asserted that it required additional time to work with SMART to finalize the necessary details for constructing the crossing. (See 2021 Petition (July 16, 2021) at 3, 7.) Rail Safety and SMART opposed the requested extension. Rail Safety argued that accidents on SMART's rail property line since SMART began operations in 2017 demonstrated that the Jennings Crossing was not safe. (Rail Safety Response to 2021 Petition (Aug. 16, 2021) at 4-7, 8.) SMART asserted that the extension was not warranted because SMART and the City were unable to reach an agreement on important terms for the Jennings Crossing, despite good faith efforts. (See generally SMART Response to 2021 Petition (Aug. 16, 2021).)

In D.21-10-003, we granted the City's request and extended the authorization period for constructing the Jennings Crossing to September 20, 2023. (D.21-10-003 at 10, 16 (Ordering Paragraphs 1 & 2).) In that decision, we also stated that there was insufficient time to litigate the incidents raised by Rail Safety due to the authorization's impending expiration. (*Id.* at 10.) We noted that Rail Safety or any party

alleging new or changed facts should file a petition for modification pursuant to Rule 16.4. (*Ibid.*)

On January 24, 2022, Rail Safety filed the Petition. Rail Safety claimed that new facts warranted modification, including: (1) SMART's operation of a passenger rail line beginning in 2017, with 26 trains per day; and (2) nine incidents between 2017 and 2020 on SMART's rail line involving pedestrians or bicyclists. (Rail Safety Petition (Jan. 24, 2022) at 4-8.) Rail Safety argued that the Jennings Crossing presents an unreasonable risk of harm to the public and should not be opened. (*Id.* at 3, 8-9.)

On March 10, 2022, parties filed responses to the Petition. The Joint Parties, the City, and Mr. Duncan opposed the Petition while SMART supported it. As part of its response, SMART introduced evidence of six additional incidents occurring on SMART's railroad right-of-way since the 2016 Decision. (SMART Response to Petition (Mar. 10, 2022) at 2.) SMART also made the same arguments that it did in its response to the 2019 Petition: the Jennings Crossing should not be constructed due to the new multi-use pathway and the reconstructed Guerneville Road crossing. (*Id.* at 4-5.) On March 21, 2022, the Joint Parties, Rail Safety, Mr. Duncan, and the City filed replies to the responses.

On November 17, 2022, we issued the Decision. The Decision denies the Petition on the grounds that Rail Safety failed to assert new or changed facts that specifically relate to the Jennings Crossing and failed to conduct an analysis of the seven-factor test of impracticability for a separated grade crossing. (Decision at 7-8, 9.)

### III. DISCUSSION

#### A. **The Decision is modified to clarify that Rail Safety was not required to analyze the seven-factor test of impracticability.**

Rail Safety and SMART argue that the Petition was erroneously denied for failure to address the seven-factor test of impracticability. They assert that the seven-factor test is neither a general test to determine safety nor applicable to petitions for modification. (Rail Safety App. Rehg. at 4-5, 7-10; SMART App. Rehg. at 10-11.) They also contend that the Decision's reasoning is incorrect because Ordering Paragraph 7 of

the 2016 Decision provides an independent basis for revocation or modification “if public convenience, necessity or safety so require.” (Rail Safety App. Rehg. at 8, 10; SMART App. Rehg. at 11.) Alternatively, they argue that if the seven-factor test is applicable, the Petition addressed certain factors and analysis of all factors supports revocation. (Rail Safety App. Rehg. at 10; SMART App. Rehg. at 11-17.)

While analyzing some or all the seven-factors may be relevant to support a petition for modification on safety grounds, we agree that there is no requirement to conduct the analysis for this purpose. Thus, we modify the Decision as stated below in the Ordering Paragraphs to clarify this point. To the extent that Rail Safety’s and SMART’s arguments regarding factors from the seven-factor test are applicable, these arguments are addressed below.<sup>5</sup>

**B. The Decision correctly determines that Rail Safety’s allegations of new or changed facts do not justify modification of the 2016 Decision.**

The Decision finds that Rail Safety fails to justify the proposed modifications to the 2016 Decision because the Petition is based entirely on the premise that factual allegations concerning any part of SMART’s rail line constitute new or changed facts. (Decision at 7.) The Decision further finds that the nine incidents did not occur at the Jennings Crossing,<sup>6</sup> Rail Safety failed to establish any causal connection between the incidents and the Jennings Crossing, and at issue in the 2016 Decision was whether the Jennings Crossing complied with applicable safety rules, procedures, guidelines, and criteria. (*Id.* at 7-8.) The Decision therefore concludes that the new or changed facts must relate specifically to Jennings Crossing. (*Id.* at 8.)

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<sup>5</sup> We decline to address SMART’s arguments regarding factors 3, 4, 5, and 6. These factors either are not directly applicable to Rail Safety’s Petition or are unnecessary to address because Rail Safety and SMART fail to present any new or changed facts warranting modification of the 2016 Decision.

<sup>6</sup> SMART presents evidence of six additional incidents involving pedestrian trespassers on SMART’s right-of way, which the Decision does not address. (SMART Response to Petition at 7; SMART App. Rehg. at 7.) We do not address those additional incidents for the same reasons we reject Rail Safety’s incident history evidence.

Rail Safety and SMART argue that the Decision erroneously determines that the incident history has no bearing on the Jennings Crossing. (Rail Safety App. Rehg. at 12; SMART App. Rehg. at 6) In particular, they argue the Decision fails to consider that the incident history is not only relevant, it is the best evidence to demonstrate that the Jennings Crossing is unsafe because: (1) it shows the unpredictable element of human behavior, which is particularly relevant considering that children are anticipated to use the crossing; (2) it is not possible to gather data directly from the Jennings Crossing, which has been fenced off from public use since 2015; (3) accident data prior to 2015 is not reliable due to increased frequency of passenger trains at higher speeds and plans to operate freight trains; (4) the limitations of a train to avoid an accident (e.g., stop times and inability to veer); and (5) the physical layout of Jennings Avenue presents particular safety concerns that are not present at other crossings. (Rail Safety App. Rehg. at 5-7, 10, 11-12; SMART App. Rehg. at 5-7, 8-10; SMART Response to Petition (Mar. 10, 2022) at 3, 7.)

Rail Safety and SMART also argue that the Decision sets a dangerous standard that is inconsistent with the Commission's preventative approach to safety and goal of zero-accidents. Specifically, they assert that the Decision would support approval of every at-grade crossing, regardless of site-specific safety risks, and require an incident to occur before a crossing is deemed unsafe. (Rail Safety App. Rehg. at 12-13; SMART App. Rehg. at 7-8.)

Section 1708 sets forth that we “may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision” we have made. (§ 1708.) The language of section 1708 is permissive, and exercise of this authority is a matter of our discretion. (§ 1708; see, e.g., D.15-12-053 at 5, D.20-12-013 at 3.) The proper exercise of our discretion to grant or deny a petition to modify is not legal error. (*Northern California Assn. to Preserve Bodega Head & Harbor, Inc. v. Public Utilities Com.* (1964) 61 Cal.2d 126, 135 (*Bodega Head*).

Rail Safety and SMART fail to demonstrate we were required to modify the Decision pursuant to section 1708. We note our approval became final in 2016. As in *Bodega Head*, a party cannot belatedly challenge a Commission decision with “a series of late-filed petitions, basing its right to review on the latest among them, when, in fact, it is seeking review of the basic decision. If such a device were allowed, one obtaining a certificate [approval] from respondent commission could never safely act under it without fear of later attack.” (*Bodega Head, supra*, 61 Cal.2d at 135.) As such, a determination whether to reopen a Commission decision is entirely within our discretion and not subject to challenge. (*Id.* at 135-136.)

Rail Safety and SMART also fail to present evidence to justify reopening the 2016 Decision. (See D.17-12-006 at 10-11.) While incident histories from other crossings may be relevant to our consideration of the risks associated with an at-grade crossing application, they do not necessarily on their own establish a premise to deny the crossing. (See, e.g., D.93065 [6 Cal.P.U.C. 2d 169, 1981 WL 166597 at \*5, \*7 (Ordering Paragraph 1)], D.06-06-032 at 16 (Conclusion of Law 2).) We also take into account site-specific considerations. (See, e.g., D.82-04-033 [8 Cal.P.U.C. 2d 572, 1982 WL 196886 at \*8 & fn. 13], D.16-09-002 at 18.) In addition, Rail Safety’s and SMART’s arguments are not new. They inappropriately attempt to relitigate the same or similar factual issues decided in the 2016 Decision. (See, e.g., D.16-09-002 at 2-3, 15, 16, 18, 21-22, 30, 38-39 (Findings of Fact 2, 4, 8, 9, 12) [evidence of at-grade crossing incidents, physical layout of Jennings Crossing, composition of surrounding area, and facts regarding passenger trains and freight trains].) Re-litigation of these issues does not establish grounds for modification and is particularly disfavored. (See, e.g., D.17-12-006 at 9, 10, D.15-08-010 at 5.)

Lastly, Rail Safety and SMART are incorrect that the Decision finds the incident history irrelevant and sets a standard that incidents must occur for us to deny an at-grade crossing application. The Decision does not ignore the incident history. The Decision considered the incident history to correctly find that the new incidents do not warrant modification of the 2016 Decision, as explained above and further below.

(Decision at 7-8.) In addition, the Decision's holdings do not undermine our safety policies or goals. We adhere to our public safety commitments by evaluating the facts and circumstances at hand to determine whether to approve, modify, or deny proposed crossings. (See, e.g., General Orders 72-B & 75-D, D.03-12-018 at 23-32, 44 (Conclusion of Law 4), D.22-09-017 at 5-8.)

For the reasons stated above, we conclude that good cause has not been shown to grant rehearing.

**C. The Decision's failure to address SMART's separate allegations of new or changed facts is not legal error.**

SMART's Response to the Petition argued that the Jennings Crossing authorization should be revoked because a purported safer crossing now exists nearby. SMART states that since the 2016 Decision was issued, a multi-use pathway adjacent to the railroad right-of-way was constructed and the Guerneville Road crossing, which is approximately a quarter mile north, was reconstructed to be allegedly safer than the Jennings Crossing (e.g., removing the pedestrian/bicyclist crossing from the road and vehicular traffic, and creating a refuge landing between the double tracks for pedestrians and bicyclists). (SMART Response to Petition (Mar. 10, 2022) at 4, 5, 7-8.)

The Decision focuses on Rail Safety's factual claims presented in the Petition and does not directly address SMART's claims. SMART argues that the Decision's failure to do so is legal error because SMART's evidence demonstrates that the Jennings Crossing presents an unreasonable safety risk. (SMART App. Rehg. at 6, 12-13.) SMART cites as support D.13-02-003, which denied an application for an at-grade crossing filed by the City of Davis. (*Id.* at 13, 17.)

SMART fails to identify legal error for several reasons. First, there are procedural issues with SMART's allegations. SMART raised the same arguments as part of its Response to the City's 2019 Petition. (SMART Response to 2019 Petition (May 17, 2019) at 5.) We rejected SMART's arguments in D.19-10-020, which approved the 2019 Petition. (D.19-10-002 at 4-5, 7-8.) That decision also noted that SMART failed to provide support for its allegations of new or changed facts in accordance with Rule 16.4,

and that SMART may provide this support by filing a petition for modification. (*Id.* at 8.) SMART did not file a petition for modification. Nor has SMART explained why its above factual arguments could not have been presented within one year of the 2016 Decision or D.19-10-002. On this basis alone, we would have grounds to reject SMART's claims. (Rule 16.4, subd. (d).)

Second, even setting aside the above procedural problems, SMART's evidence does not demonstrate that the outcome of the 2016 Decision would have been different. There is no requirement that we deny a request for or revoke approval of an at-grade crossing when there is another at-grade crossing nearby. (See § 1201 [crossings must be approved by the Commission and the Commission "may refuse its permission or grant it upon such terms and conditions as it prescribes"]; cf. GO 75-D [recommending that if a new at-grade crossing is established an existing at-grade crossing should be closed].)

Additionally, D.13-02-003 is not determinative. The 2016 Decision already considered this prior decision and rejected it as grounds to deny the City's application. (See D.16-09-002 at 34, 35.) SMART's attempt to relitigate this decision as controlling precedent is improper. Moreover, deviation from our previous decisions is not legal error and may be justified by the circumstances particular to a given situation. (*Postal Telegraph-Cable Co. v. Railroad Com.* (1925) 197 Cal. 426, 436.) In D.13-02-003, we made several findings supporting denial that we did not make in the 2016 Decision. (See D.13-02-003 at 7-8.) D.13-02-003 also discussed several safety issues at the proposed crossing that are not applicable to the Jennings Crossing. (See *id.* at 13-14.) Thus, SMART fails to show that we should follow D.13-02-003.

Lastly, SMART does not raise new facts. Plans to reconstruct the Guerneville Road crossing and construct a new pathway were known at the time the 2016 Decision was issued. (See, e.g., D.16-09-002 at 15, 16, 30.) SMART's focus on the Guerneville Road crossing also ignores that the Jennings Crossing was approved, in part, due to-safety concerns with not opening the new crossing and consideration of specific

safety measures. (*Id.* at 7, 17, 20-22, 26, 38 (Finding of Fact 6), 41 (Conclusion of Law 12).)

For the reasons above, we reject SMART's argument that the Jennings Crossing authorization should be revoked.

**D. The Decision does not violate SMART's due process rights.**

SMART argues that its due process rights were violated because the Commission failed to hold a hearing and provided no notice and opportunity to be heard before issuing the Decision. (SMART App. Rehg. at 5.) As support, SMART cites to *California Trucking Assn. v. Public Utilities Com.* (1977) 19 Cal.3d 240 (*California Trucking*).

SMART is incorrect that its due process rights were violated. Section 1708 requires the Commission to provide notice and "opportunity to be heard as provided in the case of complaints" when it rescinds, alters, or amends its decisions. (§ 1708.) In *California Trucking*, the California Supreme Court interpreted section 1708 to require "at the very least that a party ... be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal." (*California Trucking, supra*, 19 Cal.3d at 244-245; see also D.03-08-075 at 10.) Section 1708 did not provide SMART the right to evidentiary hearings before issuance of the Decision because the Decision did not rescind, alter, or amend the 2016 Decision. (See, e.g., D.21-09-047 at 9.) In addition, SMART had notice and opportunity to be heard when Rail Safety filed its Petition and upon filing its response to the Petition. Thus, SMART fails to identify legal error.

**E. SMART's request for oral argument is denied.**

Pursuant to Rule 16.3, SMART requests oral argument. (SMART App. Rehg. at 2-3.) SMART asserts that its rehearing application raises issues of major significance because the Decision's failure to revoke authorization of the Jennings Crossing presents an unreasonable risk of harm to the public, and because the Decision applies the wrong legal standard for modification. (*Ibid.*) SMART also asserts that oral

will materially assist the Commission in resolving the issues set forth in its rehearing application. (*Id.*)

SMART's request for oral argument is denied. We have complete discretion to determine the appropriateness of oral argument in any particular matter, and commonly issue rehearing orders without oral argument. (Rule 16.3, subd. (a).) SMART's rehearing application sufficiently discusses its arguments of legal error and we have addressed those arguments. Accordingly, there is no basis to conclude that oral argument will benefit our disposition of the rehearing application and the request is denied.

#### IV. CONCLUSION

For the reasons stated above, good cause has not been demonstrated to grant rehearing of D.22-11-025 or oral argument. We modify D.22-11-025 to clarify that Rail Safety was not required to analyze the seven-factor test under the circumstances. Rehearing of D.22-11-025, as modified pursuant to the below Ordering Paragraphs, and SMART's request for oral argument are denied.

**THEREFORE, IT IS ORDERED** that:

1. Replace the first full paragraph on page 1 of the Decision with the following paragraph:

We deny Rail Safety Division's Petition for Modification (PFM) of Decision (D.) 16-09-002, which approved an at-grade crossing at Jennings Avenue in Santa Rosa, because the PFM fails to present any evidence of new or changed facts specific to the Jennings Avenue location.

2. Replace the first full paragraph on page 9 with the following paragraph:

The PFM fails to conduct any analysis of the seven factors to support its contention that the Jennings Avenue at-grade crossing should not be opened. In addition to the problems discussed with RSD's factual allegations, the PFM completely lacks analysis of the underlying legal framework for the Commission to better evaluate the merits of the petition. Thus, the PFM is denied.

3. Replace the last full paragraph starting on page 9 and ending at the first full sentence on page 10 in Section 5 of the Decision with the following paragraph:

We dismiss the comments of RSD and SMART regarding the significance of incidents that are not specific to the Jennings Avenue location because those arguments were thoroughly addressed in the proposed decision. We also reject RSD's explanation that it failed to address the seven-factor test in its PFM because that test "was specific to determining whether a grade-separated crossing was practicable, not whether an at-grade crossing is safe."<sup>31</sup> To the contrary, the seven factors may be relevant and useful because they require the Commission to compare a grade-separated crossing to an at-grade crossing, including whether there has been a convincing showing that all potential safety hazards have been eliminated.<sup>32</sup>

4. Delete Conclusion of Law 3 and renumber Conclusions of Law 4 through 6 to reflect this deletion.

5. Rehearing of Decision 22-11-025 is denied.

6. This proceeding, Application 15-05-014, is closed.

This order is effective today.

Dated March 16, 2023, at San Francisco, California.

ALICE REYNOLDS  
President  
GENEVIEVE SHIROMA  
DARCIE L. HOUCK  
JOHN REYNOLDS  
KAREN DOUGLAS  
Commissioners