

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

James L. Duncan

Complainant,

vs.

Sonoma-Marín Area Rail Transit
District (SMART)

Defendant.

Case 21-06-011

James L. Duncan, for himself, Complainant.

Thomas F. Lyons, for Sonoma Marin Area Rail Transit District,
Defendant.

**MODIFIED PRESIDING OFFICER'S DECISION
DISMISSING COMPLAINT AND DENYING RELIEF**

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**MODIFIED PRESIDING OFFICER'S DECISION
DISMISSING COMPLAINT AND DENYING RELIEF**

Summary

James L. Duncan, (Complainant or Duncan), filed the instant complaint against Sonoma-Marín Area Rail Transit District (SMART), Defendant, alleging among other things that SMART has failed to comply with Commission Decision 16-09-002 because SMART has failed to come to an agreement with the City of Santa Rosa (City) to construct the Jennings Avenue at-grade rail crossing.

Duncan requests that SMART be compelled to agree to the construction of the Jennings Avenue rail crossing and that SMART be fined accordingly. Duncan's assertions of fact are insufficient to support the causes of action alleged and have failed to demonstrate by a preponderance of the evidence of any violation of any applicable Commission rule, law or decision. Therefore, the relief requested cannot be granted. It is noted, however, that it has been eight years since Decision 16-09-002 was issued granting the authority to construct the Jennings Avenue at-grade rail crossing construction and SMART and the City are still nowhere close to reaching an agreement.

The complaint is dismissed.

The requested relief is denied.

This proceeding is closed.

1. Factual and Procedural Background

On June 7, 2021, James L. Duncan (Complainant or Duncan) filed this complaint, which first appeared on the Commission's Daily Calendar on

June 18, 2021.¹ The complaint arises from Application (A.) 15-05-014, which sought authorization from the Commission for approval to construct an at-grade pedestrian and bicycle crossing over Sonoma-Marín Area Rail Transit District (SMART) railroad tracks at Jennings Avenue in the City of Santa Rosa (City).² The authority to construct the crossing was granted by the Commission in Decision (D.) 16-09-002.

On June 29, 2021, the Commission served the *Instruction to Answer* to Duncan and SMART.³ The *Instruction to Answer* preliminarily determined that this complaint is adjudicatory. On July 9, 2021, an e-mail ruling granted SMART's request for an extension of time to file its Answer. SMART filed its Answer on September 14, 2021. On October 25, 2021, both Duncan and SMART filed prehearing conference (PHC) statements in this matter.

An initial PHC was held on November 1, 2021, to address the issues of law and fact, determine the need for hearing, set the schedule for resolving the matter, and address other matters as necessary. On December 13, 2021, a Scoping Memo and Ruling (Scoping Memo) was issued setting forth the issue of whether the complaint should be dismissed. On December 21, 2021, Duncan filed comments on the Scoping Memo. SMART filed comments on December 22, 2021.

¹ Duncan is a self-represented non attorney litigant in this proceeding.

² The Commission subsequently issued D.17-08-017 on August 11, 2017, which modified D.16-09-002 and denied a request for rehearing. On September 17, 2019, the Commission issued D.19-10-002, which extended the authority to construct the crossing. On October 8, 2021, the Commission issued D.21-10-003, which again extended the authority to construct the crossing.

³ SMART was represented in this matter by in house attorney Jessica Southerland. SMART and Duncan may be referred to jointly as the parties.

On January 25, 2022, SMART filed a Motion to Dismiss Duncan's complaint (Motion to Dismiss). On February 25, 2021, Duncan filed an Opposition to the Motion to Dismiss (Opposition). On March 14, 2021, SMART replied to the Opposition. On March 16, 2021, the Motion to Dismiss was denied.

On January 24, 2022, a Petition for Modification (PFM) that was filed by the Commission's Rail Safety Division in A.15-05-014, seeking to have the crossing be grade separated rather than at-grade. On June 22, 2022, A.15-05-014 was consolidated with this proceeding, because the outcome of the PFM filed in A.15-05-014, could have rendered this complaint moot. As a result of the consolidation, the schedule for this complaint was suspended pending the resolution of the PFM. On November 17, 2022, D.22-11-025 was issued denying the PFM. On November 21, 2022, an Email Ruling was issued and unconsolidated A.15-05-014 and C.21-06-011.

On November 7, 2022, a subsequent PHC was conducted in this matter. On December 15, 2022, D.22-12-039 was issued extending the statutory deadline to March 29, 2024. A subsequent Scoping Memo was issued on December 19, 2022.

Evidentiary hearings were held on August 7-8, 2023. An additional date of evidentiary hearings was needed so that the complaint could serve a subpoena on a witness. The third day of evidentiary hearings was held on November 13, 2023. At the conclusion of hearings on November 13, 2023, there was a disagreement about whether something was included in the scope of the matter. This disagreement resulted in the need for the parties to brief this issue. The assigned Administrative Law Judge (ALJ) ultimately ruled that the disputed

issue was not in scope because it was not listed in the Scoping Memo and neither party appealed the Scoping Memo.

On March 7, 2024, D.24-03-013 extended the statutory deadline to December 29, 2024. On May 5, 2024, the parties filed their Opening Briefs in this proceeding. Duncan's Opening Brief had attachments that contained information that was not previously admitted to the record. SMART objected to this and it resulted in the need for Duncan to correct and refile his Opening Brief, which was refiled on June 5, 2024. On June 5, 2024, the matter was reassigned from Commissioner Genevieve Shiroma to Commissioner Matthew Baker. Reply Briefs were filed on June 28, 2024. The matter was submitted on June 28, 2024. On December 19, 2024, D.24-12-053 extended the statutory deadline to June 30, 2025. On December 23, 2025, the Complainant filed an appeal of presiding officer's decision. On January 7, 2025, the Defendant filed a response to the Complainant's appeal of the presiding officer's decision.

2. Issues

Section two of the complaint lists 42 causes of action which the Complainant wishes the Commission to consider.⁴ These 42 causes of action focus on whether the Defendant complies with Commission orders, decision, and rules. The issues before the Commission can be summarized as follows:

1. Has SMART failed to comply with Commission D.16-09-002, D.17-08-017, and D.19-10-002; Rule 1.1; the

⁴ Some of the requests in the Complaint are invalid, such as requesting the Commission to waive exclusive jurisdiction of an issue so that the Complainant could continue to pursue legal action in Superior Court. Neither Duncan nor SMART contested the issues set forth in the subsequent Scoping Memo issued on December 19, 2022.

Public Utilities (Pub. Util.) Code § 702, § 1201, § 1202, § 1709; and California Constitution Article XII, § 8?

2. If yes, what should the consequences be?

3. Position of the Parties

The central issue in this case is the enforcement of the Commission's exclusive jurisdiction over railroad crossings, particularly the Jennings Avenue crossing, which was approved by the Commission in D.16-09-002. As a result of not coming to an agreement with the City to construct the crossing, Duncan believes that SMART violated the California Constitution; §§ 702, 1201, 1202(a) and 1709 of the Pub. Util. Code; multiple Commission decisions, particularly D.16-09-002, D.17-08-017, and D.19-10-002; and Rule 1.1 of the Commission's Rules of Practice and Procedure (Rule).⁵

Duncan asserts that SMART has continuously failed to comply with Commission decisions regarding the Jennings Avenue crossing and that Smart's actions have caused harm to the public and regulatory process. Duncan seeks the enforcement of Commission orders, financial penalties pursuant to Pub. Util. Code § 2107, and that SMART be compelled to agree to the construction of the crossing as approved.⁶

Duncan contends that SMART initially supported the crossing and had contractors ready to construct it for the City, but SMART later suspended the

⁵ Unless stated otherwise, all future references to Rule or Rules means the Commission's Rules of Practice and Procedure.

⁶ Duncan believes that the Commission has mandated that the crossing be constructed because the Commission approved the City's Application (A.15-05-014) for an at-grade crossing and because SMART's Motion to Dismiss the Complaint was denied on March 16, 2022.

agreement, insisting that the City enter into a separate agreement with terms he contends were dictated by SMART. This separate agreement included insurance, indemnification, and funding for SMART's Quiet Zone crossings, which are unrelated to the Jennings Avenue crossing.

Duncan claims that SMART has failed to comply with three key Commission decisions: D.16-09-002, D.17-08-017, and D.19-10-002. Duncan believes these decisions established the crossing's safety, the Commission's exclusive jurisdiction, and ordered SMART to cooperate with the City for the construction of the crossing.

Duncan accuses SMART of delaying the project by imposing new conditions not included in the original agreements, including a demand for a Quiet Zone agreement that was not directly related to the Jennings Avenue crossing. Duncan believes that SMART's actions have violated the California Constitution and various Pub. Util. Codes, which grants the Commission exclusive authority over railroad crossings.

He believes that the fact that SMART now asserts that an at-grade crossing is not safe and the fact that the crossing in question has not been completed that this is evidence that SMART is deliberately disobeying the Commission's authority. Duncan also argues that SMART is trying to relitigate issues that has already been decided by the Commission, namely that crossing should be grade-separated rather than at-grade.

Duncan argues that SMART has failed to act in good faith and although SMART asserts it is negotiating with the City in good faith, Duncan claims that SMART's behavior shows the opposite. He states that by imposing new,

unrelated conditions, SMART is delaying the construction and obstructing the process. He argues that SMART has used legal maneuvers and delays to avoid compliance with the Commission's decisions, thus violating Pub. Util Code § 702, which in relevant part mandates compliance with Commission decisions.

Duncan stresses the importance of maintaining the integrity of the Commission's authority and ensuring that SMART complies with its regulatory obligations. Duncan asks the Commission to enforce its earlier decisions, impose fines on SMART, and compel the construction of the Jennings Avenue crossing without further delay. Finally, Duncan argues that hearsay evidence need not be excluded from a Commission proceeding solely on the basis that the evidence is hearsay.

SMART was created by the California Legislature to oversee passenger rail service in Sonoma and Marin Counties and started operations in 2017. SMART denies any wrongdoing in this matter. SMART asserts that as the complainant, Duncan bears the burden in this proceeding to establish that SMART has failed to comply with Commission decisions, statutes, or Rules. SMART asserts that Duncan has failed to meet this burden and as such fines and penalties are not warranted in this matter. SMART requests the Commission dismiss Duncan's complaint with prejudice.

SMART made several arguments in this proceeding. SMART contends that it has not deliberately failed to comply with Commission decisions, rather it has been negotiating in good faith with the City to achieve an agreement that will allow the crossing in question to be completed. SMART denies that it is relitigating issues, but rather expressing safety concerns. Additionally, SMART

asserts that Duncan cannot prove his case because he relies mainly on hearsay evidence.

SMART alleges it has been in engaging in discussions with the City regarding the construction and safety concerns surrounding the Jennings Avenue crossing since the Commission granted regulatory authority approving the crossing. Although SMART is negotiating with the City for an agreement, SMART and the City have been unable to come to an agreement concerning the crossing.

SMART denies that it is relitigating the issues in this matter. Rather, SMART states that is simply raising safety concerns regarding the at-grade crossing, particularly given the proximity to a school and residential areas. SMART argues that raising its good faith belief concerning safety concerns does not establish that it is usurping the Commission's authority. SMART contends that although it has expressed concerns to the City about the safety of the at-grade crossing, it has been diligently working with the City to come to an agreement and that it would be a disregard of its duty to public safety not to express these concerns.

SMART argues that the lack of an agreement is not proof that it has failed to negotiate with the City in good faith. Rather, SMART asserts that it has acted within its legal rights to negotiate terms, including safety enhancements, insurance, indemnity, and other operational responsibilities. SMART also points out that the Commission's Rail Safety Division also expressed concerns about the safety of an at-grade crossing when it filed a PFM on June 22, 2022. Finally, SMART points out that Commission decisions did not mandate immediate

construction of the crossing but rather authorized it, leaving room for negotiations regarding safety and other details.

4. Relevant Pub. Util. Codes and California Constitution

As noted above, Duncan asserts that SMART violated Pub. Util. Code §§ 702, 1201, 1202(a), 1709, California Constitution Article XII § 8 and Rule 1.1. Additionally, he asserts that hearsay evidence is admissible in Commission proceedings. Relevant Pub. Util. Codes, California Constitution Article XII § 8, and Rules 1.1 and 13.6 state the following:

Pub. Util Code §702: Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees.

Pub. Util Code §1201: No public road, highway, or street shall be constructed across the track of any railroad corporation at grade, nor shall the track of any railroad corporation be constructed across a public road, highway, or street at grade, or shall the track of any railroad corporation be constructed across the track of any other railroad or street railroad corporation at grade, nor shall the track of a street railroad corporation be constructed across the track of a railroad corporation at grade, without having first secured the permission of the commission. This section shall not apply to the replacement of lawfully existing tracks. The commission may refuse its permission or grant it upon such terms and conditions as it prescribes.

Pub. Util Code §1202: The commission has the exclusive power:

- (a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation,

operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, of a street railroad by a railroad, of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or of a railroad by a street.

Pub. Util Code §1709: In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

California Constitution Article XII, § 8:

A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power of the Commission....

Rule 1.1 Ethics:

Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

Rule 13.6 Evidence:

- (a) In hearings before the Commission, the technical rules of evidence, whether statutory, common law, or adopted by court, need not be applied. Although evidence need not be excluded merely by application of rules governing admissibility, competency, weight, or foundation in the record, the rights of parties to meaningfully participate in the proceeding and to public policy protections shall be preserved.

5. Discussion

The basic issue here is whether SMART has complied with D.16-09-002. Duncan believes that SMART has not complied with the decision. SMART on the other hand argues that it has.

Duncan relies heavily on emails, public meetings, and newspaper articles as the basis of proof for his allegations. At the evidentiary hearings he wanted to play several hours of videos from public meetings where SMART's Chief Engineer Bill Gamlen (Gamlen) and General Manager Eddy Cumins (Cumins) made various statements regarding alternatives to an at-grade crossing at the Jennings Avenue crossing. Many of the documents that Duncan attempted to present as evidence were plans and drawings that the Commission relied on when approving A.15-05-014.

He requested the admission of a typed transcription that he and his wife created following a March 2, 2023, community meeting that was held by the City concerning the Jennings Avenue crossing as proof that SMART failed to comply with D.16-09-002 because Gamlen and Cumins made statements at the meeting which provided alternatives to constructing an at-grade crossing. Duncan stated at the hearing on August 8, 2023, that the typed document was key to his case because it proves there is an ongoing violation by SMART.⁷

SMART objected to Duncan's characterization that the typed document was a transcript, because it was not transcribed by a certified reporter. Duncan countered that he and his wife were at the meeting and that a recording of the

⁷ Hearing Transcript Volume 1 at 14-15.

meeting was later placed on YouTube and the recording of the meeting contained closed captions and he and his wife took screenshots of the video and then typed up the closed captions. SMART also argues that Duncan has the responsibility to put forth the best evidence and rather than rely on the hearsay statements made at the meeting, he should address his allegations with SMART's witnesses Cumins and Gamlen.

Duncan correctly responds that just because something is hearsay, does not mean that it must be excluded. Rule 13.6 asserts that the technical rules of evidence need not be applied. This does not mean that a decision in Duncan's favor will be based solely on hearsay evidence. Duncan has a responsibility to prove the allegations that he asserts in his complaint and he failed to do so.

Many of Duncan's exhibits were admitted to the record under the caveat that the documents were not being admitted for the truth of the matter asserted, but rather would be evaluated and weighed appropriately. Additionally, Duncan is self-represented and did not take the stand at the hearing and provided no testimony and was never subjected to cross examination. During the hearing, Duncan made many statements that were his beliefs that SMART has failed to comply with D.19-09-002. He consistently relied on his statements as proof of what he was asserting. His statements at the hearing were his opinions and not treated as testimony.

Rather than adequately cross examine the two SMART witnesses, Duncan spent a large portion of his time attempting to impeach Gamlen and/or arguing with the witness. He tried to impeach Gamlen on the basis that Gamlen made statements at the March 2, 2023, community meeting where he stated that

SMART essentially did not believe that an at-grade crossing was safe and put forward various alternatives to the at-grade crossing.

Duncan confronted Gamlen and argued that SMART initially supported the City's Application for an at-grade crossing and then at the community meeting he made statements putting forth alternatives that SMART deemed were safer than an at-grade crossing. Duncan argues he should be impeached because SMART initially supported an at-grade crossing, but later changed its mind. He also argues that these statements are proof that SMART is trying to relitigate the matter because SMART now is putting forth alternatives to the at-grade crossing at the community meeting. Duncan was given the opportunity to cross examine the witnesses and other than argue with the witness, he failed to obtain testimony on cross examination to support his allegations.

Duncan also asserts that emails he obtained from a Public Records Act request establishes that SMART initially complied with the D.16-09-002. He asserts that these emails show that SMART made efforts to build the crossing at the City's expense when D.16-09-002 was initially issued.⁸ He claims that because SMART later put forth alternative to the at-grade crossing that SMART is not complying with that decision and that SMART is relitigating the issue.

On redirect, Gamlen testified under oath that he concedes that the Commission has exclusive jurisdiction concerning the rail crossing.⁹ He also testified that no one at SMART is trying to usurp the Commission's authority

⁸ Hearing Transcript Volume 1 at 28.

⁹ Hearing Transcript Volume 2 at 208-217.

and that SMART is not trying to relitigate the issues in this matter. Finally, he went into details concerning SMART's efforts to engage in good faith negotiations with the City in previous years.

SMART also correctly raised a concern that Duncan mischaracterized statements and rulings both at the hearing and in his briefs. Specifically, in his closing brief Duncan argues that the Commission ordered SMART to proceed with the construction of the Jennings Avenue crossing and that SMART refuses to comply with the Commissions decisions because the crossing has not been completed. Duncan alleges in his closing brief that when the Commission issued a ruling on March 16, 2022, denying SMART's Motion to Dismiss his complaint that the Commission mandated the construction of the crossing in this ruling.

SMART is correct that the Commission never issued a decision that states that SMART must agree to construction of the crossing on its right-of-way. Duncan either misunderstood or mischaracterized the Commission's March 16, 2022, ruling denying SMART's Motion to Dismiss. That ruling never stated that SMART was compelled to go ahead with the construction of the crossing when the ruling denying the Motion to Dismiss was issued. Rather the ruling denied the Motion to Dismiss because it found that SMART did not meet the criteria to have the Motion to Dismiss granted.

Cumins testified in detail concerning the alleged efforts SMART made to meet with the City to attempt to negotiate an agreement to build the crossing. Duncan spent his time on cross examination trying to establish that SMART was attempting to relitigate the matter because SMART suggested alternatives to the approved at-grade crossing. It should be noted that the Commission's own Rail

Safety Division expressed concerns about the safety of the at-grade Jennings Avenue crossing because it filed a PFM on January 4, 2022, requesting the Commission to determine that an at-grade crossing at Jennings Avenue presented an unreasonable risk of harm to the public and should not be opened. This request was denied on November 17, 2022, in D.22-11-025. No Commission decision prevents a party from filing a PFM if the requirements for filing a PFM are met. Additionally, parties are allowed to change their mind concerning whether they decide to no longer support a particular application in the future.

Duncan requested a subpoena to compel Jason Nutt (Nutt), the Assistant City Manager and Director of transportation and Public Works for the City. The subpoena was granted and Nutt appeared and testified on November 13, 2023. Duncan and SMART asked questions of Nutt. Additionally, the assigned ALJ asked various questions.

In A. 15-05-014, the City filed a PFM seeking an extension of time of the authority to granted by the Commission to construct the Jennings Avenue crossing. In this PFM, the City attached an affidavit from Nutt where he stated that past efforts dealing with SMART to come to an agreement were “not productive.”

Duncan did not ask the witness any questions about this affidavit. Rather it was the assigned ALJ who asked Nutt questions about the affidavit and his opinions on dealing with SMART. Duncan failed to question the witness about the affidavit or ask any questions that could have potentially provided beneficial information to support his allegations. Although the ALJ did ask Nutt many questions, it is not the ALJ’s responsibility to litigate Duncan’s case. Duncan

spent most of his time asking Nutt to agree that SMART was trying to relitigate the matter, to which Nutt stated that he did not agree SMART was relitigating the matter.

Nutt went on to testify that it was his belief that the Commission granted authority to construct the crossing and that it did not resolve indemnity issues. He also testified that as the owner of the property, SMART has the authority to ensure that the City provides adequate assurance to SMART regarding liability and other issues. He also testified that the statements made by Cumins at the Jennings Avenue crossing community meeting were Cumins' personal beliefs about how an at-grade crossing could impact SMART's operations. He wrapped up his testimony by stating that although things were not productive in the past, discussions subsequently improved.

The backbone of Duncan's case is that when the Commission issued D.16-09-002, it mandated that SMART agree to the construction of the crossing in its right-of-way. Duncan tries to prove his case by relying on hearsay statements that Cumins and Gamlen made at the joint Jennings Avenue crossing public meeting. Duncan believes that because Cumins and Gamlin made statements at this meeting seeking public input on a grade-separated crossing rather than the at-grade crossing approved by the Commission that it automatically means SMART is not complying and SMART is relitigating the matter.

The only witness Duncan put forth was Nutt. He never questioned Nutt about the specifics of previous negotiations with SMART or anything about Nutt's statement that discussions were not productive in the past. As noted earlier although the assigned ALJ assisted with some questions of Nutt, it is

inappropriate for the assigned ALJ to completely litigate Duncan's complaint on his behalf. Duncan also failed to question the witness concerning what efforts were undertaken to come to an agreement between the City with SMART to construct the crossing on SMART's right-of-way. Duncan failed to properly litigate his case.

Duncan failed to adequately prosecute his complaint. As a result of Duncan's failure to put forth adequate evidence, there is insufficient evidence to determine that SMART has failed to comply and should therefore be subject to penalties. When the Commission issued D.16-09-002 it provided regulatory authority for the crossing to be constructed, it did not resolve the issue of securing an agreement between the City and SMART for the at-grade crossing to be constructed on SMART's right-of-way. Accordingly, Duncan's complaint is dismissed for failing to prove by a preponderance of the evidence the allegations raised in his complaint.

Duncan has failed to prove by a preponderance of the evidence that SMART is intentionally not complying with D.16-09-002 and thus should be subject to fines and penalties. However, he has raised reasonable suspicion as to why it has been eight years since D.16-09-002 was issued granting the authority to construction and SMART and the City are still nowhere close to reaching an agreement concerning the Jennings Avenue crossing.

SMART claims that they were not directed by the Commission to cooperate with the City in good faith to try and reach an agreement until 2019 when the Commission issued D.19-10-002. The lack of progress toward building the Jennings Avenue at-grade rail crossing is of concern to the Commission.

Progress toward completion of the rail crossing should continue to be assessed in proceeding A.15-05-014.

6. Appeal and Review of Presiding Officer's Decision

The presiding officer's decision in this matter was mailed to parties in accordance with Section 311 of the Pub. Util. Code and an appeal was allowed under Rule 14.4. Complainant filed an appeal of the presiding officer's decision (Appeal) on December 23, 2024. Defendant filed a response to the Appeal on January 7, 2025.

The Appeal generally asserts that the presiding officer's decision contains the following errors, summarized below¹⁰:

- Asserts that the presiding officer's decision does not address all the issues in the scoping memo.
- Reargues the issue of whether SMART can require the City to agree to certain terms before the crossing can be constructed on SMART's right-of-way.
- Asserts that the Commission ordered SMART to construct the crossing because a witness for SMART was asked during the evidentiary hearing: "Can you cite any examples of any rail crossings in any other rail line ... in which a crossing has not been constructed, even though approved by the Public Utilities Commission because an agreement outside of the Commission was not reached?" and the response was "I don't have any knowledge of any example like that."

¹⁰ The Appeal makes numerous allegations, many of which are not in dispute such as D.16-09-003 approved the City of Santa Rosa's application for a crossing and it has been eight years and no crossing has been built; relists the issues set forth in the Scoping Memo; reargues all issues the majority of all issues and positions put forth during evidentiary hearings; and asserts that the Commission has exclusive jurisdiction for rail crossings.

- Reargues that because SMART's Motion to Dismiss was denied that it means the Commission ordered SMART to construct the crossing in question.
- Argues that when SMART's Motion to Dismiss was denied that the Commission ruled on against SMART's asserted defenses and positions in this proceeding.
- Argues that the presiding officer's decision is in error because it did not specifically address the complainant's statement in the Reply Brief that "SMART has not borne its burden of proof on new matter, affirmative defenses, and to refute the prima facie case."
- Argues the presiding officer's decision is in error because it only made three citations to the hearing transcript.
- Reargues the assigned ALJ's ruling on the best evidence rule and the ALJ's decision concerning the weight that was given to the Complainant's evidence.
- Is unhappy that the presiding officer's decision states that the Commission will consider an OII if an agreement between the SMART and the City of Santa Rosa is not reached within than 12-months from the date this decision is deemed final and reargues that because the crossing has not been completed that SMART has failed to comply with prior Commission decisions.

In response to the Appeal, Defendant supports the presiding officer's decision and asserts generally that: (1) the Appeal fails to identify any factual or legal error in the presiding officer's decision; (2) the presiding officer's decision correctly concludes that the Complainant failed to meet the burden of proof; (3) the Complainant mischaracterizes the presiding officer's review of the Complainant's evidence; and (4) Complainant's additional arguments fail to establish the presiding officer's decision is unlawful or erroneous.

We have reviewed the Appeal and Defendant's response to the Appeal. The Commission disagrees with Complainants' assertions that the presiding officer's decision contains factual or legal error and thus, makes no modifications to the presiding officer's decision.

7. Assignment of Proceeding

Matthew Baker is the assigned Commissioner and Gerald F. Kelly is the assigned Administrative Law Judge and Presiding Officer in this proceeding.

Findings of Fact

1. The complaint was filed by Duncan on June 7, 2021.
2. Among other things, the complaint alleges that SMART failed to comply with D.16-09-002.
3. It has been eight years since Decision 16-09-002 was issued granting the authority to construct the Jennings Avenue at-grade rail crossing construction and SMART and the City are still nowhere close to reaching an agreement
4. The complaint requests that SMART be compelled to come to an agreement with the City to construct the Jennings Avenue at-grade rail crossing on SMART's right-of-way and that SMART be fined accordingly.
5. SMART denies any wrongdoing in this matter.
6. The Complainant is a non-attorney self-represented litigant.
7. SMART was represented by its in-house legal team.
8. The complaint fails to prove by a preponderance of the evidence upon which any relief, including the requested orders, can be based.

Conclusions of Law

1. This proceeding should be dismissed for failure to prove by a preponderance of the evidence that SMART has failed to comply with D.16-09-002.
2. The complaint fails to request relief that may be granted based upon the facts alleged and evidence presented.
3. At no point did any prior Commission order, ruling or decision compel SMART to construct the Jennings Avenue crossing.
4. Progress toward completion of the rail crossing should continue to be assessed in proceeding A.15-05-014.
5. The proceeding should be closed.

O R D E R

IT IS ORDERED that:

1. The complaint is dismissed.
2. The requested relief is denied.
3. Progress toward completion of the Jennings Avenue at-grade rail crossing shall continue to be assessed in proceeding Application 15-05-014.
4. Case 21-06-011 is closed.

This order is effective today.

Dated _____, at Kings Beach, California