

Decision No. R08-0975 [**this decision and its Appendix A were entirely replaced by Errata Notice R08-0975-E**]

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 08R-297R

IN THE MATTER OF THE PROPOSED RULES REGULATING RAILROADS, RAIL FIXED GUIDEWAYS, TRANSPORTATION BY RAIL, AND RAIL CROSSINGS, 4 CODE OF COLORADO REGULATIONS 723-7.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
KEN F. KIRKPATRICK
ADOPTING RULES**

Mailed Date: September 12, 2008

I. STATEMENT

1. This proceeding was instituted when the Commission gave a Notice of Proposed Rulemaking (NOPR) regarding its Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7 in Decision No. C06-1074, September 13, 2006.

2. The Commission repealed and reenacted its entire body of rules on April 1, 2006. Due to the complexity of such an undertaking, the need for additional improvements to these rules is necessary.

3. In Decision No. C06-1074, the Commission stated that the basis and purpose of the proposed amendments were to simplify definitions, add rules that were inadvertently omitted during the preceding rulemaking, remove a requirement that is burdensome to applicants, request additional contact information on applications, and provide technical corrections to a few of the current railroad rules.

4. A hearing on the proposed rules was set for November 7, 2006 at 9:00 a.m. in a Commission hearing room in Denver, Colorado. Prior to the hearing written comments were filed by the BNSF Railway Company (BNSF), the Regional Transportation District (RTD), the Colorado Department of Transportation (CDOT), and the Union Pacific Railroad Company (UPRR).

5. At the assigned place and time the undersigned Administrative Law Judge called the matter for hearing. Oral comments were given by Staff of the Commission (Staff), BNSF, RTD, and UPRR. In accordance with § 40-6-109, C.R.S., the undersigned now transmits to the Commission the record of this proceeding along with a written recommended decision.

II. DISCUSSION

6. The statutory authority for the proposed rules is found in §§ 40-2-108, 40-2-119, 40-3-101(1), 40-3-102, 40-3-103, 40-3-110, 40-4-101(1), 40-4-101(2), 40-4-106, 40-5-105, 40-6-111(3), 40-9-108(2), 40-18-102, 40-18-103, 40-29-110, and 40-32-108, C.R.S.

7. Current rules incorporate the National Electrical Safety Code in two separate places. These proposed rules would reduce the incorporations by reference in this regard to one instance, namely, to Rule 7008. This change will be adopted.

8. The current rules have definitions for highway-railroad and railroad-highway crossings. The only difference in these two definitions is whether the highway preexisted the railroad. Highway-rail crossing is the more standard term of use. Rule 7201 is proposed to be modified to remove the two existing definitions and create a new definition for highway-rail crossing. Appropriate changes are made throughout the rules to remove highway-railroad and railroad-highway references, and to replace them with the new term highway-rail. These changes will be adopted.

9. Proposed Rule 7203 adds categories of persons or entities that may apply for railroad crossings and utility crossings. These categories do not exist in the current rules. Several commenters suggested that the rule as proposed be amended by adding the word “only” after the word “may” and before the phrase “be made” in each of subsections (a) through (f). No one opposed this suggestion and it will be adopted.¹

10. Rule 7204 is proposed to be modified to add additional information originally excluded, rearrange the listed order of requirements, and correct technical specifications of required information for interconnection and preemption at a highway traffic signal. These proposals will be adopted.

11. Rule 7208 is proposed to be modified to include certain notice requirements, which were inadvertently omitted in the preceding rulemaking, for applications seeking authority to close a highway-rail crossing. Several commenters noted that the proposals lack detail as to when the notice is to be posted or for how long. At hearing, Staff proposed additional language to address this shortcoming, and the proposal, as amended at hearing, will be adopted.

12. Finally, it was proposed in the NOPR that all rules concerning applications require facsimile number and e-mail address information for the applicant representative. This proposal will be adopted.

13. CDOT, in its written comment filed prior to hearing, requested that Rule 7211(a) be modified in this proceeding. The current rule requires that the roadway authority bear the cost of materials to maintain, repair, or replace the crossing surface. CDOT seeks to shift this cost to the railroad corporation, rail fixed guideway, transit agency, or owner of the track. The currently

¹ Should an entity other than one authorized to file an application in these subsections seek a change in the level of crossing protection, a complaint would be the proper avenue.

existing allocation was determined in the recent recodification of these rules that went into effect April 1, 2006. CDOT offers no reasoning or rationale for changing what was determined in the last rulemaking. In Decision No. C06-1074 opening this docket, the Commission indicated that “The instant rulemaking should not be construed as an opportunity to reopen contentious issues that have already been resolved in preceding rulemakings.” The allocation that CDOT seeks to change was previously resolved and no change to Rule 7211(a) will be made. Even had the Commission not precluded such a change, CDOT put forth no evidence that would support its proposal.

14. In accordance with § 40-6-109, C.R.S., it is recommended that the Commission enter the following Order.

I. ORDER

A. The Commission Orders That:

1. The changes to the Commission’s Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7, set forth in Appendix A to this Decision, are hereby adopted.

2. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

3. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse basic findings of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

4. If exceptions to this Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

KEN F. KIRKPATRICK

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

**Doug Dean,
Director**

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 CODE OF COLORADO REGULATIONS (CCR) 723-7

PART 7

RULES REGULATING RAILROADS, RAIL FIXED GUIDEWAYS, TRANSPORTATION BY RAIL, AND RAIL CROSSINGS

BASIS, PURPOSE, AND STATUTORY AUTHORITY

The basis for and purpose of these rules is to describe the manner of regulation over railroads, railroad corporations, rail fixed guideways, rail fixed guideway systems, transit agencies, persons holding a certificate of public convenience and necessity to operate by rail, any other person operating by rail, governmental or quasi-governmental entities that own and/or maintain public highways at rail crossings, railroad peace officers, and to Commission proceedings concerning such entities. These rules address a wide variety of subject areas including, but not limited to, applications, petitions, annual reporting, formal and informal complaints, operating authority, transfers of operating authority, mergers, tariffs, crossings and warning devices, cost allocation for grade separations, crossing construction and maintenance, railroad clearances, system safety program standard for rail fixed guideway systems, and employment of railroad peace officers.

The statutory authority for the promulgation of these rules can be found at §§ 40-2-108, 40-2-119, 40-3-101(1), 40-3-102, 40-3-103, 40-3-110, 40-4-101(1), 40-4-101(2), 40-4-106, 40-5-105, 40-6-111(3), 40-9-108(2), 40-18-102, 40-18-103, 40-29-110, and 40-32-108, C.R.S.

GENERAL PROVISIONS

* * *

[indicates omission of unaffected rules]

7002. Applications.

Commission action may be sought regarding any of the following matters through the filing of an appropriate application:

- (a) For a certificate of public convenience and necessity, as provided in rule 7101.
- (b) To amend a certificate of public convenience and necessity, or to change, extend, curtail, abandon, or discontinue any service, as provided in rule 7102.
- (c) For authority to transfer a certificate of public convenience and necessity, to obtain a controlling interest in any utility, to transfer assets or stock, or to merge a utility with another entity, as provided in rule 7103.

- (d) For authority to construct, alter, or abolish a utility crossing, ~~a railroad crossing~~, or a highway-rail crossing; or for authority to install or modify crossing warning devices, as provided in rule 7204.
- (e) For authority to allocate costs for highway-rail grade separations, as provided in rule 7205.
- (f) For approval of a transit agency's system safety program plan, as provided in rule 7343, or system security plan, as provided in rule 7344.
- (g) For any other matter provided by statute or rule but not specifically described in this rule.

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CROSSINGS AND WARNING DEVICES

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7201. Definitions.

The following definitions apply only in the context of rules 7200 through 7211.

- (a) "ADT" means average daily traffic.
- (b) "Arterial" means "arterial," as that term is used in Chapter 1 (Highway Functions: Systems and Classifications) of the 2001 edition of *A Policy on Geometric Design of Highways and Streets*, published by the American Association of State Highway and Transportation Officials.
- (c) "Collector" means "collector," as that term is used in Chapter 1 (Highway Functions: Systems and Classifications) of the 2001 edition of *A Policy on Geometric Design of Highways and Streets*, published by the American Association of State Highway and Transportation Officials.
- (d) "Exposure factor" means the ADT multiplied by the average daily number of train movements.
- (e) "Freeway" means "freeway," as that term is used in Chapter 1 (Highway Functions: Systems and Classifications) of the 2001 edition of *A Policy on Geometric Design of Highways and Streets*, published by the American Association of State Highway and Transportation Officials.
- (f) "Highway-rail crossing" means:
 - (I) the point at which any public highway may be constructed across the tracks or other facilities of any railroad corporation, railroad, or rail fixed guideway, at, above, or below grade; or
 - (II) the point at which the tracks or other facilities of any railroad corporation, railroad, or rail fixed guideway may be constructed across any public highway at, above, or below grade; or
 - (III) the point at which any public highway may be constructed across private tracks, over which any railroad corporation, railroad, or transit agency may operate, at, above, or below grade; or

(IV) the point at which private tracks, over which any railroad corporation, railroad or transit agency may operate, may be constructed across any public highway at, above, or below grade.

~~(g) "Railroad crossing" means the point at which the tracks or other facilities of any railroad corporation, railroad, or rail fixed guideway may be constructed across the tracks or other facilities of any other railroad corporation, railroad, or rail fixed guideway.~~

~~(gh)~~ "Reasonably adequate facility," except as may be otherwise demonstrated, means:

(I) A rural collector roadway that allows for two 12-foot travel lanes with two 5-foot shoulders;

(II) A rural arterial roadway that allows for two 12-foot travel lanes with two 8-foot shoulders and an 8-foot pedestrian-bikeway;

(III) An urban collector roadway that allows for two 12-foot travel lanes with two 10-foot parking lanes and an 8-foot pedestrian-bikeway;

(IV) An urban arterial roadway that allows for four 12-foot travel lanes with an 11-foot median and an 8-foot pedestrian-bikeway on one side;

(V) A single main line track that allows for mainline track, one passing track on 15-foot centers and a 12-foot maintenance road or a 4-foot walkway on one side;

(VI) A double mainline track that allows for two mainline tracks and one passing track on 15-foot centers and a 12-foot maintenance road or a 4-foot walkway on one side; and

(VII) Railroad yards or terminals that allow for currently existing tracks and service facilities.

~~(h)~~ "Utility crossing" means the point at which the tracks or ~~other~~ facilities of any public utility may be constructed across the ~~tracks or other~~ facilities of any other public utility at, above, or below grade, or at the same or different levels.

* * *

7203. Who May Apply.

(a) An application for authority to construct a highway-rail crossing where the highway currently exists may only be made by the railroad, rail fixed guideway, or other person, firm, or corporation that will own the tracks proposed to be constructed.

(b) An application for authority to construct a highway-rail crossing where the tracks or other facilities currently exist may only be made by the appropriate municipality, county, state agency, or other governmental entity.

- (c) An application for authority to alter or abolish a highway-rail crossing may only be made by the appropriate railroad corporation, railroad, rail fixed guideway, municipality, county, state agency, or other governmental entity.
- (d) An application for authority to install or modify signal lights or other warning devices may only be made by a railroad corporation, railroad, rail fixed guideway, municipality, county, state agency, or other governmental entity.
- ~~(e) An application for authority to construct, alter or abolish a railroad crossing may only be made by the appropriate railroad corporation, railroad, or rail fixed guideway.~~
- (ef) An application for authority to construct, alter or abolish a utility crossing may only be made by the appropriate public utility, railroad, rail fixed guideway, or other person, firm, or corporation that will own the tracks or other facilities proposed to be constructed.

7204. Application Contents — Generally.

- (a) For purposes of this rule only, the Commission incorporates by reference Section 8A.01 of the 2003 Edition of the Manual on Uniform Traffic Control Devices for Streets and Highways and the Colorado Supplement to the Federal Manual on Uniform Traffic Control Devices 2003 as adopted by the Transportation Commission of Colorado on September 14, 2004. No later amendments to or editions of the Manual on Uniform Traffic Control Devices are incorporated into these rules. Any person seeking information regarding how the incorporated material may be obtained or examined may contact the Director or his/her designee, Colorado Public Utilities Commission, 1560 Broadway, Suite 250, Denver, Colorado 80202. The material incorporated by reference may be examined at any state publications depository library.
- (b) Any engineering schematics, plans, drawings, or maps submitted pursuant to this rule shall be submitted on pages no larger than 11" x 17".
- (c) In the case of an application (other than to modify or replace the existing crossing surface without changing the width or configuration of a crossing) to construct, alter, or abolish a utility crossing, a highway-rail crossing, ~~or a railroad crossing,~~ or to install or modify crossing warning devices, the applicant shall submit the information required by this paragraph, to the extent applicable, either in the application or in appropriately identified attached exhibits. If the applicant is unable to provide certain information required by this paragraph, or if the applicant believes certain required information is excessive compared to the scope of the proposed project, the applicant may omit the required information provided that the application specifically justifies the omission. If the applicant desires Commission approval of special application procedures not otherwise contemplated by this paragraph (e.g., a design-build process or expedited approval), the application shall so state, shall specify the relief sought, and shall justify the request. Applications shall contain the following:
 - (I) the applicant's name and mailing address;
 - (II) if the applicant is a corporation or limited liability company: the name of the state in which the applicant is incorporated or organized and the location of its principal office, if any, in Colorado;

- (III) if the applicant is a partnership: the names and addresses of all general and limited partners;
- (IV) the name, address, telephone number, facsimile number, and e-mail address of the applicant's representative to whom all inquiries concerning the application may be made;
- (V) the U.S. Department of Transportation National Inventory Number of the crossing, the railroad or rail fixed guideway milepost, and the roadway milepost;
- (VI) a detailed statement as to the nature of and need for the construction, alteration, abolition, installation, or modification for which approval is sought;
- (VII) a statement of:
 - (A) the existing number, character, and timetable speed of trains and vehicles passing the crossing each day, and
 - (B) the five-year projection, and the ten-year or twenty-year projections if available, of increases or decreases of the number, character, and speed of such trains and vehicles, if any;
- (VIII) a statement of the scope of the project, including without limitation:
 - (A) highway design, crossing warning devices, and traffic signal interconnection and preemption;
 - (B) the itemized estimated cost of the proposed construction, alteration, abolition, or crossing warning device installation or modification; and
 - (C) how applicant proposes to provide for the cost, explaining the proposed apportionment between or among the parties in interest if applicable;
- (IX) in the case of an application for the installation or modification of crossing warning devices, a statement describing the type of crossing warning devices the applicant proposes to install (reference may be made to recommended standards on highway-rail grade crossing warning devices as published in current revisions of the Manual on Uniform Traffic Control Devices and/or American Railway Engineering and Maintenance-of-Way Association's Signal Manual of Recommended Practice);
- (X) a statement of the estimated start and completion dates for the construction, alteration, abolition, or crossing warning device installation or modification, and a statement of the estimated date for crossing's commencement of operation;
- (XI) a vicinity map that includes the proposed project limits (i.e., a map that includes the general area circumscribing the project);
- (XII) detailed plans/drawings of a suitable scale, showing the grade crossing, including signing and striping, tracks, buildings, structures, property lines, and public highways within the right-of-way limits of the railroad, railroad corporation, or rail fixed guideway;

- (XIII) a profile drawing showing grade lines and proposed grade lines of approaches on the public roads, highways, streets railroads, or rail fixed guideway systems that may be affected by the proposed or existing highway-rail crossing ~~or railroad crossing~~;
- (XIV) the schematic diagram of the crossing warning devices (commonly known as the "front sheet");
- (XV) in the case of an application to install or modify interconnection and preemption at a highway traffic signal:
 - (A) the traffic signal timings (e.g. signal cycle length, yellow change, red clearance) and traffic signal phasing diagram including preemption sequence;
 - (B) a statement of the type of preemption (e.g. simultaneous, advance)
 - (C) an analysis of the following timings as defined in Section 8A.01 of the Manual on Uniform Traffic Control Devices:
 - (i) the maximum highway traffic signal preemption time;
 - (ii) the right-of-way transfer time;
 - (iii) the queue clearance time;
 - (iv) the separation time;
 - (v) the minimum warning time – through train movements;
 - (vi) the advance preemption time, if applicable;
 - (vii) the exit gate clearance time (required for four-quadrant gate systems only); and
 - (viii) any additional timings the Commission may request.
- (XVI) the names and mailing addresses of all persons, including adjacent property owners, public utilities, municipalities, counties, and state that may be interested in or affected by the application;
- (XVII) if the crossing is at grade: a statement fully justifying why a separation of grades is not practicable under the circumstances;
- ~~(XVIII) in the case of an application to construct, alter, or abolish a railroad crossing:~~
 - ~~(A) a detailed description of the installation and operation of any lights, block, interlocking, or other system of signaling proposed to be constructed at the crossing; and~~
 - ~~(B) a statement of the operating rules and procedures that will govern the movement of trains over the crossing;~~

- (~~XVIII~~) a statement that the applicant agrees to respond to all questions propounded by the Commission or its Staff concerning the application:
 - (~~XI~~) a statement indicating the town or city, and any alternate town or city, where the applicant prefers any hearings to be held; and
 - (~~XXI~~) a sworn statement verifying and attesting to the facts stated in the application as described in rule 1403(a).
- (d) If the applicant adopts a substantive change to any map, drawing, plan, or schematic that has been filed with the application, the applicant shall file the new map, drawing, plan, or schematic within ten days of the change. In all cases, the applicant shall submit final maps, drawings, plans, or schematics, as applicable, within ten days of the availability of such final maps, drawings, plans, and schematics. ~~For each filing made pursuant to this paragraph, the applicant shall attach a certificate of service showing that a true and correct copy of the filing has been served upon those persons the applicant has listed in response to subparagraph (c)(XVI) of this rule, and showing the manner of such service.~~

* * *

SAFETY

Generally

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7301. Installation and Maintenance of Crossing Warning Devices.

- (a) All crossing warning devices, whether electrically operated or otherwise, and of whatsoever nature, which have been installed at ~~railroad crossings or~~ highway-rail crossings in the state of Colorado, shall be efficiently maintained and kept in good operating condition by the entity owning the track at the crossing.
- (b) Whenever crossing warning devices are interconnected to standard highway traffic signals, the highway traffic signal shall be efficiently maintained and kept in good operating condition by the public highway authority in interest.
- (c) Every person to whom this rule applies shall at all times keep its right-of-way free and clear from all obstructions which substantially interfere with the safe sight distance of approaching trains at ~~railroad crossings and~~ highway-rail crossings; provided, however, that:
 - (I) This paragraph (c) shall not apply to existing buildings, permanent structures, and natural obstructions other than trees and vegetation.
 - (II) This paragraph (c) shall not apply to rolling stock or materials temporarily on the right-of-way in connection with switching movements or with the loading or unloading of shipments.

- (III) This paragraph (c) shall not apply to ~~railroad crossings and~~ highway-rail crossings, at which ~~are protected by~~ automatic signals and gates are installed. The exception provided by this subparagraph (III) shall only be applicable if such automatic signals and gates are kept free and clear of all obstructions interfering with either:
- (A) the operation of the automatic signals and gates; or
- (B) the ability of drivers to detect the automatic signals and gates.
- (d) No grain elevators, storage tanks, warehouses or other buildings which substantially obstruct the view of approaching trains at crossings shall be built on the right-of-way unless and until the railroad complies with any requirements which the Commission may impose as to signals or other safety installation in connection with such obstruction.

* * *

7342. Incorporation by Reference.

References in these rules to 49 C.F.R. 659 are rules issued by the FTA and are hereby incorporated by reference in these rules. References in these rules to 49 C.F.R. 15 are rules issued by the Office of the Secretary of the U.S. Department of Transportation and are hereby incorporated by reference in these rules. References in these rules to 49 C.F.R. 1520 are rules issued by Transportation Security Administration Department of Homeland Security and are hereby incorporated by reference in these rules. These rules may be found at 49 C.F.R. 15, 659, and 1520 revised as of October 1, 2005. References to 49 C.F.R. 15, 659 and 1520 do not include later amendments to, or editions of, 49 C.F.R. 15, 659 and 1520. ~~References in these rules to standards of the American Public Transit Association are standards contained in its "Manual for the Development of Rail Transit System Safety Program Plans" published on August 20, 1991. References to standards of the American Public Transit Association do not include later amendments to, or editions of, this Manual.~~ A copy of all material that has been incorporated by reference is maintained at the offices of the Colorado Public Utilities Commission, ~~156080 Logan Street~~Broadway, Suite 250~~Office Level 2,~~ Denver, Colorado 802023, and is available for inspection during normal business hours. Copies of the incorporated rules shall be provided at cost upon request. The Director of the Commission, ~~1580 Logan, Office Level 2, Denver, Colorado 80203,~~ will provide information regarding how 49 C.F.R. 15, 659 and 1520 ~~and the "Manual for the Development of Rail Transit System Safety Program Plans"~~ may be obtained or examined. This incorporated material may be examined at any state publications depository library.

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