Decision No. C23-0780

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21R-0538R

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

COMMISSION DECISION GRANTING, IN PART, AND DENYING, IN PART, EXCEPTIONS TO RECOMMENDED DECISION NO. R23-0618 AND ADOPTING RULE AMENDMENTS, WITH MODIFICATIONS

Mailed Date: November 27, 2023
Adopted Date: November 17, 2023

TABLE OF CONTENTS

I. BY THE COMMISSION

A. Statement

1. This matter comes before the Commission for consideration of the exceptions filed by rulemaking participants to Recommended Decision No. R23-0618, issued September 22, 2023, by Administrative Law Judge (ALJ) Melody Mirbaba (Recommended Decision). The Recommended Decision adopts amendments to the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* (CCR) 723-7

(Recommended Rules). Among other updates and revisions, the rule amendments implement fining authority for noncompliance with rail crossing safety regulations and orders as authorized in Senate Bill (SB) 19-236, enacted and effective May 30, 2019, and codified at § 40-4-106(1)(b), C.R.S, as relevant here. In addition, the rule amendments are designed to improve the processes and communications between the railroads and road authorities and to better facilitate the proper and timely completion of Commission-approved rail crossing projects.

2. By this Decision, we grant, in part, and deny, in part, the exceptions filed to the Recommended Decision. We adopt the ALJ's Recommended Decision and Recommended Rules, with certain clarifications as well as modifications to the rule language as discussed below and as shown in redline in Attachment A to this Decision, and in final format in Attachment B to this Decision.

3. As we stated in our Notice of Proposed Rulemaking (NOPR) that opened this rulemaking, we initiated this rulemaking to address a pattern wherein railroads significantly delayed or failed to comply with Commission orders relating to safety-related rail crossing projects, all of which were issued based on the Commission's jurisdiction under § 40-4-106(2)(a), C.R.S., to prescribe the terms and conditions of the installation, operation, maintenance, and warning at public crossings to prevent accidents and promote public safety at rail crossings.[1] The rule amendments we adopt by this Decision provide a process for the Commission to enforce compliance with orders and rules that the Commission has deemed necessary to ensure safety at rail crossings in Colorado. We believe the rule amendments reasonably balance stakeholders' competing interests while safeguarding and serving the public interest, public safety, and rail crossing safety.

[1] Decision No. C21-0737 at p. 4, citing Proceeding Nos. 18A-0332R; 18A-0339R; 18A-0629R; 18A-0631R; 18A-0636R; 18A-0809R; 19A-0201R; 19A-0231R; 19A-0413R; 19A-0475R; and 19A-0542R.

B. Background

4. The Commission initiated this matter on November 22, 2021, by issuing a Notice of Proposed Rulemaking (NOPR) and referred the matter to an ALJ for disposition. The NOPR was published in the December 10, 2021 edition of *The Colorado Register* and on the Commission's website.

5. The purpose of this Proceeding is to amend the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, found at 4 CCR 723-7. As set out in the Recommended Decision, the statutory authority for these rules is found at §§ 40-2-108, 40-4-106, 40-7-105, 40-9-108(2), 40-18-102, 40-18-103, 40-29-110, and 40-32-108, C.R.S.

6. Multiple public comment hearings were conducted by the ALJ on the proposed rules, with hearings convened on January 11, 2022; March 24, 2022; October 17, 2022; January 17, 2023; and June 1, 2023.

7. On September 22, 2023, the ALJ issued the Recommended Decision and recommended adoption of the Recommended Rules.

8. By Interim Decision No. C23-0681-I, issued October 11, 2023, the Commission granted the motion of Union Pacific Railroad Company (Union Pacific), joined by BNSF Railway Company (BNSF), for a 14-day extension of time to file exceptions to the Recommended Decision, to accommodate a delay in the railroads' ability to obtain transcripts for this Proceeding from the court reporter.

9. On October 26, 2023, the following rulemaking participants filed exceptions to the Recommended Decision, pursuant to § 40-6-109(2), C.R.S., challenging portions of the Recommended Decision and requesting clarifications or modifications to the Recommended Rules: Union Pacific;

BNSF; Colorado Communications and Utility Alliance (CCUA); and the American Short Line and Regional Railroad Association (ASLRRA).

10. On November 8 and 9, 2023, the following rulemaking participants filed responses to the exceptions: the Colorado Department of Transportation (CDOT); CCUA[2]; the City and County of Broomfield; Boulder County; and Douglas County.

11. The Commission deliberated at a November 17, 2023, Commissioners' Deliberations Meeting. The Commission granted, in part, and denied, in part, the exceptions, and adopted the Recommended Decision and Recommended Rules, with certain clarifications and modifications, which are identified below and shown in Attachments A and B to this Decision.

C. Discussion

12. Under § 40-6-109(2), C.R.S., and Commission Rule of Practice and Procedure, Rule 1505(a), 4 CCR 723-1, whenever an ALJ issues a recommended decision, the record is transmitted to the Commission, and parties to the proceeding (or in the case of rulemaking, the participants) may file exceptions. Responses are permitted within 14 days following service of the exceptions. If exceptions are timely filed, the recommended decision is stayed until the Commission rules upon them. When ruling on exceptions, the Commission may adopt, reject, or modify the ALJ's findings of fact and conclusions and may enter its own decision.

13. Below, we address the general issues raised in the exceptions as well as the specific requested rules changes. First, we address two overarching challenges to the Recommended Decision and Recommended Rules. Second, we address the preemption and constitutional assertions the railroads make in their exceptions. Third, we review the specific requested rule changes. Finally, we

[2] The CCUA states it concurs with the responses filed by the City and County of Broomfield and Boulder County.

address general requests concerning implementation of these rules. Any arguments in the exceptions that are not specifically addressed in the discussion below, have been considered and rejected. The adopted rule amendments are shown in redline format in Attachment A to this Decision and in final format in Attachment B to this Decision.

1. Request to Expand Scope of Rules

14. BNSF contends that it would be arbitrary, capricious, and contrary to law for the Commission to have the ability to impose a civil penalty on a railroad but not on the involved road authority for the same failure to comply with a Commission order or rule. BNSF reasons that the Commission has authority in its current Rules of Practice and Procedure, specifically Commission Rules 1301 and 1302, 4 CCR 723-1, to consider informal and formal complaints and to impose civil penalties on road authorities. BNSF adds that the Commission exercises authority over road authorities through its decisions concerning rail crossings. Finally, BNSF asserts that equal application of the rules is required because the Commission imposes certain obligations and compliance deadlines on road authorities regarding crossings and proceedings.

15. BNSF also contends that the Regional Transportation District (RTD) operates a railroad and that nothing in the plain language of SB 19-236 dictates or suggests RTD, or any other political subdivision of the state, should be exempted from civil fines assessed by the Commission.

16. **The Commission denies these exceptions.** We uphold the ALJ's finding at ¶ 44 of the Recommended Decision that, as a matter of law, the Commission lacks statutory authority to assess civil penalties against road authorities, and thus cannot include road authorities in these civil penalty rules. As the ALJ thoroughly explains, the Commission's statutory fining authority under

§ 40-4-106(1)(b), C.R.S., does not include road authorities, and while the Commission has broader authority to assess civil penalties against railroads as public utilities under § 40-7-105(1), C.R.S., road authorities are not "public utilities" under state law, and therefore, are not covered by this statute either. Railroads are "public utilities" as common carriers per §§ 40-1-102(3)(a)(II) and 40-1-103(1)(a)(I), C.R.S. Section 40-1-103(1)(a)(I) defines "public utilities" to include common carriers but includes no language that would encompass road authorities as public utilities or otherwise as entities declared by law to be affected with a public interest.

17. Contrary to BNSF's assertions in its exceptions, we find no authority in our practice and procedure rules to impose civil penalties on road authorities. Rule 1301, which BNSF cites, sets out the Commission's process for its staff's review of informal complaints. The other rule BNSF cites, Rule 1302, provides the framework for adjudicating formal complaints. BNSF does not point us to any specific language in these rules that supports its contention that these rules provide authority for the Commission to impose civil penalties on road authorities, and we can find no such language upon our own review.

18. As to the argument that RTD should not be exempted from civil penalties under these rules, we uphold the ALJ's findings at ¶ 58 of the Recommended Decision that RTD's status as a political subdivision requires an exception in our implementing rules specifying that the civil penalties will not apply to a political subdivision. RTD is a political subdivision of the State of Colorado, *see* § 32-9-119, C.R.S.,[3] and is a transportation district created pursuant to the authority conferred by Title 32, Article 9, C.R.S. As RTD clarified in its rulemaking comments, it is a political subdivision

[3] § 32-9-119(1)(a), C.R.S. ("The [Regional Transportation District] shall be a political subdivision of the state."). RTD was established and is statutorily authorized to develop, to operate, and to maintain a mass transportation system for the district.

(*i.e.*, a governmental entity),[4] and as currently enacted, the fining authority conferred on the Commission in § 40-4-106(1)(b), C.R.S., is specific to fining "a railroad company," so it does not apply to RTD, which is not a railroad company.

2. Challenge to References to Cause of Delay

19. BNSF disputes what it claims are references in the Commission's NOPR and in the ALJ's Recommended Decision to a "pattern of delay," intimating that railroads are responsible for such "delays." BNSF maintains that railroads prioritize safety above all else. BNSF asserts, to the extent any delays in meeting compliance deadlines occur, railroads would not allow such circumstances to impact rail crossing safety. BNSF contends these references that implicate project delay is attributed to railroad conduct do not reflect the practical realities of crossing projects. BNSF states, in contrast, the railroad and the road authority must work together to complete projects. BNSF reasons, with two parties involved, it should not be overlooked that delays can arise from many sources.

20. **The Commission denies this exception.** We affirm our statement from the NOPR that we continue to be dismayed at the pattern of delay by railroads. That statement was supported by the several proceedings cited in the NOPR, where the Commission was asked repeatedly by road authorities for extensions of time to file required documents due to delay they were experiencing in working with the railroad. In those proceedings, the Commission determined that significant delay in complying with Commission decisions, including instances involving delay in filing a signed construction and maintenance agreement as required by a Commission decision, would postpone upgrades and installations that the Commission had already approved and ordered to proceed.

21. Now, at the conclusion of this rulemaking process, the record contains numerous credible comments from the participating road authorities that speak directly to their experiences of

[4] Recommended Decision at ¶ 43 (citing RTD's 4/15/21 Comments at p. 1 in Proceeding No. 21R-0100R. *See* RTD's 12/22/21 Comments at p. 1 (reasserting 4/15/21 Comments in Proceeding No. 21R-0100R)).

delay and non-responsiveness when working with railroads on crossing projects. The ALJ specifically reviews many of these comments in the Recommended Decision. For example, when addressing the civil penalty rules, the ALJ discusses the comments submitted by the City of Steamboat Springs, in which the city reported that its experience negotiating with Union Pacific on crossing projects "has uniformly been marked by unreasonable delay, opaque billing practices, breach of contract, and a general unwillingness to negotiate in good faith."[5] Similarly, the ALJ discusses that the City of Aurora confirmed in its comments that railroads continue to cause project delays by failing to provide Commission-required documentation within the ordered timeline in proceedings.[6] The ALJ states Douglas County commented that railroads plainly leverage the existing rules to burden local jurisdictions, and requested that the Commission step-in and amend the rules to limit railroads' ability to continue to do so.[7] Likewise, the ALJ states that the CCUA reported in its comments that it is especially common for railroads to delay or refuse to negotiate a construction and maintenance Agreement for a Commission-approved crossing modification in order to extract concessions from road authorities, and alleged that railroads would even refuse to negotiate such agreements in order to extract monetary concessions.[8]

22. While BNSF alleges the implication that delays are caused by railroads does not reflect "the practical realities" and that "it should not be overlooked that delays can arise from many sources," these claims fail to invalidate the road authorities' credible comments about their own experiences, contained in the record of this Proceeding. Overall, we find the record persuades us that there is a very real need to improve the processes and communications between the railroads and road authorities, and to better facilitate the proper and timely completion of Commission-approved rail crossing projects.

[5] Recommended Decision at ¶ 25 (citing Steamboat's 2/10/22 Comments at p. 1).
[6] Recommended Decision at ¶ 29 (citing Aurora's 1/5/22 Comments at p. 1).
[7] Recommended Decision at ¶ 30 (citing Douglas County's 2/18/22 Comments at pp. 1-2).
[8] Recommended Decision at ¶ 31 (citing CCUA's 4/14/21 Comments at p. 4 in Proceeding No. 21R-0100R).

Many of the amendments in the Recommended Rules are designed to do just that including, for example, rules addressing notice, coordination, and communication between railroads and road authorities. In addition, the civil penalty rules provide a process and a means for the Commission to enforce compliance with the orders and rules that we have deemed necessary to ensure safety at rail crossings. Further, as discussed below regarding the civil penalty rules, the rules provide ample due process that protects respondents from being assessed civil penalties for any violations that they did not commit. We are assured there is no legitimate risk that a railroad would be assessed a final penalty for a delay that it did not in fact cause.

3. Preemption and Constitutional Arguments

23. In their exceptions, BNSF and Union Pacific assert that the Commission's rules are either preempted or unconstitutional and must not be adopted as recommended by the ALJ. BNSF argues that the ALJ's determination not to address these arguments in the Recommended Decision represents an abuse of discretion. Nonetheless, the manner in which BNSF and Union Pacific present these arguments to the Commission in their exceptions leaves much to be desired. The arguments contained in the body of BNSF's exceptions are underdeveloped and conclusory. In footnotes, BNSF points the Commission to various pages of an attachment to its exceptions that contain more developed arguments. For its part, Union Pacific provides us even less. It addresses the five constitutional arguments it seeks to raise on exceptions with only two sentences of argument, while providing footnotes citing to various pages of comments filed in this Proceeding and another.

24. Though Union Pacific has failed to properly present these issues for our review, because BNSF has marginally presented these constitutional issues, we address them here.[9] As discussed

[9] *See Town of Breckenridge v. Egencia, LLC*, 2018 COA 8, ¶ 87 (declining to reach underdeveloped and improperly presented arguments).

below, after due consideration of these claims, we find no cause in these objections to reconsider or reject any of the Recommended Rules.

a. Preemption Claim

25. BNSF and Union Pacific contend the Interstate Commerce Termination Act of 1995 (49 § USC 10501(b)) (ICCTA) preempts state laws that affect railroads in two ways: (1) it categorically preempts "state or local regulation of matters directly regulated by" the federal Surface Transportation Board (STB); and (2) it preempts, as applied, any state law that "would have the effect of preventing or unreasonably interfering with railroad transportation." *Emerson v. Kansas City*, 503 F.3d 1126, 1130, 1133 (10th Cir. 2007). They claim both forms apply here, alleging the Recommended Rules impermissibly intrude on STB jurisdiction and impermissibly burden interstate rail transportation.

26. Having thoroughly reviewed the ICCTA preemption arguments in the exceptions, the railroads have not persuaded us that any of the Recommended Rules are preempted. This is because the arguments presented fail to apply the legal analysis used to determine whether state law is preempted by the ICCTA. Read together, the many cases the railroads cite develop an analysis that tests a specific state law or regulation against the ICCTA or regulations of the Federal Railroad Administration (FRA) or STB. With one brief exception,[10] the arguments presented to this Commission do little more than make general assertions about the rules and claim they are preempted, failing to meaningfully engage with the analysis developed by the courts to address ICCTA preemption issues. Accordingly, we are not persuaded that the Recommended Rules ought to be modified on these grounds.

[10] BNSF references Rule 7212(g), pertaining to railway consultants' involvement in crossing proceedings, and asserts the rule is preempted. The case it cites to for support, however, addresses one of many "blocked-crossing" statutes that have been found to be preempted because it interferes with "railway operations", *i.e.*, when and how trains may be moved or parked. We are therefore unconvinced the case has any meaningful applicability to these regulations that govern the application process for establishing, closing, or modifying rail crossings.

27. We are also unpersuaded that the ICCTA reaches the Recommended Rules because the rules regulate rail crossing safety, and the Federal Railroad Safety Act (49 USC § 20106) (FRSA)—not the ICCTA—governs whether state rail safety regulations are preempted by federal law. *See BNSF Ry. Co. v. Hiett*, 22 F.4th 1190, 1196 (10th Cir. 2022) ("FRSA provides the appropriate basis for analyzing whether a state law, regulation or order affecting rail safety is pre-empted by federal law.").

b. Constitutional Arguments

28. In their exceptions, BNSF and Union Pacific assert that the Recommended Rules and proposed civil penalties against railroads are unconstitutional on grounds that they: (1) violate the equal protection clause of the 14th Amendment; (2) impair the freedom of parties to contract in violation of the Contract Clause; (3) discriminate against out-of-state entities (railroads) in violation of the Commerce Clause; and (4) constitute an excessive and inappropriate exercise of state police powers. Upon our review of the railroads' arguments on these issues, we do not find compelling grounds that would warrant modifications to the Recommended Rules.

29. As to equal protection, the railroads contend that: (1) it is not rational to treat road authorities differently from railroads; and (2) removing some stakeholders (which we interpret to mean road authorities) from civil penalties is facially arbitrary. They argue it is irrational to exclude road authorities from the rules governing civil penalties and that doing so does not advance the stated goal of promoting safety by expediting such projects. However, as the Recommended Decision points out, the Commission lacks statutory authority to assess civil penalties against road authorities.[11] We are unpersuaded that it is irrational, or a violation of the 14th Amendment, for this Commission to enact civil penalty rules that align with the statutory authority the legislature has given to it.

[11] Recommended Decision at ¶ 44.

30. In Exhibit E to its exceptions, BNSF asserts "the amendments are in general overly broad and thus arbitrary" and claims a one-sized-fits-all rule is a poor choice for the varied aspects of each highway-rail grade crossing project. But the rules BNSF challenges[12] as overly broad provide specific procedural requirements for certain crossing applications. We perceive no overbreadth issue with any of the particular rules, and BNSF articulates none, beyond a general claim that rules may limit flexibility. Accordingly, we are unmoved by BNSF's contention to consider modifications to the Recommended Rules.

31. As to freedom of contract, the railroads contend the Recommended Rules impair the freedom of parties to contract by, among other things, allegedly: dictating contractual terms, mandating that road authorities and railroads enter into "template" agreements, imposing time limits on agreeing to contracts, limiting railroads' ability to employ safety consultants, and impacting existing contractual agreements between railroads and road authorities.

32. For support, BNSF offers only a quotation from the Contracts Clause and a lone citation to a case. That case, *Raptor Educ. Found., Inc. v. State*, 296 P.3d 352 (Colo. App. 2012), determined that a state law unconstitutionally impaired an existing contract. This case is unpersuasive because the rules here will apply prospectively to proceedings initiated after these rules become effective. The railroads offer no other developed legal arguments and so we will not consider modifications to the Recommended Rules on these grounds.

33. To support the claim of in-state favoritism, the railroads contend that road authorities are being treated differently than railroads and other similar entities. Their reasoning is that road authorities are in-state entities, while railroads are out-of-state entities. Using this reasoning, they conclude, by enacting penalties for out-of-state interests while favoring in-state interests, the rules are discriminatory. They assert, "A discriminatory law is 'virtually *per se* invalid,' and will survive only if

[12] BNSF notes "For clarity, these are proposed Rules 7204 (a)X (C),(D) 7211 (o); 7212 (e), (f)."

it 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.' They continue, absent such discrimination, the law "will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *People v. Boles*, 280 P.3d 55, 62 (Colo. App. 2011).

34. We are unpersuaded by the railroads' attempt to read discrimination against out-of-state entities into these rules. BNSF frames the issue as road authorities versus out-of-state railroads, however the two cases it cites in support indicate that the proper comparison is between similarly situated entities—here, railroads.[13] And the rule amendments treat in-state and out-of-state railroads exactly the same. To the extent the railroads argue the civil penalties are precluded by the Commerce Clause because the impact is disproportionate to the benefit, we disagree. As the ALJ explained at ¶ 47 of the Recommended Decision, these civil penalty rules advance legitimate interests in ensuring that railroads comply with statutory obligations, Commission orders, and Commission rules relating to crossing safety. Nor do we view BSNF's suggestion to remove the civil penalties rules as a reasonable alternative to achieve the rules' purpose. So, we will not consider any modifications to the Recommended Rules on these grounds.

35. Finally, regarding police powers, the railroads disagree that the Recommended Rules promote safety; indeed, they argue many rules would hinder safety (*e.g.*, allegedly disregarding railroad industry and internal engineering standards which are aimed at promoting safety, limiting railroad use of consultants, and advancing quiet zone projects). They also believe that limiting civil penalties to railroads belies the stated goal of advancing safety and argue the rules are therefore an excessive and inappropriate exercise of police powers.

[13] *Coffman v. Williamson*, 2015 CO 35 (analyzing whether a regulation impermissibly discriminated between two types of attorneys [Colorado residents and residents of other states]); *People v. Helms*, 396 P.3d 1133, 1141 n.5 (Colo. App. 2016) (rejecting challenge because statute treats identically interstate and intrastate communications).

36. BNSF's brief argument on this point does not persuade us to depart from the clear analysis and findings in the Recommended Decision that explain why these rules promote and further crossing safety. *See, e.g.*, Recommended Decision at ¶ 54. At their core, the rules will help ensure that crossing safety projects proceed apace and BNSF's underdeveloped assertion that the rules do not promote safety is insufficient to convince us to consider modifications to the Recommended Rules.

4. Requested Rule Changes

a. Rules 7009-7011 – Civil Penalties

37. Rules 7009 through 7011 are a new section within the Commission's Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, in 4 CCR 723-7. As the ALJ explains, these new civil penalty rules are a means for the Commission to enforce railroads' compliance with the Colorado Constitution, provisions in articles 1 to 7 of title 40, Colorado Revised Statutes, and Commission orders and rules. Such orders and rules are issued under the Commission's authority to take such measures as it deems reasonable and necessary to prevent accidents at rail crossings, promote safety at rail crossings, and prevent accidents in railroad operations pursuant to its authority under §§ 40-4-106(1)(a)[14] and (2)(a),[15] and 40-9-108(2),[16] C.R.S. These rules implement both the Commission's broad authority to issue civil penalties under § 40-7-105(1), C.R.S.,[17] and the specific authority conferred in SB 19-236, which added new subsection § 40-4-106(1)(b), C.R.S., providing:

[14] Section 40-4-106(1)(a) authorizes the Commission to promulgate such rules that promote and safeguard the health and safety of the public, including rules that require performance of such acts that health and safety may demand.

[15] Section 40-4-106(2)(a) grants the Commission authority to make decisions regarding public grade crossings, including to prescribe the terms and conditions of installation, operation, maintenance, and level of warning at such crossings and authorizes the Commission to prescribe standards to the "end, intent, and purpose that accidents may be prevented and the safety of the public promoted."

[16] Section 40-9-108(2) authorizes the Commission to "make and enforce rules, as in its judgment, will tend to prevent accidents in the operation of railroads in this state."

[17] Under § 40-7-105(1), C.R.S., the Commission has authority to assess a civil penalty against any public utility who violates or fails to comply with the state constitution, articles 1 to 7 of title 40, or a Commission rule or order.

> If, pursuant to this subsection (1), the commission issues an order or promulgates a rule requiring a railroad company to comply with railroad crossing safety regulations, the commission may impose a civil penalty pursuant to article 7 of this title 40, in an amount not to exceed the maximum amount set forth in section 40-7-105 (1), against a railroad company that fails to comply with the order or rule.

38. Rules 7009 through 7011 provide defined terms, outline the process for imposing a civil penalty, and identify violations that may form the basis for a civil penalty assessment notice (CPAN). BNSF, Union Pacific, and ASLRRA each filed exceptions requesting clarifications or modifications to these provisions.

(1) CPAN Process

39. Both BNSF and Union Pacific raised logistical concerns with the process around assessing a civil penalty.

40. BNSF cautions that road authorities could use the threat of civil fining as leverage in proceedings before the Commission. BNSF objects that the due process protections built into the process are insufficient to prevent inappropriate leveraging of the rules by road authorities because the railroads would have to expend significant resources even to respond to inappropriate civil fines requested by road authorities, including filing briefs, attending hearings, and pursuing appellate remedies. BNSF requests, at minimum, the rules should state that railroads can present exculpatory evidence demonstrating any alleged delay or other alleged rule violation was occasioned by the road authority and not the railroad.

41. Union Pacific objects that the Commission's assessment notice to a railroad of an alleged violation could be the first time the railroad hears of an allegation and would then only have 14 days to cure. Union Pacific raises concern that the Commission's initial determination to issue an assessment notice could be based solely on a one-sided version of events. Union Pacific cautions that the proposed process would place a heavy burden on the Commission, as the road authorities could "flood" the Commission with reports of alleged violations, each requiring use of Commission

resources to investigate and then prove at hearing.[18] Union Pacific posits that a more reasonable, less burdensome process, would be for the Commission to set a status hearing(s) in the proceeding to determine the cause of delay, before proceeding to an assessment notice. Union Pacific also requests, since railroads are large organizations dealing with thousands of crossing projects across many states, the Commission should at least extend the timelines in Rules 7010(a), 7010(b)(II)(E) and 7010(c) – to 60 calendar days – allowing more time for a railroad to cure an alleged violation or to pay a prescribed penalty.

42. In its response, Douglas County counters that road authorities do not themselves benefit, or receive monetary gain, from arbitrarily requesting that the Commission fine a railroad. Douglas County argues that road authorities have attempted to give time to the railroads for generation of estimates, schematics, and agreements, particularly once plans are final, but continue to experience delays. Douglas County states, under current practices, road authorities have no recourse when coordination stalls due to the railroad's inability to commit to a timeline and deliver requested estimates, schematics, and agreements in a timely manner that allows the project to proceed. Douglas County states railroads can avoid these penalties by standardizing their development of schematics, estimates, and agreements, and committing to a timeline to deliver these documents.

43. **The Commission denies this exception.** We uphold the ALJ's findings at ¶ 50 of the Recommended Decision that the due process afforded to respondents under the civil penalty rules will adequately ensure that the railroads' concerns with unfounded allegations are not ultimately realized. As the ALJ summarizes, the civil penalty rules provide a plethora of due process protections that ensures respondents will not be assessed penalties for violations they did not commit. After an initial notice, the case will proceed to formal adjudication, where Trial Staff of the Commission will carry the burden of proof as to each alleged count. In that forum, the respondent will have full opportunity to

[18] Union Pacific Exceptions at p. 3.

present relevant evidence and arguments including that someone else caused the violation. To Union Pacific's suggestion of using a status conference to determine the cause of delay before proceeding to a CPAN, while this is an available tool, we decline to prescribe this in rule. We also decline to extend the timelines for cure or payment. The Recommended Rule states a *minimum* of 14 days must be allowed for cure and the Commission, in its discretion, may provide additional time to cure the alleged violation. Overall, we are satisfied the rule as currently written provides sufficient flexibility for the Commission to adjust to the circumstances of each case.

(2) Amount of Penalties

44. Recommended Rule 7011 provides that the total amount of civil penalties assessed against a single entity may not exceed $150,000 in any consecutive 12-month period. As to each offense, Recommended Rule 7010(d)(II) states, in any written decision assessing a civil penalty, the Commission may impose a penalty of not more than $2,000 per offense. Likewise, Recommended Rule 7011 states a violation may result in an assessment of up to $2,000 per offense.

45. BNSF requests that the Commission modify the rules to further limit the amount of civil penalties that may be assessed. BNSF contends the ALJ wrongly concluded that the civil penalties in the Recommended Rules would not have a significant impact on railroad operations or existing agreements. BNSF maintains road authorities may use these rules to attempt to renegotiate existing agreements or to disrupt long-standing agreements under the guise of new projects.

46. ASLRRA also filed objections to the amount of civil penalties. ASLRRA objects that a "one size fits all" approach to the level of fines is harmful to small business railroads. ASLRRA cautions that the short line freight railroads operating in Colorado would be negatively impacted by these rules. ASLRRA maintains short lines are small businesses that, on average, employ fewer than 30 people, run an average of only 79 miles, and have $7.7 million or less in annual revenue. ASLRRA states these small businesses operate the most vulnerable segments of the system and succeed by

competing aggressively for business. ASLRRA cautions the recommended $2,000 fine per violation could result in heavy fines on small railroads and the overall limit of $150,000 is too severe for small railroads. ASLRRA objects that even the process of defending itself would be costly.

47. **The Commission denies these exceptions.** As the ALJ notes at ¶ 86 of the Recommended Decision, the $150,000 maximum 12-month amount is similar to the limit on civil penalties against public utilities that provide electric, gas, water, water and sewer, and telecommunications services, per § 40-7-113.5(5), C.R.S. And as the ALJ emphasizes at ¶ 85, these rules do not impact railroads' operations, but merely allow the *potential* for the Commission to enforce the Colorado Constitution, articles 1 to 7 of title 40, and its orders and rules, through civil penalties on a prospective basis. The ALJ also correctly points out that implementing rules that allow the Commission to assess civil penalties have been foreseeable for years, given the General Assembly has historically given the Commission this type of authority, and specifically gave the Commission this authority years ago per §§ 40-4-106(1)(b) and 40-7-105(1), C.R.S. In addition, we note Recommended Rule 7010(d)(II) makes clear that, in determining the penalty amount, the Commission will consider relevant factors including the respondent's ability to pay and to continue in business.

48. Specific to ASLRRA, we agree with the ALJ's reasoning at ¶ 75 of the Recommended Decision that, unless ASLRRA's members presently plan to commit significant violations of Commission orders and rules, there are no grounds to assume its member railroads will be assessed penalties that will impact operations. Further, as we note above, the civil penalty rules expressly require that when the Commission assesses a civil penalty, it consider relevant factors including the respondent's ability to pay, the effect on the respondent's ability to continue in business, the size of the respondent's business, and any other factors as equity and fairness may require. We agree with the ALJ that these factors mitigate the risk that the Commission would assess a civil penalty that would

jeopardize the ability of any of ASLRRA's members to continue their operations. To alleviate unnecessary concern, we also emphasize the purpose of these civil penalty rules is compliance. We intend to utilize CPANs as an appropriate tool where the facts and circumstances warrant.

(3) FRA Program

49. ASLRRA renews its request that the Commission engage in a partnership with the FRA in its Rail State Participation Program as an alternative to the proposed rules. ASLRRA states that joining the partnership would save Colorado money that it would otherwise have to spend on enforcing civil penalties. ASLRRA indicates that thirty states have already partnered with the FRA, successfully strengthening protections to the public and having consistent standards vis-à-vis crossing standards. ASLRRA states the partnership would take nothing away from the ability of the Commission to enforce its rules, it would just provide uniformity regarding investigative and surveillance capabilities to the benefit of the railroads, the road authorities, and the public.

50. **The Commission denies this exception.** We uphold the ALJ's determination to deny this request. At ¶ 76 of the Recommended Decision, the ALJ rejected ASLRRA's suggestion that the Commission partner with the FRA to join its Program relating to investigative and surveillance capabilities in lieu of the civil penalty rules. The ALJ concluded, and we agree, while the FRA's Program would have benefits, it does not advance the Commission's interest in enforcing its orders and rules and relevant statutes. Additionally, ASLRRA provided no information about how the Commission would pay for this program, and there would likely need to be a statutory change to allow the Commission to start such a program. Further, we are not persuaded that the FRA's Program would meet the same objectives as our rules – the issues our rules address concerning crossing safety are not necessarily things that would be addressed by the FRA's Program.

b. (NOPR) Proposed Rule 7202 – Necessary Parties

51. The NOPR proposed adding a new Rule 7202 that clarifies that any owner of a track at a railroad crossing would be joined as a necessary party in an application proceeding before the Commission. The purpose of this requirement was to improve efficiency in the application process. The ALJ ultimately concluded the proposed rule may do more harm than good and declined to adopt it.

52. BNSF urges the Commission to adopt this rule. BNSF reasons this procedural mechanism will alleviate the burden of railroads having to file interventions in proceedings that they do not actually oppose but do wish to monitor. BNSF states its policy is to intervene in any proceeding impacting one of its crossings in order to be apprised of the progress and outcome of such proceedings.

53. The City and County of Broomfield, Boulder County, and Douglas County filed responses urging the Commission to deny this exception. Broomfield cautions that requiring railroads to be a party to an application would delay road authorities from being able to file applications. Likewise, Boulder County states it does not see the value of joining railroads as a party to an application proceeding as road authorities are already delayed due to railroad inefficiencies. Douglas County questioned whether railroads would commit to be joined as a party to an application.

54. **The Commission denies this exception.** We agree with the ALJ's conclusions in ¶ 111 of the Recommended Decision that a rule automatically joining a railroad as a party to a crossing application proceeding before the Commission should not be adopted. As the ALJ explains, under Rule 1403(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, a proceeding will not be considered contested or opposed unless an intervention has been filed that includes a clear statement specifying the grounds of objection. Thus, if a railroad did oppose an application, or desired a hearing, it would still have to file an intervention setting forth its objection.

c. Rule 7208(e) – Notices Outside of Formal Proceeding

55. The ALJ recommends adding a new paragraph (e) to existing Rule 7208, addressing provision of notices outside of a formal proceeding before the Commission. Rule 7208(e) requires a railroad to publish on its website, and keep current, the name, email, and mailing address of the person designated by the railroad to receive written notices that are required by the Commission's rules outside of a formal Commission proceeding.

56. Union Pacific requests modifying the language of this rule to permit it to list its contact center as the designated person to receive these notices. Union Pacific states it uses a contact center as its notice mechanism, rather than a specific person or persons. Union Pacific states the contact center operates 24/7, provides responses, and ensures that communications are directed to the appropriate department.

57. Douglas County responded to Union Pacific's exception, raising concern that road authorities and the Commission need to know the correct contact information for the designated Union Pacific Public Project Representative for Colorado, so that documents and submittals can be made to the correct individual. Douglas County states, if the contact center is the conduit for such contact, then this information should be displayed; however, the lack of contact information for a physical person prevents the road authority from being able to directly follow up in the event no acknowledgment is received.

58. **The Commission grants this exception.** The ALJ adopted this new notice requirement in Rule 7208(e) to address circumstances where stakeholders need to provide notice to each other in matters involving public and crossing safety that occur outside of a formal proceeding before the Commission. The ALJ explains that requiring the railroad to publish this information on its website avoids placing the Commission or its staff in the position of having to act as a conduit between parties for these communications. Based on Union Pacific's representation that its contact center operates

24/7, provides responses, and ensures that communications are directed to the appropriate Union Pacific department, we find it reasonable to adjust the language in this notice rule to allow for the designation of a contact center. The Commission therefore modifies the language in Rule 7208(e)(I) and (II) as shown in Attachments A and B to this Decision. Nonetheless, we share the concern raised by Douglas County that a centralized contact center, with no personal contact, may leave road authorities with no person with whom to follow up if they receive no response after sending a communication through the contact center. We make clear that Union Pacific assumes the risks associated with routing critical notices through its contact center, including those that that start timelines under these rules. Accordingly, a road authority that sends a written notice to the designated contact center will have served proper notice and Union Pacific will be accountable for the receipt of any such notice, regardless of whether the contact center appropriately directed the notice to its correct internal destination.

d. Rule 7211(k) – Obstructions

59. Union Pacific requests a clerical edit to Recommended Rule 7211(k) to correct the cross reference in this rule to Rule 7301(d) (not *c*).

60. **The Commission grants this exception.** Rule 7211(k) should cross reference Rule 7301(d); this change is reflected in Attachments A and B to this Decision.

e. Rule 7212 – Crossing Safety Diagnostics and Cost Estimates

(1) Rule 7212(c) – Diagnostic

61. Recommended Rule 7212(c) states that, during a field diagnostic review, the road authority and railroad, with any necessary assistance by Commission staff, shall review and confer on safety devices, preemption and timing of traffic control signals, and the exit gate operating mode and clearance time. The rule specifies that, although this conferral is required, the railroad does not have

authority to overrule the road authority's determinations as to aspects that directly relate to control and direction of vehicular traffic.

62. BNSF objects that this rule is ambiguous and potentially improperly gives road authorities sole authority over the selection of devices and preemption times at crossings. BNSF states that railroads and their personnel and consultants are experts in these matters and urges that railroad expertise promotes safety. BNSF states, for instance, road authorities should not be granted unfettered discretion to select preemption times for interconnected traffic signals or exit gate operating modes that promote traffic flow but reduce safety margins at the crossing. BNSF states, likewise, road authorities should not be permitted to dictate sacrifices in safety in the name of expediting quiet zone projects by installing the road authorities' preferred measures.

63. Boulder County and Douglas County filed responses maintaining it is proper, as the rule language affirms, for the road authority to determine what is appropriate for a given crossing. They state that railroad consultants are themselves not experts in a crossing's vehicular traffic characteristics and often request traffic or pedestrian features that are not necessary. They explain that by default, road authorities must complete request for preemption forms to the railroads, which gives railroads the opportunity to provide input. They note road authorities also submit railroad plan sheets for railroad review and input. They add that, as to quiet zones, the FRA has produced a Final Rule that provides tested and approved crossing treatments for quiet zone establishments, from which a road authority may select. They conclude that as a result, road authorities do not sacrifice safety and a road authority may determine, per FRA Final Rule, what is appropriate for a given crossing.

64. **The Commission denies this exception.** On the one hand, as the ALJ recognizes at ¶ 159 of the Recommended Decision, leaving out railroads from a crossing safety diagnostic makes little sense given that the rules allow them to request such a meeting. We also agree with the ALJ that

railroads can contribute their specialized rail expertise to a field diagnostic review, which promotes public and rail crossing safety. On the other hand, we recognize the ALJ intentionally adjusted the language in this rule to ensure that a railroad's participation in this meeting does not mean the railroad controls the meeting, or controls aspects of the crossing related to vehicular traffic engineering. We will retain the ALJ's recommended rule language. As the ALJ appropriately concludes, road authorities, with the Commission's approval, are best situated to make decisions concerning design elements related to vehicular traffic, as they are able to bring their traffic engineering expertise to bear.

(2) Rule 7212(e) – Cost Estimate and Schematic

65. Recommended Rule 7212(e) states that a railroad must provide to the road authority an initial cost estimate and a schematic diagram no more than 90 calendar days after the road authority has properly submitted a request and has provided the necessary documents for the railroad to prepare the initial cost estimate and schematic diagram. The rule provides, if the railroad determines the road authority has not provided all necessary documents for it to create the initial cost estimate and schematic diagram, within 14 calendar days of receiving the road authority's request, the railroad must notify the road authority in writing of the additional documents that it requires. The rule states, if the railroad does not provide this notice, the road authority is presumed to have provided the necessary documents and the 90-day timeframe will run from the date the road authority is served its request. If the railroad does provide notice that it requires additional documents, then the initial cost estimate and schematic diagram must be provided within 90 days of the date the road authority provides the additional documents. Below we address several exceptions related to this rule.

(a) Necessary Documents

66. BNSF contends the Recommended Rules do not sufficiently require the provision of all necessary information to a railroad before it is required to provide an initial cost estimate and schematic diagram to a road authority. BNSF states that railroads cannot be expected to create these

documents without first obtaining the appropriate project information. BNSF maintains, for example, the crossing safety diagnostic is a critical component of this process and a necessary precursor to creating the initial cost estimate and schematic diagram.

67. The City and County of Broomfield, Boulder County, and Douglas County all filed responses generally agreeing that necessary project information must be provided before a railroad is expected to develop these documents. They caution; however, that road authorities should not be unnecessarily delayed by the inability of a railroad (or its consultants) to fit a needed diagnostic meeting into their schedule. They state that road authorities typically attempt to accommodate the railroad's schedule, by looking several months ahead to schedule a needed diagnostic meeting.

68. BNSF offers that, in the alternative, the rules should permit more than 14 calendar days for a railroad to provide a written request for needed additional documents, allowing instead 30 calendar days or 21 business days. BNSF states that it prefers a rule requiring provision of necessary documents before the safety diagnostic but appreciates the proposed procedure to seek additional necessary documents from the road authority. BNSF states, given the nature of the interstate railroads' large system and the limited resources within the engineering, public projects, and maintenance-of-way departments, there will be a burden to clearly document these missing documents within the ALJ's recommended 14 calendar days.

69. Union Pacific makes a similar request. It states that, due to complexities of determining whether a road authority has provided all the necessary documents for the railroad to create the initial cost estimate and schematic diagram, the timeline of 14 calendar days should be extended to 30 calendar days.

70. Douglas County responds to this proposal, stating "necessary documents" should only include those documents showing railroad features under the authority of the railroad. Douglas County

states that requesting additional documents such as vehicular traffic studies, adjacent development plans, etc., for which railroads have no authority, should not be reason for the railroad's delay in providing review, comments, estimates, etc., as these are not 'necessary documents' for the railroad to review or provide comment to road authorities.

71. **The Commission grants these exceptions, in part, and denies them, in part.** We see merit to the crossing safety diagnostic meeting occurring before provision of the initial cost estimate and schematic diagram; however, we are sensitive to the concern in the responses that a delay in scheduling the diagnostic could cause further delay of the project. We therefore adopt BNSF's alternative approach, adopting a rule change that allows 30 calendar days for a railroad to provide its written request to the road authority for additional necessary documents. The Commission modifies the language in Rule 7212(e) as shown in Attachments A and B to this Decision. As the railroads have urged in their exceptions, we understand each crossing project is different, with its own nuances, so we agree that additional time may be warranted to identify any outstanding necessary documents. We do not make any adjustments based on Douglas County's response, but we agree that railroads must be realistic in what they deem to be a necessary document under this rule. To that end, we clarify that this rule is not to be used as a means to circumvent other rules and that the "necessary documents" that may be required under this rule refers narrowly to those documents the railroad actually needs to create the initial cost estimate and schematic diagram.[19] We conclude that this rule, with the 30-day timeframe for requesting necessary documents, reasonably balances the responsibilities and expectations of the multiple parties involved in a crossing project and ensures that this initial process will be timely completed – and avoids undue delay that prevents the crossing project from progressing.

[19] In general, documentation should be limited to railroad crossing plans showing the proposed design and any preemption information. Traffic studies, signing and striping plans, and roadway plans (aside from the crossing location) are examples of what normally should not be allowed as necessary documents.

(b) Timeframe

72. BNSF requests that the Commission extend the timeframe for a railroad to provide the initial written cost estimate and the schematic diagram, from the 90 calendar days in the Recommended Rules to 120 calendar days. BNSF objects that it cannot meet a 90-day turnaround, based on the workflow across its expansive multistate system, the limited resources it has to handle such requests, and its desire to treat road authorities across its system fairly by processing requests generally in the order received. BNSF reasons that the requested 120-day timeframe is only 30 more days than the ALJ recommended, so no meaningful delay would be occasioned by adopting this more feasible timeline.

73. The City and County of Broomfield, Boulder County, and Douglas County filed responses supporting BNSF's request to extend this timeframe to 120 calendar days. They agree that 120 days is an acceptable timeframe if this timing can in fact be achieved by the railroads.

74. **The Commission grants this unopposed exception.** We agree that this moderate extension, from 90 calendar days to 120 calendar days, is reasonable given the concerns raised by BNSF and the support in the filed responses for a timeframe that the railroads have agreed to and will be accountable to going forward. The Commission modifies the language in Rule 7212(e) as shown in Attachments A and B to this Decision.

(3) Rule 7212(f) – Execution of C&M Agreement

75. Recommended Rule 7212(f) states the signed construction and maintenance (C&M) agreement must be filed with the Commission within 90 days of the Commission's final decision authorizing the crossing project, or within the 30-day period preceding the Commission-approved construction start date, whichever comes later.

76. BNSF maintains that the deadlines in the Recommended Decision for filing a C&M agreement are too restrictive, absent agreement on templates, which it maintains is unlikely the partiers

will reach. BNSF adds that any requirement that a railroad enter into agreements by a date unrelated to the actual start date of construction interferes with private contractual rights and is beyond the scope of the Commission's jurisdiction.

77. Union Pacific objects to the establishment of a fixed or any project schedule to the extent such schedule does not contemplate the complexities and spectrum of public projects, which each carry their own circumstances and may require additional approvals, design changes, personnel, money, etc. Union Pacific maintains that a fixed schedule is arbitrary and invites further unintended consequences, including disputes when the railroad or other party inevitably seeks additional time, and additional financial burdens from increased disputes and setbacks. Union Pacific reasons, although in theory a fixed schedule would streamline projects, in practice, it would only cause further delays because each project is complicated and nuanced.

78. Union Pacific states, if the Commission adopts the Recommended Rule, the 90 calendar day timeline should be extended to 120 days, as verifying, or identifying matters involving real property can take more than 90 days. Union Pacific states that although it understands this rule is in conjunction with Rule 7214 regarding templates, the majority of C&M agreements impact the railroad's real property, and due to the time that an adequate real property analysis can take, the timeline should be at least 120 days.

79. The City and County of Broomfield and Douglas County filed responses maintaining the deadlines for filing C&M agreements are not too restrictive as currently written. They contend that receiving an executed agreement 30 days before the commencement of construction fulfills the requirement that a railroad enter into an agreement by a date related to the actual start date of construction. They add that road authorities must have the executed agreement at least 30 days prior to construction in order to timely file it with the Commission and give notice to proceed to the contractor

to begin working with the railroad on safety training, right-of-entry, and coordination of the schedule. They dispute the claim that this timing is too restrictive, responding that the timing is essential for the road authorities in order to complete the construction and coordinate with contractors effectively.

80. **The Commission denies this exception.** We uphold the ALJ's finding at ¶ 199 of the Recommended Decision that, by establishing a deadline to file C&M agreements, Rule 7212(f) attempts to solve a common issue in rail crossing application proceedings, that is, significant delay in executing C&M agreements. As the ALJ explains, such agreements are a necessary step before construction on a Commission-approved crossing safety project may proceed. As the ALJ outlines, avoiding substantial delays in completing a crossing safety project serves the public interest and falls within the Commission's authority under § 40-4-106(1)(a), C.R.S., to require the performance of an act "that the health or safety" of the public demands; its authority under § 40-4-106(2)(a), C.R.S., to use such means as to the Commission "appears reasonable and necessary to end, intent, and purpose that accidents may be prevented and the safety of the public be promoted;" and its authority under § 40-9-108(2), C.R.S., to make and enforce such rules as, in its judgment "will tend to prevent accidents in the operation of railroads" in the state. We also note, once template agreements are developed, the process for executing C&M agreements should be more streamlined. That provides another reason to retain the timing in this rule, in order to incentivize the efficient use of template agreements going forward. As the ALJ states at ¶ 203 of the Recommended Decision, once template agreements are available, there is no reason why parties cannot file a C&M agreement within 90 days of the Commission's order authorizing the project. Indeed, templates will greatly reduce time-consuming negotiations. And as the ALJ points out, if a party requires more time, as they always have been able to do, they may file a motion requesting additional time.

81. We consider, and will decline, Union Pacific's request to extend the 90 calendar day timeline for filing a C&M agreement to 120 days. We balance their stated concern that more time may be needed to complete a real property analysis with the imperative purpose of this rule, which is to solve the issue of delay in executing C&M agreements, so that construction of approved projects may timely proceed. The reason given in Union Pacific's exception, that most C&M agreements impact the railroad's real property, and an adequate real property analysis can take more time, is insufficient to persuade us to extend the reasonable timeline that the ALJ recommends.

(4) Rule 7212(g) – Railroad Consultant Time

82. Recommended Rule 7212(g) provides, if a railroad uses a consultant to perform a public project review on its behalf, the consultant's review is limited to 12 billable hours. Further, the consultant's review is limited in scope to preemption calculation verification using the road authority's traffic signal timing information, and project review reports relating to the preemption calculation verification for crossing projects. The 12 billable hours may not include traffic engineering matters, which are under the road authority and Commission's purview and expertise. The rule provides the railroad may request an extension of the 12 billable hours for good cause, including that additional time is necessary to ensure safety considerations are addressed and the scope of the work to be performed.

83. BNSF and Union Pacific filed exceptions requesting reconsideration of this rule. CDOT, the City and County of Broomfield, Boulder County, and Douglas County filed responses, urging the Commission to adopt the Recommended Rule.

84. Both BNSF and Union Pacific oppose limiting railroad consultants' time. BNSF maintains that any such limits are arbitrary and detrimental to safety. BNSF argues that road authority projects typically do not benefit the railroad, so it is appropriate for road authorities to bear the costs of consultants. BNSF contends, just as the cost of materials must be borne by road authorities, so too

must costs for consultants. BNSF states it operates an expansive system with tens of thousands of crossings. BNSF states that consultants can provide substantial benefit to road authorities and assist with expediting design. BNSF states, moreover, this process is necessary to facilitate safe and efficient design of projects. BNSF adds that each project is unique, and the 12-billable-hour time limit is arbitrary and not tied to any actual project or empirical data. Union Pacific adds that various railroad personnel and consultants testified to the complexities of crossing projects and how road authorities' designs often lack the detail necessary for the railroad and its consultants to adequately review and approve plans. Union Pacific cautions that limiting time can lead to road authority's project failing to progress due to absence of such details and/or components. Union Pacific further objects that this rule would limit the communication and collaboration between road authorities and railroads, which would not be in the best interest of public safety or use of public funds.

85. Likewise, both BNSF and Union Pacific oppose limiting railroad consultants' review of traffic engineering matters. BNSF states that excluding railroad consultants from working on "vehicular traffic issues," with no definition for that term, will lead to ongoing disputes. Pointing to the limit in Rule 7212(d) that railroad may not require a road authority to pay for a study or report that it did not request, BNSF raises concern that road authorities may misuse this provision to claim that any billing submitted by a railroad consultant relates to "vehicular traffic issues." BNSF requests, at minimum, Rule 7212(d) should be clarified to state that railroad consultant review and comment on designs is a permissible billable expense and not a "report" the road authority has not requested. Union Pacific maintains railroad consultants must review plans to ensure that they are complete and will comply with standards and federal regulations. Union Pacific states it expects to be reimbursed by the road authority for its consultants' time because it is the road authority's project for which the work is being done.

86. CDOT filed a response, asserting that BNSF incorrectly claims that road authorities restrict the ability of railroads to employ consultants. CDOT explains that it does not oppose the use of consultants, as a general matter, but does oppose the broad scope for which railroads use their consultants – and then bill the road authority. CDOT explains, for example, railroads employ consultants for review of standards outside the railroads' authority, then request payment from CDOT for that review. CDOT states the railroads' consultants do not have authority or expertise to review CDOT's traffic engineering plans, which pertain to areas beyond the railroad right-of-way. CDOT also objects to Union Pacific's assertion that railroad consultants must review traffic engineering plans to meet necessary standards and federal regulations. CDOT states that it is responsible for reviewing plans to make sure they meet federal and state guidelines and how those plans affect the travelling public in its rights-of-way. Finally, CDOT states it is required to follow standards outlined by local, state, and federal authorities to monitor the safety of the public along its roadway and that it cannot be bound by internal standards of private railroads that may conflict with these authorities.

87. The City and County of Broomfield's response similarly clarifies that its opposition is to railroads' broad use of consultants, which includes review of road features that are not under the railroads' authority to review, and then billing the road authority for the consultants' work, without the road authorities' consent, and claiming the road authority agreed to the costs. Broomfield also states that costs for railroad consultants should be borne by the railroad, and the consultants should limit their evaluation and comments to only railroad equipment. Broomfield states, if a railroad desires additional guidance on compliance with roadway standards, those expenses should be borne by the railroad and not the road authority.

88. In its response, Boulder County states that its objection with consultants is to the railroad and their consultants dictating what they can do on the road authority's roadway. Boulder

County maintains that a railroad and its consultants should not review road features that are not under the railroad's authority to review. Boulder County states the costs of a railroad's review should not be billed without the road authority's consent. Specific to the 12-billable-hour limit, Boulder County maintains that a local agency should not be required to bear the costs of a railroad's discretionary review of proposals that are authorized by the local agency by statute or regulation. Boulder reasons that railroads must determine how to protect themselves, but other entities should not be forced to incur those transaction costs.

89. Douglas County echoes these concerns. Douglas County adds that 12 hours is sufficient time to review a few crossing plan sheets and preemption calculations, if included in the project. Douglas County objects that it is a misuse of public funds for road authorities to have to reimburse railroads' consultants for hotels, cars, meals, airfare, several days onsite taking pictures and 'assessing' the traffic condition, then producing a report, all of which was requested by the railroad, not the road authority. Douglas County maintains railroads have been vague in the Preliminary Engineering Agreements, not identifying, in detail, what the estimated cost is intended to cover. Douglas County states, it is only at the field diagnostic, when many staff from the railroad or its consultant attend, that the road authority has any idea that it will be invoiced for the expenses of all this railroad personnel. Douglas County adds that railroads have been including a line item in their equipment and labor estimates titled 'Traffic Engineering Study' or similar, with a cost of $20,000 to $30,000, that is also vague. Douglas County adds that railroad consultants are not necessarily experts in the traffic demographic of a particular crossing and lack the long-term understanding of the roadway network and traffic that is regularly studied by the road authority's staff. Douglas County states, to arrive a day or two prior to a diagnostic meeting and observe traffic does not make railroad consultants experts in the crossing function, operation, or traffic anomalies, any more than a road authorities' consultant could be

an expert in railroad equipment operation simply by watching it activate. Douglas County concludes, use of consultants is the choice of the railroad and should be utilized at the railroad's expense.

90. **The Commission denies this exception.** As explained in the NOPR and the Recommended Decision, this rule is intended to minimize delay resulting from railroad consultants' involvement in public projects, which can lead to public safety concerns. The ALJ found at ¶ 206 of the Recommended Decision, and we uphold this finding, that the record establishes that railroad consultants' work on public projects are a common cause of delay in projects progressing, which creates crossing safety concerns.[20] As the ALJ discusses, while road authorities have no choice in selecting railroads' consultants, or ability to direct the scope or speed of their work, railroads have routinely passed such costs onto road authorities. Further, the scope of consultants' work has regularly included vehicular traffic engineering, which is an area for which road authorities have their own experts. We agree with the ALJ that it is questionable whether road authorities, or public safety, benefit from railroads hiring consultants to advise on vehicular traffic engineering matters. At the same time, we are mindful of the railroads' concern that railroads must contract with consultants to do the necessary work and should not be required to pay consultant costs for projects of no benefit to the railroad. Balancing these considerations, we find Rule 7212(g) reaches a reasonable compromise. We agree with the ALJ that the rule encourages railroads to ensure that their consultants perform only the necessary work by establishing a limited scope and amount of time expected for such work. The rule also contains explicit language allowing that the railroad may, for good cause, request the Commission extend the time limits, which addresses the railroads' concerns that additional time may be necessary to ensure safety considerations and the scope of work for a given project. We agree with the

[20] Recommended Decision ¶ 206 (citing Fort Collins' 12/10/21 Comments at p. 6; Windsor's 12/14/21 Comments at pp. 5-7; Greeley's 12/21/21 Comments at pp. 6-8; Aurora's 1/5/22 Comments at p. 6; CCUA's 4/14/21 Comments at p. 12 in Proceeding No. 21R-0100R; Fort Collins' 12/10/21 Comments at pp. 5-6).

stakeholders, and the ALJ, that the road authority, with the Commission's approval, is the entity in the best position to determine issues surrounding vehicular traffic engineering issues.

91. Finally, as the ALJ makes clear, this rule does not intend to dictate the scope of a railroad's contracts with its own consultants. Railroads remain free to contract with consultants as they deem appropriate. As the ALJ explains at ¶ 211 of the Recommended Decision, our rule simply identifies the matters that the Commission, using its specialized expertise, has determined are reasonable, appropriate, or necessary for railroads' consultants to review and opine on in the course of a rail crossing safety project over which the Commission has jurisdiction, alongside a baseline reasonable number of hours it will take to complete the same.

f. Rule 7213 – Stop Signs at Passive Crossings

92. Rule 7213(a) states that all public crossings shall have posted, at a minimum, one MUTCD[21] R15-1 crossbuck sign, one MUTCD R15-2P number of tracks sign for crossings with more than one track, one MUTCD R1-2 yield sign, and one MUTCD I-13 emergency notification sign mounted on the same support, for each direction of vehicle and/or pedestrian traffic. The rule states that any different signage requires Commission approval.

93. BNSF requests the Commission modify this rule to permit the use of a stop sign, rather than a yield sign, as a minimum protection at a crossing without active warning devices. BNSF states that railroads and road authorities supported a consensus amendment to this effect during the rulemaking, which the ALJ declined to adopt because of CDOT's objection. BNSF states CDOT's opposition is based on its own adoption of the MUTCD, which requires a yield sign as the default

[21] The Manual on Uniform Traffic Control Devices (MUTCD).

traffic control. BNSF counters that the Commission is not bound by the MUTCD or CDOT's adoption. BNSF contends the consensus rule would promote safety by permitting installation of stop signs at passive crossings without the need for undertaking a vehicular traffic study. BNSF states, at minimum, the rule could be modified to permit the Commission to order road authorities to undertake such studies where appropriate and install stop signs on Commission order if merited under the study.

94. The City and County of Broomfield responds that it concurs with CDOT's objections. Broomfield states that road authorities all over the U.S. and in Colorado routinely follow the MUTCD. Broomfield maintains the concept is simple, if all jurisdictions follow the same rules of signage, there will be less accidents and thus improved safety.

95. Likewise, Boulder County responds that it has also adopted the MUTCD and agrees an engineering study performed by a road authority is needed prior to placement of a stop sign. Boulder County adds that railroads should consult with the road authority prior to placement of any signs on their signposts. Boulder County explains this coordination is needed so that the road authority is aware of sign placement and does not mistake the signs being placed as without permission or by someone in the general population.

96. Douglas County filed a response stating it agrees that an engineering study is needed, and only the road authority, not the railroad, should be allowed, by Commission order, to place a stop sign at a passive crossing.

97. **The Commission denies this exception.** We see merit to the ALJ's finding at ¶ 224 of the Recommended Decision that, because CDOT has adopted the MUTCD, as a starting point, our rule has to comply with the standards that CDOT has adopted. Upon review of the exceptions and the specific responses opposing any change filed by the City and County of Broomfield, Boulder County, and Douglas County, we agree that our rule should meet the standards in the MUTCD.

g. Rule 7214 – Template Agreements

98. Recommended Rule 7214 provides that, starting November 22, 2024, road authorities and railroads must use Commission-approved templates for C&M agreements and Preliminary Engineering Agreements. In the Recommended Decision, the ALJ explains the intent of this rule is to address the significant delay in executing C&M agreements, for reasons the comments suggest range from railroads using the negotiation process to extract unreasonable concessions knowing the road authorities must timely move projects forward or risk losing funding, to the railroads insisting road authorities enter into agreements that are unlawful under Colorado law, to road authorities refusing to accept railroads' form agreements and insisting on negotiating different terms. The Recommended Decision finds at ¶ 200 that the record establishes that railroads have insisted, at least initially, that road authorities execute C&M agreements that violate, are contrary to, or inconsistent with Colorado law. The ALJ concludes it is unreasonable for road authorities and railroads to continue to waste time and resources negotiating terms that should be well-established and within the parameters of Colorado law. Below we address two exceptions relating to this rule.

(1) Subject Crossings

99. CCUA filed an exception requesting the Commission add "utility crossings" to the list of crossing types requiring template agreements. CCUA states the Commission has authority over utility crossings of a railway and applications for utility crossings of a railway pursuant to Rules 7002(a)(IV), 7203(e), and 7204(a)(XVIII), 4 CCR 723-7. CCUA states that in its written comments submitted during the rulemaking, it identified increasing difficulties in negotiating utility crossing agreements for all the same reasons the ALJ provided as justifications for Rule 7214 in the Recommended Decision.

100. **The Commission grants this exception.** We find good cause to add this additional type of crossing to the list of template agreements, based on the arguments in CCUA's exception filing.

We adopt the change proposed by CCUA, specifically, we will add the term "utility crossings" to the list in this rule. This change to Rule 7214 is reflected in Attachments A and B to this Decision.

(2) Workshop Process

101. BNSF allows that it would participate in a workshop to create template agreements, but objects that the process set forth in the Recommended Decision is too vague to be workable and provides no mechanism for resolution, should railroads and road authorities not agree on template agreements. BNSF further objects that a "one-size-fits all" approach is not desirable for the many different communities and political subdivisions BNSF must negotiate agreements with across Colorado. BNSF states the template agreements that it and Union Pacific have negotiated with CDOT reflect this concern – while those agreements have streamlined the process with CDOT, they were the product of years of negotiation and CDOT is but one road authority in the state. BNSF states it is willing to work in good faith to try to negotiate template agreements, with flexibility to meet the needs of railroads and the varied political entities cross Colorado with whom they must enter into C&M agreements. BNSF concludes; however, that participants need a procedure to address differences that remain at the end of a workshop beyond forcing railroads to accept the provisions sought by road authorities.

102. **The Commission grants, in part, and denies, in part, this exception.** While we find the process outlined by the ALJ to be flexible and workable, we understand the concern raised by BNSF of the potential for participants to reach an *impasse* in developing workable template agreements. The ALJ's recommended process already contemplates Commission staff involvement and monitoring; Rule 7214 requires template agreements to be developed through a workshop process, in a Commission miscellaneous proceeding. We intend to open a miscellaneous proceeding for this purpose, ideally no later than 30 days after the final Commission decision in this Proceeding. Through that decision we will outline further how this process will be managed, including requirements for any

workshops, which stakeholders we may ask to lead these efforts, requirement for status reports, and resolution of disputes.

(3) Confidentiality

103. BNSF urges Commission to clarify that C&M agreements and related technical information filed with the Commission are confidential and should not be publicly available. BNSF states this sensitive information implicates national security concerns related to critical rail infrastructure. BNSF reasons, while the Commission does have procedures in place to submit information as confidential, it would be better to treat these agreements and information as *de facto* confidential.

104. CDOT responds, objecting to any requirement that its agreements with the railroads be deemed confidential by rule. CDOT states it is a public entity subject to the state Colorado Open Records Act and, as such, cannot withhold these agreements.

105. Douglas County also responds, maintaining public projects are public. Douglas County urges that information regarding public projects needs to remain available to the general public for transparency of use of public funds. Douglas County reasons that technical information in C&M agreements should remain available to the public, not only to retrieve previous agreements when needed, but to read and understand the process and project that was undertaken. Douglas County also questions why template C&M agreements would need to be confidential.

106. **The Commission denies this exception.** As BNSF acknowledged, the Commission already has in place a set of procedures for how to file information with the Commission as confidential. These rules apply to information that is "claimed to be a trade secret or confidential in nature." Rule 1100(a), 4 CCR 723-1. As set forth in the Commission's Rules of Practice and Procedure, Rules 1100–1103, 4 CCR 723-1, if a party believes a document contains confidential information, they can file it under seal. A claim of confidentiality constitutes a representation to the

Commission that the party has a reasonable and good faith belief that the subject information is confidential under applicable law. If a party wishes to challenge the claim of confidentiality, Rule 1101(f) sets out the procedures to do so. If a party believes certain information is highly confidential and requires extraordinary protection, then the party can file a motion requesting extraordinary protection be afforded such information. We believe the best approach to protecting any potentially sensitive information in C&M agreements is through use of these well-established rules. We decline BNSF's request to treat these agreements and information as *de facto* confidential because that would undercut the fair and clear processes in our rules for claiming, and challenging, confidentiality.

h. Rule 7301 – Maintenance Costs

107. BNSF acknowledges that the Commission has existing rules concerning maintenance of equipment and further notes that BNSF disputes any claim that it has been involved in "extorting" road authorities to pay for maintenance concerning any project, including quiet zone projects. BNSF objects that parties should be free to enter into private contractual agreements concerning maintenance agreements, without Commission involvement. BNSF also urges the Commission, going forward, to consider whether Commission rules concerning maintenance obligations that predate federal quiet zone standards are appropriate and equitable in allocating responsibility for equipment installed solely to facilitate quiet zone designations.

108. Union Pacific states it welcomes the opportunity to participate in the workshop process to develop template agreements; however, it clarifies that federal authorities expressly prohibit states from allocating crossing maintenance costs to railroads when federal funds are involved.[22] In the comments cited in its exceptions, Union Pacific had explained that federal law separately preempts state efforts to require railroads to share construction or maintenance costs for federally funded

[22] Union Pacific Exceptions at p. 8 (citing Union Pacific 04/14/21 Comments (filed in Proceeding No. 21R-0100R) at p. 9; Union Pacific 12/22/21 Comments at p. 10; and Union Pacific 09/16/22 Comments at p. 13).

railroad-highway projects and the same regulations also provide that projects for grade crossing improvements are deemed to be of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs.

109. **The Commission denies this exception.** The railroads raise this general concern but do not offer any specific rule changes for consideration. We therefore acknowledge these concerns regarding cost allocation and will address them as they arise in future proceedings. We also note the Commission's rules regarding maintenance obligations have been reissued since the federal quiet zone rule was established and took the federal quiet zone rule into account.

5. General Requests Regarding Implementation

a. Request for Deferral

110. Union Pacific requests, if the Recommended Rules are adopted, the Commission should allow a one-year deferral period prior to commencing any fining. Union Pacific claims the rule amendments essentially overhaul the railroads' internal processes, which they argue will take time for the railroads to address and change. Union Pacific states a deferral period is necessary in order to provide railroads with time to prepare and create the infrastructure needed to handle and respond to the CPAN mechanism created under the rules. Union Pacific states the rules will have a sweeping effect on railroads operating in Colorado and will be greatly burdensome, making a transitional period imperative.

111. Douglas County objects to any ordered deferral, reiterating that establishing templates for basic estimates, schematics, and agreements, to which project specific details may be added to reflect individual projects, would, in fact, help to expedite project documentation for both railroads and road authorities. Douglas County states the fact that railroads find these opportunities burdensome is a precursor to more reasons for delays.

112. **The Commission denies this exception.** As the ALJ points out, the Commission has long had general fining authority to assess civil penalties against railroads as public utilities under § 40-7-105(1), C.R.S. Moreover, the specific fining authority in SB 19-236 has been effective since May 30, 2019. The Commission's fining authoring thus derives from preexisting statute, not the implementing rules adopted by this Decision. Although these rules provide more clarity and definition for this process, the rules are not necessary to exercise the Commission's fining authority, which it has had now for years. The Commission noted this in the NOPR, discussing how it had in prior cases found it necessary to act in individual adjudications before rules could be adopted, and that § 40-4-106(1)(b), C.R.S., does not require that the Commission adopt rules in order to use the fining authority conferred in the statute.[23] For these reasons, we find BNSF's request does not provide good cause to self-impose a constraint on our ability to continue to ensure safety at railroad crossings. However, we note that, because the rules will apply on a prospective basis – to proceedings initiated *after* the rules take effect – there will inherently be a phased-in approach to the rules.

b. Requests for Extension

113. Union Pacific requests that the Commission include in the rules a statement that the railroads may request an extension of any of the timelines presented, and that such extension shall not be unreasonably withheld.

114. **The Commission denies this exception.** The Commission's Rules of Practice and Procedure, Rule 1003, already provides a process for requesting a waiver or variance from Commission rules. Rule 1003 sets out the requirements and process for making such request and provides that, in deciding whether to grant a requested waiver or variance, the Commission may take into account, but is not limited to, considerations of hardship, equity, or more effective implementation of overall policy on an individual basis. The rule states the Commission may subject any waiver or

[23] NOPR at ¶ 10.

variance granted to such terms and conditions as it may deem appropriate. We are satisfied that this existing rule addresses the substance of Union Pacific's request; we decline to add duplicative language that may confuse the issue or any language that imposes a separate standard on the Commission's decision-making on a waiver or variance request specific to its rail rules.

c. Prospective Application

115. Union Pacific requests that the rules adopted by this Decision follow the general principle of non-retroactive application and are thereby not applicable to projects initiated before the effective date of the proposed rules.

116. **The Commission grants, in part, and denies, in part, this exception.** As a matter of law, new rules adopted by an administrative agency have a "future effect" (*i.e.*, newly adopted rules are prospective). § 24-4-102(15), C.R.S. As a result, we clarify that the amended rules will only apply to proceedings initiated *after* the effective date of the rules.

D. Motion for Oral Argument

117. With their exceptions, both BNSF and Union Pacific request oral argument to address the exceptions. We deny the request for oral argument because the record is clear, the recommended decision is very thorough, and there are not any ambiguous facts or legal arguments that oral argument would help clarify. We find the Commission has sufficient information to render its decision on the exceptions without additional argument by the participants. This rulemaking has extended several years and participants have had full opportunity to be heard through several iterations of written comments and multiple rulemaking public comment hearings before the ALJ. It is also infeasible to accommodate oral argument in the remaining procedural schedule, particularly with the delay caused by the extension of time to file exceptions, as a Commission decision adopting rules must issue no later than November 28, 2023, pursuant to the 180-day statutory deadline in § 24-4-103(4)(d), C.R.S.

II. ORDER

A. The Commission Orders That:

1. The Commission Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, 4 *Code of Colorado Regulations* 723-7, contained in Attachment A and Attachment B to this Decision, are adopted consistent with the discussion above.

2. The adopted rules are available through the Commission's E-Filings system at: https://www.dora.state.co.us/pls/efi/EFI.Show_Docket?p_session_id=&p_docket_id=21R-0538R

3. The exceptions filed by BNSF Railway Company to Recommended Decision No. R23-0618, are granted, in part, and denied, in part, consistent with the discussion above.

4. The exceptions filed by Union Pacific Railroad Company to Recommended Decision No. R23-0618, are granted, in part, and denied, in part, consistent with the discussion above.

5. The exceptions filed by the Colorado Communications and Utility Alliance to Recommended Decision No. R23-0618, are granted, consistent with the discussion above.

6. The exceptions filed by the American Short Line and Regional Railroad Association to Recommended Decision No. R23-0618, are denied, consistent with the discussion above.

7. The motion for oral argument is denied.

8. The Commission adopts the amendments to the Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings, found at 4 *Code of Colorado Regulations* 723-1, recommended by the Administrative Law Judge in Recommended Decision No. R23-0618, in their entirety, except for the modifications identified in this Decision and shown in redline in Attachment A and in final format in Attachment B to this Decision.

9. The 20-day period provided for in § 40-6-114, C.R.S., within which to file applications for rehearing, reargument, or reconsideration begins on the first day following the effective date of this Decision.

10. This Decision is effective upon its Mailed Date.

B. ADOPTED IN COMMISSIONERS' DELIBERATIONS MEETING November 17, 2023.

(S E A L)

ATTEST: A TRUE COPY

Rebecca E. White,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

ERIC BLANK

MEGAN M. GILMAN

TOM PLANT

Commissioners