Decision No. R23-0618

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.

RECOMMENDED DECISION OF ADMINISTRATIVE LAW JUDGE MELODY MIRBABA ADOPTING RULES

Mailed Date: September 22, 2023

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I. STATEMENT AND BACKGROUND

A. Summary

1. This Decision adopts amendments to the Colorado Public Utilities Commission's (Commission) Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings (the Rules), 4 *Code of Colorado Regulations* (CCR) 723-7.[1] Generally, changes amend rules relating to rail crossings in Rules 7001 to 7214.[2]

II. PROCEDURAL HISTORY[3] AND BACKGROUND

2. The Commission initiated this matter on November 22, 2021 by issuing a Notice of Proposed Rulemaking (NOPR) to amend the Rules governing rail crossings, that is, Rules 7001 through 7301, 4 CCR 723-7.[4] At the same time, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition and provided notice to the General Assembly per § 24-4-103(3), C.R.S., that the proposed Rules seek to implement statutory fining authority.[5]

3. On January 3, 2022, the Commission filed a copy of its Cost-Benefit Analysis per § 24-4-103(2.5), C.R.S., that was submitted to the Office of Policy, Research and Regulatory Reform on December 30, 2021.[6]

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[1] In reaching this Decision, the Administrative Law Judge (ALJ) has considered the entire record in this Proceeding, including all aspects of the proposed Rules, the relevant law, public comments, including those discussed briefly or not at all. Any arguments not specifically addressed have been considered and are rejected. Throughout this Decision, headers, sub headers, and the like are for ease of reference. This Decision does not discuss minor Rule changes such as renumbering paragraphs, fixing typos, or other non-substantive changes that improve clarity, as unnecessary.

[2] This Decision adopts new Rules or Rule changes not originally included in the Notice of Proposed Rulemaking (NOPR), but the ALJ finds that such changes are reasonably within the scope of the NOPR because they relate to other proposed Rule changes in the NOPR. As a result, adopting such changes does not run afoul of § 24-4-103, C.R.S.

[3] Only the procedural history necessary to understand this Decision is included.

[4] Decision No. C21-0737 (mailed November 22, 2021) (Decision No. C21-0737 or NOPR).

[5] *Id.* at 20; Commission's Notice of Proposed Rule to Increase Fees or Fines filed November 22, 2021.

[6] *See* January 3, 2022 Cost Benefit Analysis filing.

4. Members of the public have filed numerous public comments since the onset of this Proceeding.[7]

5. Among public commenters are road authorities, railroads, railroad corporations, rail fixed guideways, transit agencies, and entities whose membership includes these entities.[8]

6. Among other updates and revisions, the NOPR seeks to amend the Rules to implement fining authority for noncompliance with rail crossing safety regulations and orders as authorized in Senate Bill (SB) 19-236 (codified at § 40-4-106(1)(b), C.R.S, as relevant here).[9] This is the Commission's second rulemaking proceeding to consider the same proposed revisions to the Rules. The Commission closed the prior rulemaking proceeding (Proceeding No. 21R-0100R) due to procedural concerns without deciding whether to adopt Rules.[10]

7. During the course of this Proceeding, the ALJ identified areas for public comment; took administrative notice of filings in other Commission proceedings; and invited comments on the same.[11] Specifically, the ALJ took administrative notice of filings made in the following proceedings as of December 9, 2021: Proceeding Nos. 21R-0100R, 19M-0379R, 19A-0201R,

[7] Given the sheer volume of public comments filed in this Proceeding, this Decision does not identity or discuss all the public comments. Many commenters made numerous filings, many including differing titles that do not readily distinguish prior and subsequent comments from each other. To ensure a clear record, this Decision cites to commenters' filings in the following format (and does not cite the title shown on the comments): filer's name, file date as reflected in the record (*e.g.* 1/1/21), "Comments," and the page(s) on which the cited material can be found (*e.g.*, County's 1/5/22 Comments at 1). Where this Decision cites to administratively noticed filings in other proceedings, the Decision adds a reference to the proceeding number (*e.g.*, County's 11/1/21 Comments at 1 in Proceeding No. 21R-0100R).

[8] Except as otherwise stated, this Decision's references to "railroads" includes railroads, railroad corporations, rail fixed guideways, owners of the track, and transit agencies as defined by Rule 7001, 4 CCR 723-7, or organizations whose membership includes the same entities. Likewise, this Decision's references to road authority are to "road authority" as defined by Rule 7001, 4 CCR 723-7, or organizations whose membership includes road authorities. For ease of reference, comments are organized under the headers, "Road Authority Comments," and "Railroad Comments."

[9] *See* Decision No. C21-0737 at 2.

[10] *Id.* at 2-3.

[11] Decision Nos. R21-0781-I (mailed December 9, 2021); R22-0027-I (mailed January 12, 2022); R22-0420-I (mailed July 19, 2022); R22-0483-I (mailed August 15, 2022); R22-0638-I (I (mailed October 24, 2022); and R23-0274-I (mailed April 26, 2023).

19A-0231R, 19A-0413R, 19A-0475R, 19A-0542R, 18A-0332R, 18A-0339R, 18A-0629R, 18A-0631R, 18A-0636R, and 18A-0809R.[12]

8. The ALJ held public comment hearings on the proposed Rules on January 11, 2022; March 24, 2022; October 17, 2022; January 17, 2023; and June 1, 2023.[13]

9. During the October 17, 2022 public comment hearing, several stakeholders responded positively to the ALJ's inquiry as to whether an informal workshop meeting between interested stakeholders could help bridge the significant divide between the participants' positions on the proposed Rules.[14] As a result, the ALJ established a schedule for participants to hold an informal workshop meeting and to file a status report and proposed consensus Rules.[15]

10. On December 12, 2022, the Colorado Communications and Utility Alliance (CCUA), the Union Pacific Railroad Company (UP), BNSF Railway Company (BNSF), and the Regional Transportation District (RTD) filed a Joint Status Report Submitting Partial Consensus Rules (Status Report), with proposed partial consensus Rules as Exhibit A (Consensus Rules).[16] The Status Report states that an informal workshop was held on November 15, 2022 to develop proposals for potential consensus Rules, and that representatives from the CCUA, UP, BNSF, RTD, the American Short Line and Regional Railroad Association (ASLRRA), the Colorado Department of Transportation (CDOT), Douglas County, the City and County of Broomfield (Broomfield), the City of Aurora (Aurora), the City of Fort Collins (Fort Collins), the City of Greeley (Greeley), the City of Evans (Evans), the Town of Timnath (Timnath), and other

[12] Decision No. R21-0781-I at 4.
[13] *See* Decision Nos. C21-0737; R22-0027-I; R22-0483-I; R22-0638-I; and R23-0274-I.
[14] *See* Decision No. R22-0638-I at 3.
[15] *Id.* at 7.
[16] Status Report filed on 12/12/22 (12/12/22 Status Report); Exhibit A to 12/12/22 Status Report (Consensus Rules).

unidentified stakeholders attended this workshop.[17] During the workshop, participants discussed the proposed Rules, which helped them better understand each other's perspectives and collaborate on Consensus Rules.[18]

11. While they were not able to reach agreements on all the proposed Rules, the workshop resulted in the partial Consensus Rules.[19] CDOT objects to many of the Consensus Rules, and, for the most part, supports the Rules as proposed in the NOPR.[20] BNSF objects to the 90-day timeline identified in Consensus Rule 7212(e), but does not object to any other Consensus Rule.[21] Except as noted, no other workshop participant indicated opposition to the Consensus Rules.[22] Thus, the CCUA, UP, RTD, ASLRRA,[23] BNSF, Broomfield, Aurora, Fort Collins, Greeley, Evans, and Timnath support or do not oppose the Consensus Rules, except that BNSF only opposes Consensus Rule 7212(e).

12. During the January 17, 2023 public comment hearing, the ALJ raised questions and concerns about the Consensus Rules, and invited public comment on the same (among other matters). After the hearing, several stakeholders filed comments responding to these items, which are discussed in the context of the relevant Consensus Rules, below.

13. The last public comment hearing was held on June 1, 2023.[24] Several stakeholders filed additional public comments in response to issues raised during that hearing.

[17] 12/12/22 Status Report at 1-2.
[18] *Id.* at 2.
[19] The Consensus Rules are not written in a manner that highlights every single suggested change to the proposed Rules, and thus, a careful line-by-line comparison between the Consensus Rules and the proposed Rules was necessary to identify all the changes agreed-upon by stakeholders.

[20] CDOT's 1/6/23, 1/27/23 and 5/25/23 Comments. *See* 12/12/22 Status Report at 2.
[21] BNSF's 1/6/23 Comments at 1-2.
[22] 12/12/22 Status Report at 2.
[23] In addition, on December 16, 2022, the ASLRRA filed comments confirming that it concurs with and joins the Status Report and Consensus Rules. ASLRRA's 12/16/22 Comments at 1.
[24] *See* Decision No. R23-0274-I.

III. COMMISSION'S AUTHORITY TO PROMULGATE RULES

A. Statutory Authority to Promulgate Rules

14. The Commission's has broad statutory authority under § 40-2-108(1), C.R.S., to promulgate such rules "as necessary for the proper administration and enforcement of [title 40]." Thus, where the Commission finds that rules are necessary to enforce or administer provisions in title 40, it has authority to promulgate such rules.[25] The NOPR here seeks to promulgate rules to enforce, implement, or administer provisions in title 40. Most notably, the proposed Rules implement fining authority in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. In addition, the proposed Rules prescribe standards that appear to the Commission reasonable and necessary to the "end, intent, and purpose that accidents may be prevented and the safety of the public promoted," as authorized by § 40-4-106(2)(a), C.R.S.

15. In addition to the Commission's general authority, it also has specific statutory authority to promulgate the Rules. Section 40-4-106(1)(a), C.R.S., specifically authorizes the Commission to promulgate such rules that promote and safeguard the health and safety of the public, including rules that require the performance of such acts that the health and safety of the public may demand. In addition, § 40-9-108(2), C.R.S., 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."[26] The proposed Rules implement standards that in the Commission's judgment, the public health and safety demands, that will tend to prevent accidents in the operation of railroads, and that will improve rail crossing safety.[27] For the foregoing reasons and authorities, the ALJ

[25] § 40-2-108(1), C.R.S.
[26] § 40-9-108(2), C.R.S.
[27] *See* §§ 40-4-106(1)(a) and 40-9-108(2), C.R.S.

concludes that the Commission has both specific and general statutory authority to promulgate the proposed Rules.[28]

B. Challenges To Commission's Authority to Promulgate Rules

16. UP makes numerous constitutional arguments challenging the Commission's authority to promulgate the proposed Rules, which BNSF, Great Western Railway of Colorado, LLC (Great Western), and ASLRRA support or mirror.[29] Specifically, it argues that the proposed civil penalty Rules (Rules 7009-7011) violate the United States (U.S.) Constitution's 14th Amendment equal protection clause and Commerce Clause, (art. I, § 8, cl. 3), because they exempt road authorities from civil penalties; and that proposed Rule 7011 is invalid under the Contract Clause of the U.S. Constitution, art. I, § 10, cl. 1, because it impairs the obligation of contracts.[30] It also argues that the proposed Rules amount to an improper use of "unfettered" police powers because they "are not really related (or substantially related) to protect [*sic*] safety," but instead relate to road authorities' frustrations, and the Commission's desire to give road authorities an unfair advantage.[31] Arguments alleging a violation of the state's police powers are constitutional arguments under the U.S. or Colorado Constitution's due process clauses.[32]

17. In addition, UP argues that proposed Rules are preempted by ICC Termination Act of 1995, (49 § USC 10501(b)) (ICCTA).[33] Likewise, the American Association of Railroads

[28] *See* §§ 40-4-106(1)(a) and 40-9-108(2), C.R.S (specific statutory authority); § 40-2-108 (general statutory authority to promulgate rule necessary to enforce title 40, including §§ 40-4-106(1)(b) and (2)(a) and 40-7-105, C.R.S.)

[29] UP's 12/22/21 Comments at 8-14; UP's 9/16/22 Comments at 11-16; UP's 4/14/21 Comments at 7-13 in Proceeding No. 21R-0100R; BNSF's 12/22/21 Comments at 1-2; BNSF's 10/7/22 Comments at 1; Great Western's 12/27/21 Comments at 1; ASLRRA's 12/17/21 Comments at 2.

[30] UP's 12/22/21 Comments at 11; UP's 9/16/22 Comments at 13 and 15.

[31] UP's 12/22/21 Comments at 13. *See* UP's 9/16/22 Comments at 15-16.

[32] *See Western Income Properties, Inc. v. Denver,* 485 P.2d 120, 121 (Colo. 1971)*; Western Power & Gas Co. v. Southeast Colorado Power Ass'n,* 435 P.2d 219, 223 (1967); *Olin Mathieson Chemical Corp., v. Francis,* 301 P.2d 139, 147, 149 (Colo. 1956).

[33] UP's 12/22/21 Comments at 9; UP's 9/16/22 Comments at 11.

(AAR) argues that the Federal Railroad Safety Act (FRSA), (49 USC § 20106), preempts the proposed Rules because Congress directed that laws, regulations, and orders related to railroad safety must be "nationally uniform to the extent practicable."[34] Such preemption arguments are constitutional arguments because they are premised on the Supremacy Clause of the U.S. Constitution which provides that laws of the United States, made pursuant to national constitution, shall be the supreme law of the land.[35]

18. As an administrative agency of the State of Colorado, the Commission's role is to enforce state law.[36] It is not the Commission' role to preempt itself, or to decide constitutional challenges to state laws.[37] In an appeal of a Commission decision, the district court has authority to decide all relevant questions of law and interpret relevant constitutional and statutory provisions.[38] Although the instant Proceeding does not directly involve challenges to enacted laws (*i.e.*, Rules or statutes), but to proposed Rules, the ALJ finds that deciding the presented constitutional questions is inadvisable as it veers away from the Commission's primary role to enforce state law and may amount to an advisory opinion. What is more, many of the constitutional questions may turn on whether a state law being implemented through the proposed Rules is constitutional. For example, arguments that the proposed civil penalty Rules (Rules 7009-7011) violate the U.S. Constitution's 14th Amendment equal protection clause and Commerce Clause (art. I, § 8, cl. 3) because they exempt road authorities from civil penalties

[34] AAR's 3/29/22 Comments at 2-3.

[35] U.S. Const. art. VI; *Celebrity Custom Builders v. Industrial Claim Appeals Office,* 916 P.2d 539, 541 (Colo. App. 1995).

[36] Decision No. C01-727 at 11 (mailed July 19, 2001) in Consolidated Proceeding Nos. 99A-617BP and 00F-563CP.

[37] *See Horrell v. Dep't of Admin.,* 861 P.2d 1194, 1198 (Colo. 1993); *Colo. Bd. of Accountancy v. Paroske,* 39 P.3d 1283, 1289 (Colo. App. 2001); *Celebrity Custom Builders,* 916 P.2d at 541*;* Decision No. C01-727 at 11 in Consolidated Proceeding Nos. 99A-617B and 00F-563CP ("The Commission cannot preempt itself. As an administrative agency of the State of Colorado, it is our job to enforce state law.")

[38] § 40-6-115(3), C.R.S. *See Aurora v. Pub. Utilis. Comm.,* 785 P.2d 1280, 1287 (Colo. 1990); *Continental Liquor Co., v. Kalbin,* 608 P.2d 353, 354 (Colo. App. 1977)

potentially turn on the constitutionality of §§ 40-4-106(1)(b), 40-7-105(1), 40-1-103(1)(a)(1), or 40-1-102, C.R.S.[39] As discussed in more detail later, those statutory provisions, when read together, authorize the Commission to assess civil penalties against railroads, but not against road authorities.[40] For all these reasons, the ALJ does not address the constitutional arguments mentioned above.

19. That said, the ALJ has carefully considered the many concerns arising out of the constitutional arguments, and, where practicable, adopts Rules that are modified to minimize or eliminate those concerns.

IV. DISCUSSION, FINDINGS, AND CONCLUSIONS

A. Proposed Rules

20. The NOPR adds new Rules or amends existing Rules on the following topics: civil penalties; necessary parties to application proceedings; application contents; crossing construction and maintenance agreements (C&M agreements); crossing safety diagnostics and cost estimates; minimum crossing safety requirements; and crossing warning device installation and maintenance. This Decision discusses each of the proposed Rules with a primary focus on changes which have drawn significant public comment.

[39] *See* UP's 12/22/21 Comments at 10-12.
[40] *See infra,* ¶ 44.

1. Rule 7009 – Definitions Applicable to Civil Penalty Rules

21. Proposed Rule 7009(a) through (c) defines terms as used in the proposed Civil Penalty Rules (Rules 7009 to 7011). Proposed Rule 7009(a) defines "civil penalty" as a monetary penalty imposed by the Commission against a railroad, railroad corporation, rail fixed guideway, or transit agency for failing to comply with a Commission order or rule, as authorized by § 40-4-106(1)(b), C.R.S. Paragraph (b) defines "civil penalty assessment" as an act by the Commission that imposes a civil penalty and paragraph (c) defines "civil penalty assessment notice" as a written document whereby the Commission gives initial notice of an alleged failure to comply with a Commission order or rule and sets forth the proposed civil penalty amount.

22. Many comments speak generally to the proposed Civil Penalty Rules, and thus, are addressed here.

a. Road Authority Comments

23. Fort Collins supports the definitions in proposed Rule 7009, submitting that they are necessary.[41] The Town of Windsor (Windsor) and Greeley agree.[42] Windsor adds that while it supports the civil penalty concept, it is concerned that this may unintentionally delay projects because railroads may use the CPAN hearing process to delay a project if the hearing prevents the project from moving forward until after the hearing is complete.[43] Windsor notes that when railroad companies are involved in an adjudicatory proceeding, they are able to produce Commission requested documents much more quickly.[44]

[41] Fort Collins' 12/10/21 Comments at 1.
[42] *See* Windsor's 12/14/21 Comments at 1; Greeley's 12/21/21 Comments at 1.
[43] Windsor's 12/14/21 Comments at 2.
[44] *Id.*

24. Timnath suggests no changes to proposed Rule 7009, and generally supports the proposed Rules, as it believes that the Rule changes will improve public safety.[45]

25. The City of Steamboat Springs (Steamboat) supports the proposed Rules.[46] Steamboat explains that its experience negotiating with UP 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."[47] Steamboat explains that this has resulted in substantial construction cost increases and extraordinary delays in the completing projects that directly relate to public safety.[48] Steamboat provides two recent examples of this experience.

26. First, Steamboat applied for and received approval to relocate an existing vehicular and pedestrian crossing in Steamboat Springs in Proceeding No. 15A-0086R.[49] Steamboat filed its Application with the Commission on February 10, 2015; and received approval for the project via a Recommended Decision that became final on June 28, 2016.[50] UP did not provide an executed C&M agreement and construction cost estimate until August 22, 2017.[51] UP offered no justification for this excessive fourteen-month delay. UP billed Steamboat in eight-hour blocks, claiming that when their employees worked on the project, they did so a whole day at a time.[52] Steamboat submits that this kind of block billing does not provide accountability needed for the

[45] Timnath's 12/21/21 Comments at 1.
[46] Steamboat's 2/10/22 Comments at 1.
[47] *Id.*
[48] *Id.*
[49] *Id.* at 1.
[50] *Id.*
[51] *Id.*
[52] *Id.*

expenditure of public funds and believes the practice should be prohibited as a matter of law.[53] UP also required Steamboat to obtain redundant permits and agreements for infrastructure (for a culvert) that is appurtenant to the approved crossing; this increased costs through additional fees, and further delayed the project unnecessarily.[54] Steamboat argues that this type of practice should be prohibited.[55]

27. Second, Steamboat applied for and received approval for a project that involved drainage improvements to an existing pedestrian crossing in Steamboat Springs in Proceeding No. 03A-042R.[56] The Commission approved the project in 2005 (Decision No. C05-0084). Steamboat executed a C&M agreement with UP that specifically referenced drainage improvements, requiring Steamboat to pay an $8,219 "one-time license fee.[57] When Steamboat sought to improve the existing drainage facilities, UP would not honor the executed C&M agreement.[58] Instead, UP denied Steamboat's contractor access to UP's property until Steamboat executed a new agreement that: modified agreed-upon indemnification provisions and required Steamboat to pay a $9,500 fee for a license to perform work.[59] On top of this, UP took five months to approve the one sentence revision to the agreement.[60] UP's refusal to honor the existing C&M agreement and other delays caused Steamboat approximately $45,000 in increased construction costs (in addition to the $9,500 that UP required despite the existing license), resulting in over a year delay to the project.[61] Steamboat points to other issues, such as UP requiring unnecessary consent letters

[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.* at 2.
[57] *Id.*
[58] *Id.*
[59] *See id.*
[60] *See id*.
[61] *See id.*

that were not required by their agreement.[62] While in theory, Steamboat could have sought judicial relief from UP's breach of contract and unreasonable and unlawful demands, this would have resulted in even more delay and costs, rendering judicial relief an impractical remedy.[63]

28. Based on all of this and its overall experience with railroads in moving crossing safety projects forward, Steamboat submits that the Commission's existing regulatory framework is simply not adequate to protect the public interest in ensuring timely action on safety-related crossing projects and does not deter railroads like UP from failing to comply with Commission orders. Steamboat believes that the proposed Rules will directly address these problems and urges the Commission to adopt them.[64]

29. Aurora agrees with other road authorities' comments that railroads continue to cause project delays by failing to provide Commission-required documentation within the Commission-ordered timeline in proceedings.[65]

30. Douglas County urges the Commission to free road authorities from the grip of railroads' unfair and illegal contract demands.[66] Douglas County submits that railroads plainly leverage the existing Rules to burden local jurisdictions, and that the Commission should step-in by amending the Rules to limit railroads' ability to continue to do so.[67]

31. The CCUA[68] supports proposed Rule 7009 as necessary to implement the Commission's fining authority.[69] The CCUA submits that it is critically important that the

[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] Aurora's 1/5/22 Comments at 1.
[66] Douglas County's 2/18/22 Comments at 2.
[67] *See id.* at 1-2.
[68] The CCUA incorporates by reference all of its comments filed in Proceeding No. 21R-0100R. CCUA's 12/22/21 Comments at 1-2.
[69] CCUA's 4/14/21 Comments at 4 in Proceeding No. 21R-0100R.

Commission be able to assess civil penalties for any failure to comply with a Commission order or rule, as provided in proposed Rules 7009(a) and 7010(a).[70] The CCUA asserts that there is ample evidence that this is necessary, citing, for example, that it is especially common that railroads delay or refuse to negotiate a C&M agreement for a Commission-approved crossing modification in order to extract concessions from road authorities.[71] The CCUA points to Proceeding No. 18A-0888R, where it alleges that a railroad refused to negotiate a C&M agreement to extract monetary concessions from Timnath, and submits that this is one of many examples where a railroad has used such tactics.[72]

b. Railroad Comments

32. BNSF and UP both object to the proposed Civil Penalty Rules. They argue that the civil penalties (if enacted), should apply to road authorities, and not just to railroads.[73] BNSF reasons that the Rules should have equal application to all entities to which the Rules in part 7 apply, because Rule 7000(a) states that "the '7000' series" of Rules apply to "governmental or quasi-governmental entities that own and/or maintain public highways and/or public pathways at rail crossings."[74]

33. UP posits that excluding road authorities from the civil penalty provisions demonstrates unfair bias in favor of road authorities.[75] UP argues that this is "a clear indication" that the Commission is not attempting to assist with safety or to adjudicate issues in a fair and just manner; and that this flaw shows the "true nature" of the proposed Rules to "give road authorities

[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] Exhibit B to BNSF's 12/22/21 Comments at 1-2.
[74] *Id.*
[75] UP's 12/22/21 Comments at 5-7.

more leverage by amending the rules in their favor."[76] UP argues that a regulatory scheme that is "so obviously in favor of one regulated stakeholder (road authorities) is unfair, against sound reason, and frankly illegal."[77] It explains that road authorities may cause delays in meeting deadlines proposed under the Rules, but that railroads could be penalized for this despite not being responsible for the delay.[78]

34. UP asks the Commission to reconsider its position on all the proposed Civil Penalty Rules, arguing that many project delays are attributable to noncompliance with federal standards, industry standards, and its own standards.[79] As the property owner, UP argues that it "well within its right to require that road authority projects comply with" its standards.[80] It argues that its standards ensure safety; that projects reach completion; assist it with maintaining and protecting the flow of interstate commerce; and "are binding on any agency wishing to initiate a project impacting UP property and/or operations."[81]

35. UP suggests that instead of adopting the Civil Penalty Rules, the Commission should promulgate a rule that establishes a Public Crossing Safety Committee (Safety Committee) that would study safety at public crossings and provide written reports of its observations and analysis, and would require that the Commission may not issue a notice seeking amend Rules 7000-7999 unless the Safety Committee has provided a written report no later than nine months prior to the proposed amendments.[82]

[76] *Id.* at 5-6.
[77] *Id.* at 6.
[78] *Id.*
[79] UP's 6/22/23 Comments at 4.
[80] *Id.* at 4-5.
[81] *Id.* at 5.
[82] UP's 4/21/22 Comments at 2.

36. UP also suggests that the Commission promulgate a rule creating a Public Crossing Training Program (Training Program) that would require the Commission to host a bi-annual training for public crossing projects that facilitates communication and understanding between parties involved in public projects; that requires road authorities and railroads who attend such trainings to provide guidance and support on their organization's public project procedures; and that would prohibit that entities who are unprepared from receiving credit for attending the training session.[83] It also suggests that only those who can provide proof that they attended such a training in the 12 months prior may file a formal or informal complaint with the Commission.[84]

37. In addition, UP suggests that a stakeholder group be created to open channels of communication to decrease misunderstandings (a common issue) to include CDOT representatives, road authorities, railroads, the Commission, and other relevant stakeholders.[85] UP also suggests that the Commission bifurcate the proposed Civil Penalty Rules until the Commission studies and analyzes the other newly promulgated Rules for one year; issues a report on the impact and effectiveness of the new Rules; and holds a public hearing to discuss the report's findings.[86]

38. As another alternative, UP suggests that Rule 7002(a)(X) be amended to require applications to include an initial timeline for the project with "all agreed upon deadlines outlined" for milestones reasonably foreseen to be material to completing the project, and that applications include "conclusive" evidence that the timeline was agreed-upon by all parties.[87] It also suggests that all parties be bound to the timeline unless good cause is shown.

[83] *Id.* at 3.
[84] *Id.* at 2-3.
[85] UP's 6/22/23 Comments at 5.
[86] *Id.*
[87] *See* UP's 4/21/22 Comments at 3.

39. If the Commission promulgates the proposed Civil Penalty Rules, UP asks that the Commission stay the adopted Rules for 120 days (after they are filed and published) to allow railroads time to address internal processes that the Rules impact; and to follow the general principle that the adopted Rules not be retroactively applied to any projects initiated before the Rules' effective date.[88]

40. BNSF and ASLRRA agree with UP.[89] BNSF adds that fining authority should not be used to dictate how railroads review and provide input on proposed projects or to police ministerial matters between stakeholders; that civil penalties could divert resources from moving road authority projects forward; and that fining authority should not be exercised in the context of crossing projects relating to quiet zones.[90] BNSF argues that the proposed Rules are unnecessary and unduly burdensome; fail to acknowledge that road authorities play a role in the design and agreement process for crossing; and exceed the Commission's authority under SB 19-236, which limits its authority to penalties relating to violation of safety rules.[91]

41. Great Western submits that the proposed Civil Penalty Rules will greatly impact its competitiveness both in and outside of Colorado.[92]

42. ASLRRA believes that all eleven shortline freight railroads that operate in Colorado will be negatively impacted by the proposed Civil Penalty Rules (and the proposed Rules in general).[93] ASLRRA also questions the relationship between the proposed Rules and improvements in safety, and more specifically whether the proposed Rules would have the

[88] UP's 6/22/23 Comments at 2.
[89] BNSF's 6/30/23 Comments at 1; ASLRRA's 6/27/23 Comments at 1.
[90] Exhibit A to BNSF's 12/22/21 Comments at 2-7.
[91] Exhibit B to BNSF's 12/22/21 Comments at 1.
[92] Great Western's 12/22/21 Comments at 1-2.
[93] ASLRRA's 12/17/21 Comments at 2.

opposite effect on safety due to actions to avoid a punitive consequence, especially as it relates to small businesses.[94]

43. RTD takes issue with proposed Rule 7009(a) and (c) because it fails to account for RTD's unique status as a political subdivision of the State of Colorado (a governmental entity).[95] RTD explains that the statutory authority for these Rules, § 40-4-106(1)(b), C.R.S., does not authorize penalties against it since it is not a railroad company.[96] Nonetheless, RTD acknowledges that the definitions of "rail fixed guideway system" and "transit agency" in § 40-18-101, C.R.S., are not limited to government entities, and that in other contexts, a railroad company could operate a rail fixed guideway system and therefore be a transit agency.[97] For these reasons, RTD suggests that Rule 7009(a) be modified as follows: "The Commission may impose a civil penalty against any railroad, railroad corporation, rail fixed guideway, or transit agency that is not a political subdivision of the State of Colorado for failure to comply with a Commission order or rule, as authorized in § 40-4-106(1), C.R.S."[98]

c. Discussion, Findings, and Conclusions

44. As a matter of law, the Commission lacks statutory authority to assess civil penalties against road authorities, and thus cannot include road authorities in its proposed Civil Penalty Rules. The Commission's statutory fining authority under § 40-4-106(1)(b), C.R.S., does not include road authorities. Indeed, § 40-4-106(1)(b), C.R.S., does not directly or indirectly

[94] *See id.*
[95] RTD's 4/15/21 Comments at 1 in Proceeding No. 21R-0100R. *See* RTD's 12/22/21 Comments at 1 (incorporating and reasserting its 4/15/21 Comments in Proceeding No. 21R-0100R).
[96] RTD's 4/15/21 Comments at 1 in Proceeding No. 21R-0100R.
[97] *Id.* at 2-3.
[98] *Id.* at 3.

reference road authorities. 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, and therefore, are not covered by this statute either.[99] The ALJ finds no other statutory authority granting the Commission authority assess penalties against a road authority.

45. That said, the Commission has broad constitutional and statutory police powers over public utilities,[100] and specific statutory authority to direct railroads to act in such a manner as the health or safety of the public may demand and to order and prescribe requirements as may appear reasonable and necessary to the Commission to prevent crossing accidents and promote public safety at crossings.[101] It also has specific statutory police powers to enforce such orders and rules against railroads by assessing civil penalties.[102] As such, the proposed civil penalty Rules are well within the Commission's constitutional authority and its statutory police powers.

46. The proposed 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 its authority under §§ 40-4-106(1)(a) and (2)(a), 40-9-108 (2), C.R.S. There is a substantial connection between compliance with statutes, and Commission orders and Rules and rail crossing and public safety. Amont other examples, as the record demonstrates, failing to

[99] 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 a public utilities or entities declared by law to be affected with a public interest.

[100] *See* Colo. Const. art XXV; §§ 40-1-103(1)(a)(I); 40-3-102; 40-7-101, C.R.S.; *Pub. Serv. Co. v. Van Wyk,* 27 P.3d 377, 385 (Colo. 2001).

[101] § 40-4-106(1)(a) and (2)(a), C.R.S.

[102] §§ 40-4-106(1)(b) and 40-7-105(1), C.R.S.

comply results in unreasonable delay in completing crossing safety projects. As the Commission has noted, such delay raises its own crossing safety concerns.[103]

47. The proposed Civil Penalty Rules apply equally to in-state and out-of-state railroads, and do not favor in-state economic interests. Rather, the proposed Civil Penalty Rules advance legitimate interests in ensuring that railroads comply with relevant statutes, and Commission orders and Rules relating to crossing safety. As discussed in more detail later, the proposed Civil Penalty Rules create appropriate due process for anyone facing potential penalties, and do not authorize road authorities to drive penalty assessment actions. And, as explained below, the ALJ is adopting additional procedures to further enhance the already adequate due process provided to respondents facing civil penalties.[104] The proposed Rules create the *potential* for a civil penalty assessment if a railroad fails to comply with the Colorado Constitution, a covered statute, or Commission order or rule, but only after notice, an evidentiary hearing, adjudication, and appeal (unless the railroad admits liability).

48. The ALJ has carefully considered the presented concerns about the proposed Civil Penalty Rules. As to concerns that road authorities will inappropriately leverage the Civil Penalty Rules to benefit local interests, railroads fail to recognize that road authorities do not control whether civil penalties are assessed against a railroad (or any other entity).[105] The proposed Rules do not give road authorities the power to issue, prosecute, or pursue a civil penalty assessment

[103] Decision No. C21-0737 at 4-6.
[104] *Infra,* ¶ 78.
[105] Road authorities can submit a formal or informal complaint about a railroad, a right that has long existed under the Commission's Rules. *See* Rules 1301(a) and 1302(a), 4 CCR 723-1. Yet, the record does not demonstrate that road authorities have inappropriately leveraged this. Thus, even if the road authorities had the power under the Rules to control civil penalty assessment prosecutions (which they do not), there is no record support for the proposition that this would lead to an abuse of the Rules to harm railroads.

notice (CPAN) against a railroad. Indeed, as discussed later, proposed Rule 7010(b)(I) authorizes the Commission Director or his or her designee to issue a CPAN, which is prosecuted by the Commission's Trial Staff (Trial Staff).[106] The Commission, not road authorities, solely decides whether to pursue a CPAN.

49. Railroads appear concerned that the proposed Civil Penalty Rules will open the floodgate to malicious, inappropriate, or improper CPAN prosecutions. The record reflects nothing to suggest that the Commission would exercise this authority in such a manner. In fact, the Commission has had 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 any Commission rule or order (except those relating to payment of money) under § 40-7-105(1), C.R.S., for decades.[107] This includes railroads.[108] Despite this long-standing broader civil penalty authority, there has been no showing or allegation that the Commission has improperly or inappropriately exercised its fining authority against a railroad (or any other public utility).

50. The ALJ has also carefully considered railroads' concerns that they may be assessed civil penalties for delays or failures to comply with Commission orders or rules that are caused by road authorities. As mentioned, the proposed Civil Penalty Rules provide a plethora of due process that protects CPAN respondents from being assessed civil penalties for violations that they did not commit. For example, a CPAN must provide notice of each individual alleged

[106] *See* proposed Rule 7010(c)(II).
[107] *See* § 40-7-105(1), C.R.S.
[108] §§ 40-7-105(1); 40-1-102(3)(a)(II) and 40-1-103(1)(a)(I), C.R.S.

violation; a CPAN respondent may request a hearing on the CPAN; and, at hearing Trial Staff carries the burden of proof as to each CPAN count.[109] CPAN respondents may present any relevant evidence and arguments at the hearing, including that someone other than the respondent is responsible for the violation. A penalty may only be assessed after a CPAN respondent admits liability or is adjudicated as having committed the violations alleged.[110] CPAN respondents retain the right to appeal recommended decisions assessing a civil penalty to the Commission through exceptions, and to ask the Commission to reconsider its decision on exceptions through the Commission's Rehearing, Reargument, or Reconsideration (RRR) process.[111] They may also seek judicial review of a final Commission decision assessing a civil penalty.[112] This abundance of due process not only gives CPAN respondents ample protection and opportunity to present their evidence and arguments, but it also allows for each civil penalty assessment decision to be based on the unique circumstances of each case. The ALJ is satisfied that the due process that CPAN respondents are afforded under the adopted Rules will ensure that railroads' concerns are not realized. As such, the ALJ rejects their arguments on this issue.

51. For the reasons discussed, the ALJ finds that the proposed Civil Penalty Rules amount to even-handed regulations, with significant built-in due process, that effectuates the Commission's legitimate public interest in enforcing compliance with orders and rules relating to crossing safety, and Colorado's Constitution and relevant statutory provisions.[113]

[109] *See* proposed Rules 7010(b) and (c).
[110] *See* proposed Rules 7010(d).
[111] *See* §§ 40-6-109(2), 40-6-114(1), C.R.S.; Rules 1505 and 1506, 4 CCR 723-1.
[112] § 40-6-114(4), C.R.S.
[113] *See Pike v. Bruce Church, Inc.,* 397 US 137, 142 (1970).

52. While the ALJ understands Windsor's concerns that railroads may use a CPAN proceeding to further delay completing a project, this can be addressed through filings and orders in individual crossing project proceedings.

53. Railroad comments that anyone performing a public project at their crossings is bound to their standards appears to implicitly attempt to bind the Commission to railroads' internal standards. Not so. The Commission is not bound to a railroads' internal standards; crossing projects must adhere to the Commission's specific orders in individual proceedings, which may or may not be consistent with railroads' internal standards.

54. For the same reasons discussed above, and those discussed in the NOPR, the ALJ rejects arguments that the Commission may not assess civil penalties for violations of orders or rules requiring railroads to make filings such as C&M agreements, as unrelated to railroad crossing safety.[114] Failing to comply with orders requiring such filings results in delay that postpones upgrades and installations that the Commission approved and ordered to proceed; such Commission orders are squarely grounded in safety.[115] What is more, the Commission's authority to assess penalties against railroad companies is not limited to § 40-4-106, C.R.S. As noted, the Commission has broad authority to assess a civil penalty against railroads for violating or failing to comply with the state constitution, and articles 1 to 7 of title 40, Colorado Revised Statutes, per § 40-7-105(1), C.R.S. Given that the Commission's authority to assess civil penalties is not limited to § 40-4-106, C.R.S., the ALJ will modify Rule 7009(a) so that it accurately reflects the Commission's fining authority and will make other similar changes throughout the proposed Civil Penalty Rules. This will avoid confusion about the Commission's authority to assess penalties.

[114] Decision No. C21-0737 at 4.
[115] *Id.,* relying on § 40-4-106(2)(a), C.R.S.

55. UP's proposal to create a Safety Committee is a roundabout method to limit the Commission's rulemaking authority, and as such, is rejected. In any event, stakeholders are always free to informally meet to discuss and analyze crossing safety issues, and to present concerns or suggestions to the Commission.

56. UP's suggestion to create a Training Program tethered to the ability to file informal and formal complaints inappropriately attempts to limit the public's ability to file complaints, contrary to law.[116] What is more, such a program would be nothing more than railroads and road authorities discussing their unique and varied internal processes. For the most part, the Commission does not control those processes, and thus, it makes little sense for the Commission to host a such training. As such, this suggestion is also rejected. Of course, to the extent that they find it useful, railroads and road authorities are free to host their own training programs, and invite each other, without the need for Commission involvement.

57. The ALJ also rejects UP's proposal as to timelines in applications in lieu of the proposed Civil Penalty Rules. The proposed changes would require road authorities and railroads to reach early agreements about the timeline within which crossing projects will move forward. As evidenced by many comments, railroads and road authorities have much different perspectives on how quickly public crossing projects should proceed. This makes it likely that the proposed requirement would add even more delay to a road authority filing an application in the first place and could also result in expanding the timeline within which crossing projects reach completion, which raises public safety concerns.

[116] *See* § 40-6-108(1)(a), C.R.S.

58. The ALJ finds merit in RTD's arguments that proposed Rules 7009(a) and (c) fail to account for its unique status as a political subdivision of the State of Colorado. For these reasons, and those RTD provides, the ALJ will modify proposed Rule 6009(a) and (c) as RTD suggests.

59. For the reasons and authorities discussed, the ALJ adopts Rule 7009 as follows:[117]

> The following definitions apply to rules 7009 through 7011 unless a specific statute or rule provides otherwise. In the event of a conflict between these definitions and a statutory definition, the statutory definition shall apply.
>
> (a) "Civil penalty" means a monetary penalty imposed by the Commission against a railroad, railroad corporation, rail fixed guideway, owner of the track, or transit agency that is not a political subdivision of the State of Colorado for failure to comply with the Colorado Constitution, a provision of articles 1 to 7 of title 40, C.R.S., or a Commission order or rule. ~~as authorized in § 40-4-106(1)(b), C.R.S.~~
>
> (b) "Civil penalty assessment" means the act by the Commission of imposing a civil penalty.
>
> (c) "Civil penalty assessment notice" means the written document by which the Commission gives initial notice to a railroad, railroad corporation, rail fixed guideway, owner of the track, or transit agency that is not a political subdivision of the State of Colorado of an alleged failure to comply with the Colorado Constitution, a provision of articles 1 to 7 of title 40, C.R.S., or a Commission order or rule and sets forth the proposed civil penalty amount.

2. Rule 7010 - Process and Adjudication of Civil Penalties

60. Proposed Rule 7010 establishes the Commission's framework for imposing a civil penalty. Proposed Rule 7010(a) provides that the Commission has authority to impose a civil penalty against a railroad, railroad corporation, rail fixed guideway, or transit agency for failure to

[117] Where this Decision makes changes to a proposed Rule, changes are reflected by striking deletions and underlining additions. Changes are highlighted to show modifications from the relevant *existing* Rule, or where there is no existing Rule, to the Rule as proposed in the NOPR.

comply with a Commission order or rule, as authorized in § 40-4-106(1)(b), C.R.S. Proposed Rule 7010(b) establishes the process for issuing a civil penalty assessment notice for an alleged failure to comply with a Commission order or rule, including: that the Commission's Director has authority to issue a CPAN; that the CPAN must provide notice of each alleged violation, the proposed penalty for each alleged violation, allow the responding party to pay a reduced penalty amount if paid within ten days, and state the maximum penalty surcharge (per § 24-34-108(2), C.R.S.); and sets the penalty surcharge at an amount established by the Department of Regulatory Agencies annually.

61. Proposed Rule 7010(c) allows a responding party to admit liability, contest the alleged violation, and request a hearing before the Commission, and requires Trial Staff to prove the alleged violation (at hearing) by a preponderance of the evidence.

62. Proposed Rule 7010(d) establishes procedures for assessing civil penalties after an admission of liability or adjudication that a responding party has committed the violation alleged in the CPAN. The same paragraph limits civil penalties to not more than two thousand dollars; requires the Commission to consider the factors in Rule 1302(b) when assessing a penalty; and establishes, (consistent with § 40-7-105(2), C.R.S.), that each violation is a separate offense and that continuing violations are separate offenses for each day that the violation continues. Finally, subparagraph (e) provides that nothing in the Rules impacts the Commission's ability to pursue other remedies in lieu of a civil penalty.

a. Road Authority Comments

63. Most road authority comments on proposed Rule 7010 are similar to those provided generally in support of the proposed Civil Penalty Rules, and thus are not repeated here.

64. Fort Collins supports proposed Rule 7010. Fort Collins explains that it continues to experience project delays based on railroad companies' failure to provide documentation within the timeline that the Commission orders in proceedings, and that delay could be avoided if railroads establish template agreements.[118] Aurora agrees.[119]

65. Aurora adds that the proposed civil penalty Rules would also prevent some railroads from seeking concessions from the road authority that contradict the Commission's decision approving the crossing project.[120]

66. Most of Windsor's comments mirror Fort Collins' comments.[121] Windsor adds that a reduced civil penalty should be directly tied to complying with the relevant Commission order. Windsor states that it has provided suggested changes to proposed Rule 7010 consistent with this suggestion in an attached exhibit (but no such document was filed).[122]

67. Greeley's comments mirror Fort Collins' and Windsor's.[123]

68. The City of Colorado Springs (Colorado Springs) submitted comments on behalf of itself and Colorado Springs Utilities (a Colorado Springs enterprise) (collectively, Colorado Springs).[124] Colorado Springs generally supports the proposed Rules.[125]

69. Douglas County and the CCUA also support the proposed Rule.[126]

[118] Fort Collins' 12/10/21 Comments at 2.
[119] Aurora's 1/5/22 Comments at 1.
[120] *See id* at 2.
[121] Windsor's 12/14/21 Comments at 1-2.
[122] *Id.* at 2.
[123] Greeley's 12/21/21 Comments at 1-2.
[124] Colorado Springs' 12/21/21 Comments at 1.
[125] *Id.*
[126] *See supra*, ¶¶ 30-31.

b. Railroad Comments

70. In addition to the arguments discussed above, UP faults proposed Rule 7010(b) for failing to allow railroad companies against whom a CPAN is issued to have the right "for a complete cure of the issue," and that under the proposed Rule, only a 50 percent reduction is possible.[127] BNSF agrees.[128]

71. UP also asks that the proposed Rules be modified to explicitly ensure that those subject to fines are entitled to relief under Rule 2010(c), of the Commission's Rules Regulating Telecommunication Services and Provides of Telecommunication Services, 4 CCR 723-2, §§ 40-7-116.5 and 40-6-109, C.R.S., and "any other rules, regulations or statutes."[129]

72. ASLRRA submits that proposed Rules 7010 and 7011 do not consider the size and scope of a railroad's operations.[130] For example, most short lines are small businesses, which have significantly different characteristics than large carriers and shippers.[131] ASLRRA says that on average, short line railroads employ fewer than 30 people, run an average of only 79 miles, and have $7.7 million or less in revenue and that these small businesses operate the most vulnerable segments of the railroad system, and succeed by competing aggressively for business and investing significant revenues in rail infrastructure.[132] ASLRRA argues that costly regulatory fines will divert limited revenue away from infrastructure investment resulting in a negative net impact on rail safety.[133] ASLRRA submits that the Commission should develop programs to respond to

[127] UP's 12/22/21 Comments at 5.
[128] BNSF's 12/22/21 Comments at 1; ASLRRA's 6/27/23 Comments at 1.
[129] UP's 6/22/23 Comments at 5.
[130] ASLRRA's 12/17/21 Comments at 3
[131] *Id.*
[132] *Id.*
[133] *Id.*

small entities' compliance-related inquires, and to ensure that civil penalty and other enforcement actions against small businesses are properly handled.[134]

73. ASLRRA proposes as an alternative, that the Commission instead partner with the Federal Railroad Administration (FRA) in its Rail State Safety Participation Program (FRA's Program).[135] The FRA's Program provides and enhances investigative and surveillance capability by having states assume responsibility for planned routine compliance inspections.[136] ASLRRA believes that if the Commission were to join the FRA's Program, it would gain efficiencies through a strong existing federal regulatory and enforcement framework.[137]

c. Discussion, Findings, and Conclusions[138]

74. The Commission proposed this Rule after receiving stakeholder feedback that violations of Commission orders and rules relating to crossing safety projects by railroads are widespread.[139] The Commission also noted that numerous cases before the Commission presented cases in which certain railroads significantly delayed compliance with Commission orders.[140] The Commission was concerned that these violations led to delays that impair road authorities from maintaining safe rail crossings.[141] The Commission also found that the proposed Rule will promote safety by encouraging railroads to engage in a constructive partnership with local and municipal governing authorities to timely build and maintain safe rail crossings.[142] Nothing has

[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.* at 4.
[138] To the extent that the railroads' arguments in the discussion as to Rule 7009 apply to proposed Rule 7010, the ALJ rejects those arguments for the same reasons discussed above.
[139] Decision No. C21-0737 at 8.
[140] *Id.* at 4.
[141] *Id.* at 4-5 and 8.
[142] *Id.* at 8.

changed since the NOPR was issued. The Commission's purpose for promulgating the proposed Rule remains the same, to ensure public safety and safety at rail crossings.

75. While the ALJ acknowledges ASLRRA's concerns about being assessed civil penalties, unless ASLRRA's members presently plan to commit significant violations of Commission orders and rules, there are no grounds to assume that ASLRRA's member railroads will be assessed penalties that will impact operations. Proposed Rule 7010 creates due process protections similar to those set forth in numerous civil penalty assessment statutes and existing Commission rules.[143] And, as explained below, the ALJ adopts additional changes to further align proposed Rule 7010 with due process protections afforded to other entities that the Commission regulates.[144] Those procedures have worked well and have afforded CPAN respondents significant due process that guards against unlawful civil penalty assessments. Thus, to the extent that ASLRRA's members become respondents in CPAN proceedings, they will be afforded appropriate due process in the course of the adjudication and will be assessed civil penalties only if found to have committed the alleged violations. What is more, the proposed Rule requires that when the Commission assesses a civil penalty, that it consider 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 (among other factors).[145] This provides additional protections for ASLRRA's members for whom a significant penalty would impact operations.

[143] *See, e.g.*, §§ 40-7-116 and 40-7-116.5, C.R.S.; Rules 6017 and 6018 of the Rules Regulating Transportation by Motor Vehicle, 4 CCR 723-6.

[144] *See infra,* ¶¶ 78; 80; 86.

[145] Rule 7010 does this by requiring the Commission to consider the factors in Rule 1302(b) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, when assessing a civil penalty.

76. And, as already noted, the purpose of the proposed Civil Penalty Rules is to protect and safeguard the public and crossing safety, not to undermine it. The record establishes that the Commission's existing Rules lack a strong enough deterrent to discourage violating or failing to timely comply with Commission orders and rules. As a result, the existing Rules are not adequate to protect the public interest in ensuring timely action on crossing safety projects.[146] For the same reasons, the ALJ rejects 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.[147] In addition, 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.

77. The ALJ finds some merit to UP's suggestion to amend proposed Rule 7010 to include the protections in Rule 2010(c), 4 CCR 723-2.[148] For the most part, proposed Rule 7010 includes the same protections as in Rule 2010(c), except that Rule 2010(c) includes references to § 40-7-116.5(1)(c) and (d), C.R.S. It is unclear whether those statues apply to penalties against railroads, but § 40-7-116.5(1), C.R.S., does include provisions with unique application to public utilities other than railroads. As such, the ALJ does not outright include changes referencing that statute. And, because Rule 2010(c) applies to telecommunications carriers, the ALJ also does not amend the Rule to reference Rule 2010(c).

78. To avoid confusion while also ensuring that those subject to civil penalties under Rule 7010 receive the due process protections afforded in Rule 2010(c) and in § 40-7-116.5(1)(c) and (d), C.R.S., the ALJ adopts changes to proposed Rule 7010(b) and (c) to closely mirror the

[146] *See supra,* ¶¶ 25-31; 63-67, *infra,* ¶¶ 94; 166; 168;170-172; Decision No. C21-0737 at 4-5. *See e.g.,* 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.

[147] The ALJ addresses suggestions relating to template agreements later.

[148] Rule 2010(c) applies to telecommunication carriers, not railroads. As such, amending the rule as suggested would create unnecessary confusion.

statutory language in § 40-7-116.5(1)(c) and (d), C.R.S. The ALJ also adopts language largely mirroring §§ 40-7-116.5(1)(b), 40-7-116(1)(b), C.R.S., (service and content of a CPAN), and §§ 40-7-116.5(2) and 40-7-116(2) C.R.S., (amending a defective CPAN). Combined, these changes ensure that those subject to CPANs under Rule 7010 have the same due process protections afforded under §§ 40-7-116.5 and 40-7-116, C.R.S.

79. The ALJ finds it is unnecessary to adopt language incorporating standard statutory rights for those subject to Commission hearings and proceedings, such as those provided under § 40-6-109, C.R.S., and thus does not do so.

80. Consistent with UP's comments, the ALJ will also adopt changes incorporating a process that requires notice and an opportunity to cure any alleged violations, prior to a CPAN being issued. The ALJ understands that a similar process, though informal, is already employed in other CPAN contexts. The ALJ notes that a "complete" cure may not be possible where the alleged violation is that the railroad failed to meet a Commission-ordered deadline, as it is impossible to turn back the clock. As such, the ALJ does not use language implying that the railroad should have the opportunity to "completely" cure the alleged violation.

81. The ALJ corrects other minor errors and makes changes to Rule 7010(a), (b), and (d) to ensure clarity and consistency with § 40-7-105, C.R.S. The ALJ adopts Rule 7010(e) as proposed in the NOPR (without modifications). For the reasons discussed, the ALJ adopts Rule 7010(a) though (d) as follows:

> (a) The Commission may impose a civil penalty against a railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track for failure to comply with the Colorado Constitution, a provision of articles 1 to 7 of title 40, C.R.S., or a Commission order or rule, except for an order requiring payment of money, as authorized in §§ 40-4-106(1)(b) and 40-7-105, C.R.S. Before issuing a civil penalty assessment notice, the entity alleged to have failed to comply with the Colorado Constitution, a provision of articles 1 to 7 of title 40,

C.R.S., or a Commission order or rule must be provided written notice of the alleged violation(s), and an opportunity to cure the alleged violation(s) within a minimum of 14 calendar days. The Commission, in its discretion, may provide additional time to cure the alleged violation(s).

(b) Civil penalty assessment notice.

(I) The Director of the Commission or his or her designee has ~~shall have the~~ authority to issue a civil penalty assessment notice for an alleged failure to comply with or violation(s) of the Colorado Constitution, a provision of articles 1 to 7 of title 40, C.R.S., or a Commission order or rule.

(II) The civil penalty assessment notice must be served in person, by certified mail or by personal service and shall contain:

(A) the name and address of the entity cited for the violation;

(B) a citation to the specific constitutional provision, rule, statute or Commission order alleged to have been violated;

(C) a brief description of ~~identify~~ each ~~individual~~ alleged violation and the date and approximate location (as applicable) of the alleged violation;

(D) ~~state the proposed penalty amount for each individual alleged violation;~~ the maximum penalty amount for each alleged violation and the maximum amount of the penalty surcharge imposed pursuant to § 24-34-108(2), C.R.S., if any. The penalty surcharge shall be equal to the percentage set by the Department of Regulatory Agencies on an annual basis.

(E) ~~provide for~~ a statement allowing for a reduced penalty of 50 percent of the maximum penalty amount and surcharge ~~sought~~ if paid within ten calendar days of the railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track's receipt of the civil penalty assessment notice; ~~and state the maximum amount of the penalty surcharge imposed pursuant to § 24-34-108(2), C.R.S., if any. The penalty surcharge shall be equal to the percentage set by the Department of Regulatory Agencies on an annual basis.~~

(F) a place for the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track to execute a signed acknowledgment of receipt of the civil penalty assessment notice;

(G) a place for the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track to execute a signed acknowledgement of liability for the violation; and

(H) a statement that if the prescribed penalty is not paid within ten calendar days of the railroad, railroad corporation, rail fixed guideway, transit agency or owner of the track's receipt of the civil penalty assessment notice, that the civil penalty assessment notice becomes a notice of complaint to appear before the Commission.

(III) A civil penalty assessment notice may not be considered defective so as to provide cause for dismissal solely because of a defect in its content. Any defect in the content of a civil penalty assessment notice may be cured by a motion to amend the same filed with the Commission prior to a hearing on the merits. No such amendment may be permitted if the substantial rights of the cited entity are prejudiced.

(c) Adjudication.

(I) The railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track cited with alleged violation(s) may either admit liability for the violation(s) by executing the acknowledgement of liability and paying the penalty prescribed in the civil penalty assessment notice or contest the alleged violation(s) as set forth below. When the cited entity admits liability, it must pay the civil penalty specified for the violation(s) in person at the Commission's office or by depositing payment postage prepaid in the United States mail within ten days after the citation is issued.

(II) The railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track cited with alleged violation(s) may ~~request a hearing before the Commission~~ contest the violation(s) identified in the civil penalty assessment notice and request a hearing before the Commission. If the cited entity does not pay the prescribed penalty within ten calendar days after the civil penalty assessment notice is issued, the notice constitutes a complaint to appear before the Commission. The cited entity must contact the Commission on or before the time and date specified in the civil penalty assessment notice to set the complaint for a hearing on the merits. If the cited entity fails to contact the Commission as required, the Commission will set the complaint for a hearing. At the hearing, Commission trial staff shall have the burden ~~at hearing~~ of demonstrating ~~a~~ the violation(s) by a preponderance of the evidence.

(d) Civil penalty assessment.

(I) The Commission shall assess a civil penalty only after a railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track either admits liability or is adjudicated to have committed the violation.

(II) In any written decision entered by the Commission assessing a final civil penalty, the Commission may impose a civil penalty of not more than $2,000 ~~two thousand dollars~~ for each offense, pursuant to § 40-7-105(1), C.R.S. In determining the civil penalty amount ~~of civil penalty~~, the Commission shall consider the factors set forth in paragraph 1302(b) of the Commission's Rules of Practice and Procedure, 4 Code of Colorado Regulations 723-1.

(III) In accordance with § 40-7-105(2), C.R.S., every violation is considered a separate and distinct offense, and, in the case of a continuing violation, each day's continuance thereof shall be deemed a separate and distinct offense.

3. Rule 7011 – Regulated Railroad, Railroad Corporation, Rail Fixed Guideway, or Transit Agency Rule Violations, Civil Enforcement, and Civil Penalties.

82. Consistent with the above Rules, proposed Rule 7011 provides that a maximum civil penalty of $2,000.00 per offense may be assessed for violating a Commission order, a provision in articles 1 to 7 of title 40, Colorado Revised Statutes, and the following Commission Rules: 7204(a)(X)(D); 7211(b), (c), (h), (k), (l) to (p); 7212(c) to (i); 7213(a); 7301(d); 7324(a) to (f); 7325(a) to (j); 7326(a) to (d); and 7402(a) to (c).

a. Road Authority Comments

83. The CCUA supports the proposed maximum penalty amounts.[149] The CCUA submits that civil penalties must be high enough to incentivize railroads to comply with Commission rules and orders, arguing that if the fines are too low, railroads may make a business decision to pay the penalty rather than comply.[150] The CCUA compares railroads as similar in size and structure to investor-owned electric utilities, and posits that most of the maximum fines for such utilities under Rule 3976 of the Commission's Rules Regulating Electric Utilities, 4 CCR

[149] CCUA's 4/14/21 Comments at 5 in Proceeding No. 21R-0100R at 5.
[150] *Id.*

723-3, is $2,000 and thus, that railroads may respond similarly to such a fine amount.[151] That said, the CUCA suggests that the proposed Rule be modified so that it is clear that each day a railroad is in violation of a rule or order constitutes a separate offense, consistent with § 40-7-115, C.R.S., and proposed Rule 7010(d)(III).[152]

b. Railroad Comments

84. Railroad comments on proposed Rule 7011 mirror those presented more broadly for all the proposed Civil Penalty Rules, and thus are not repeated.

c. Discussion, Findings, and Conclusions[153]

85. To the extent that railroads argue that proposed Rule 7011 will have a significant impact on their operations or existing agreements, the ALJ rejects this argument. Rules allowing the Commission to assess civil penalties have been foreseeable for years given that 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. More to the point, the proposed Rule does 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. The proposed Rule, once adopted and effective, is plainly prospective, not retrospective.

86. That said, the ALJ has carefully considered the concerns that railroads have broadly made about the potential impact that civil penalties may have on them. To this end, in addition to the adopted changes to Rule 7010, the ALJ finds that establishing a $150,000

[151] *Id.*

[152] *Id.*

[153] To the extent that the railroads' arguments in the discussion as to Rules 7009 and 7010 apply to proposed Rule 7011, the ALJ rejects those arguments for the same reasons discussed above.

maximum on the total amount that a railroad may be assessed in a consecutive 12-month period helps balance the concerns that such entities have raised. This is similar to the limit on civil penalties against public utilities providing electric, gas, water, water and sewer, and telecommunications services, per § 40-7-113.5(5), C.R.S. As such, the ALJ will adopt changes to Rule 7011 to include this limit.

87. In addition, the ALJ finds that proposed Rule 7011 requires minor adjustments to ensure clarity and avoid confusion. Given other Rule changes (discussed later), the ALJ will delete references to Rules that are not being adopted. For the reasons discussed, the ALJ adopts Rule 7011 as follows:

> Violation of the Colorado Constitution, a provision of articles 1 to 7 of title 40, C.R.S., a Commission order, and the following ~~statutes and~~ rules may result in the assessment of a civil penalty of up to $2,000.00 per offense. The total amount of civil penalties assessed against any one railroad, railroad corporation, rail fixed guideway, transit agency and owner of the track may not exceed $150,000 in any consecutive 12-month period.

Citation	Description
	~~Article 1-7 of Title 40, C.R.S.~~
	~~Commission Order~~
Rule 7204(a)(X)(D)	~~Content of Railroad~~ ~~Cost Estimates and~~ Schematic Diagram ~~Design~~
Rule 7211(b)	Track Construction or Removal
Rule 7211(c)	Railroad Projects Involving Crossings
Rule 7211(h)	Crossing Surface Maintenance
Rule 7211(k)	Crossing Obstructions
Rule 7211(l)	Project Coordination, Public Notice, and Detours
~~Rule 7211(m)~~	~~Permits, Public Notice, and Detours~~

Rule 7211~~(n)~~ (m)	Project Management and Support
Rule 7211~~(o)~~ (n)	Crossing Surface Replacement ~~Timeline~~
~~Rule 7211(p)~~	~~Construction Requiring Authority~~
Rule 7212(c)	Warning Device Selection, Preemption Timing Selection, and Exit Gate Operation Selection
Rule 7212(d)	Report Preparation and Payment Prohibition
Rule 7212(e)	Schematic Diagram ~~esign~~ Provision Requirements and Cost Estimate Provision Timeline
Rule 7212(f)	Construction and Maintenance Agreement Timeline
Rule 7212(g)	Railroad Consultant Review Time Limitation
Rule 7212(h)	Existing Crossing Easement Payment Prohibition
Rule 7212(i)	Formal Complaint for Delay and/or Untimeliness
Rule 7213(a)	Minimum Crossing Safety Requirements
Rule 7301(a)	Crossing Warning Device Installation and Maintenance
Rule 7301(d)	Crossing Obstructions
Rule 7302	Accident Notification
Rule 7324(a-f)	Overhead Clearances
Rule 7325(a-j)	Side Clearances
Rule 7326(a-d)	Track Clearances
Rule 7402(a-c)	Class I Railroad Peace Officers Minimum Requirements

4. Rule 7201 - Definitions

88. Rule 7201 includes definitions that apply only to Rules 7200 through 7213, 7301, and 7327.[154] The NOPR proposes to change the definition of "crossing safety diagnostic" in Rule

[154] Rule 7201, 4 CCR 723-4.

7201(m) to delete a reference to the "owner of the track" as redundant since the Commission's rules define railroad to include a track owner and "railroad" is already included in subparagraph (m).[155]

a. Road Authority Comments

89. Consensus Rule 7201(m) suggests that the Commission reject proposed changes to Rule 7201(m).[156] The CCUA, Broomfield, Aurora, Fort Collins, Greeley, Evans and Timnath support or do not oppose this Consensus Rule.[157]

b. Railroad Comments

90. UP, BNSF, RTD and ASLRRA support or do not oppose Consensus Rule 7201(m).[158]

91. BNSF explains that references to "owner of the track" (throughout the Rules) should not be removed because BNSF and several other railroads do not own certain portions of the industry track, so they have no control over such industry tracks, and therefore have no authority or right to perform work, including portions of non-railroad owned tracks at public crossings.[159] BNSF argues that imposing liability (through civil penalties) on railroads in circumstances where they do not own the relevant track is inappropriate.[160]

c. Discussion, Findings, and Conclusions

92. Based on the above comments, the ALJ is concerned that eliminating "owner of the track" throughout the Rules may create unnecessary confusion in more complex situations

[155] Decision No. C21-0737 at 9.
[156] Consensus Rules at 1-2.
[157] *Supra,* ¶¶ 10-11.
[158] *Id.*
[159] BNSF's 4/14/21 Comments at 3 in Proceeding No. 21R-0100R.
[160] *Id.*

such as those discussed in comments. For these reasons, and based on Consensus Rule 7201(m), the ALJ does not adopt changes to Rule 7201(m) in the NOPR.[161] For the same reasons, the ALJ rejects similar changes throughout the proposed Rules. Similarly, where the Rules at issue in this NOPR fail to reference "owner of the track," the ALJ adopts changes to incorporate that language. The ALJ does not adopt sweeping changes to Rules not at issue here to include "owner of the track," and instead relies on the definition of railroad under existing Rule 7001(d)(I)(B), 4 CCR 723-1, which includes those who possess tracks by ownership or lease. As such, the Rule changes here should not be interpreted to exempt track owners from complying with Commission rules, even where the rule references a railroad and not an owner of the track.

5. Rules 7202 and 7204 – Necessary Parties to Application Proceedings and Application Contents

93. Proposed Rule 7202 would require that railroads, railroad corporations, rail fixed guideways, or transit agencies that own tracks at a crossing subject to an application for preliminary or final approval relating to a highway-rail or pathway-rail crossing be joined in the application proceeding as a necessary party. Changes to Rule 7204(a)(X)(C) would require that railroads provide road authorities the initial written railroad cost estimate "within the timeframe outlined in paragraph 7212(e)." Changes to Rule 7204(a)(X)(D) include a clarifying reference to explain that a "front sheet" is also commonly referred to as the "state sketch," and that the schematic diagram must be provided within the timeframe outlined in Rule 7212(e).

[161] The ALJ does not adopt sweeping rule changes to include "owner of track" in all places where it does not exist, and instead relies on the definition of railroad under existing Rule 7001(d)(I)(B), 4 CCR 723-1, which includes those who possess tracks by ownership or lease.

a. Road Authority Comments

94. Fort Collins opposes proposed Rule 7202.[162] It submits that road authorities already struggle to get railroads to respond to numerous aspects of any new crossing project, ranging from responding to initial contact about a project to providing cost estimates and schematic designs.[163] Fort Collins is concerned that many crossing projects will never get to the point of an application before the Commission if road authorities have to chase railroads to get them to agree to be party to an application.[164] Fort Collins recommends that proposed Rule 7202 requiring be rejected, and that the Commission instead adopt a presumptive reasonable timeline for major milestones, ranging from 2 to 6 months for designated milestone events.[165] Fort Collins suggests that if the presumptive timelines are not met, an applicant may request that the Commission set a deadline by which the document must be provided, and subject violation of the deadline to civil penalties (at the Commission's discretion).[166]

95. Windsor, Aurora, Greeley, Broomfield, and Douglas County support Fort Collins' comments on Rule 7202, including presumptive timelines for major milestones.[167] Aurora adds that if the Commission adopts the changes to Rule 7202, that other changes would be necessary to ensure that railroads participate in the application process or face civil penalties.[168]

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[162] Fort Collins' 12/10/21 Comments at 2. The Consensus Rules does not suggest changes to proposed Rule 7202 and does not state that no consensus was reached. Consensus Rules at 2. Thus, it is possible that stakeholders who do not oppose or support the Consensus Rules agree that proposed Rule 7202 should be adopted. For the reasons discussed later, this Decision outlines and addresses comments on proposed Rule 7202 that were submitted prior to the Consensus Rules.

[163] Fort Collins' 12/10/21 Comments at 2.

[164] *Id.*

[165] *Id.* at 3.

[166] *Id.* at 3-4.

[167] Windsor's 12/14/21 Comments at 2-4; Greeley's 12/21/21 Comments at 2-5; Aurora's 1/5/22 Comments at 2-4; Broomfield's 9/14/22 Comments at 1; Broomfield's 4/13/21 Comments at 1-4 in Proceeding No 21R-0100R; Douglas County's 9/15/22 Comments at 1-2; Douglas County's 1/5/22 Comments at 4.

[168] Aurora's 1/5/22 Comments at 3.

96. Similarly, Douglas County suggests that if the Commission adopts the changes to Rule 7202, that it clarify whether the purpose of the rule is to streamline the process by which a railroad becomes a party (per its established right to do so), or to require railroads to be co-applicants.[169] If it is the latter, Douglas County submits that this would be a "death nail to public projects" involving railroad crossings in Colorado.[170]

97. The City of Louisville (Louisville) supports establishing a timeline for major milestones in Rule 7202 as Fort Collins suggests but proposes shorter timelines (by approximately two months).[171]

98. While CDOT generally supports the proposed Rules, it is concerned that proposed Rule 7202 could be interpreted to require a railroad to be a joint applicant leaving the road authority with no recourse if the railroad disagrees with the application or does not wish to be involved with it.[172] CDOT supports Fort Collins' suggested changes to Rule 7202 to adopt presumptive major milestone timelines, noting that this would add much needed predictability to the process of completing a crossing project, and would promote public safety via an enforceable timeline.[173] CDOT adds that while it understands that railroads use external consultants who may have to be responsive to multiple clients, road authorities have non-negotiable fiscal restrictions that can result in losing funding for projects if projects are unnecessarily delayed.[174] CDOT also explains that it is responsible for administering the Federal Railway-Highway Crossings Program (Section 130), which identifies high risk railway-highway crossings and provides federal funding

[169] Douglas County's 1/5/22 Comments at 4.
[170] *Id.*
[171] Louisville's 9/16/22 Comments at 2.
[172] CDOT's 1/6/23 Comments at 1.
[173] CDOT's 9/16/22 Comments at 1-2.
[174] *Id.* at 2.

to eliminate hazards at such crossings.[175] There is some urgency in completing these projects (which are completely federal funded), but "it is unknown where in the schedule that any time savings gains could be made to get these projects completed faster."[176]

99. CDOT also notes that the primary obstacles it faces in completing crossing projects is the lack of predictability in timing and costs. CDOT points to significant delays caused by the railroad taking up to six months to review and sign preliminary engineering agreements (PE Agreements), which define the scope of the project, and several more months delay after that Agreement is signed for the railroad's consultants to attend the diagnostic review meeting.[177]

100. The CCUA is unclear on the meaning of "joinder" in the proposed Rule 7202.[178] If this means that road authorities and railroads must be co-applicants, it is concerned that railroads may prevent road authorities from filing applications by refusing to join applications.[179] This, the CCUA submits, would give railroads considerable and unjustified leverage.[180] And, if "joinder" means that railroads are automatically made a party in an application proceeding, then presumably, no application would be considered uncontested for purposes of Rule 1403, so that an accelerated final decision cannot be issued in any application proceeding, even if the railroad does not oppose the application.[181] The CCUA supports road authorities' suggestion for presumptive major milestone timelines, in lieu of proposed Rule 7202.[182]

[175] *Id.*
[176] *Id.*
[177] *Id.* at 3.
[178] CCUA's 4/14/21 Comments at 6 in Proceeding No. 21R-0100R.
[179] *Id.*
[180] *Id.*
[181] *See id.*, citing Rule 1403, 4 CCR 723-1.
[182] *Id.* at 11.

101. Consensus Rule 7204(a)(X)(C) suggests that the required cost estimate be an initial cost estimate rather than a detailed one, and that the cost estimate include "to the extent applicable, at a minimum, specific lines for labor, materials, and circuitry costs of the crossing warning devices."[183] The Consensus Rules suggest no changes to proposed Rule 7204(a)(X)(D).

102. The CCUA, Broomfield, Aurora, Fort Collins, Greeley, Evans and Timnath support or do not oppose Consensus Rule 7204(a)(X)(C).[184]

103. Windsor supports proposed Rule 7204.[185]

b. Railroad Comments

104. UP disagrees with suggestions to implement presumptive milestone timelines in lieu of proposed Rule 7202, not because those timelines are unachievable, but because it is concerned that road authorities could use such deadlines to force its desired terms and conditions on a railroad.[186] It posits that a road authority could request modifications to a standard agreement knowing that it will be difficult for UP to gain the necessary internal approval before the deadline expires, and that in these situations, the railroad would also be forced to prioritize its agreements with road authorities to avoid facing a civil penalty, effectively "leapfrogging" over earlier-submitted projects.[187] UP is also concerned that similar deadlines would not be imposed on road authorities, and that there would be no consequence to the road authority for delay, even if it caused the delay.[188]

[183] *Id.*
[184] *Supra,* ¶¶ 10-11.
[185] Windsor's 12/14/21 Comments at 3-5.
[186] UP's 9/16/22 Comments at 4 (referencing Aurora's proposed timelines).
[187] *Id.*
[188] *Id.*

105. UP generally objects to a fixed project schedule or "any project schedule" to the extent that such schedules do not contemplate "the complexities and broad spectrum of public projects."[189] UP argues that a fixed schedule is arbitrary and invites unintended consequences, including increased financial burden resulting from more disputes. It submits that while a fixed schedule, in theory, would help streamline a project, in practice, it would only cause further delays for complicated and nuanced projects.[190] UP states that it has finite resources; that project volumes within its 23-state network fluctuate; that projects are addressed on a first-come, first-served basis; and that it cannot redirect committed resources from fully developed projects to support a local priority at the expense of other priorities.[191] BNSF and ASLRR agree.[192]

106. Without waiving its objections, UP suggests two alternatives for the Commission to consider. Under the first alternative, UP outlines suggestions for general, preliminary, and final project schedules.[193] UP states that in general, activity durations should be based upon realistic allocation of resources needed to complete the activity, considering physical and logistical constraints on work performance; that the narrative should reflect the dependency and relationships between activities; and that except for the first and last activities, each activity should have at least one predecessor and one successor relationship that forms a connected project schedule from notice to completion.[194] As to a preliminary project schedule, UP suggests that the parties be required to submit a preliminary joint project schedule with a written narrative within 60 calendar days of the notice to proceed or such other time as specified in a Commission order

[189] *See id.* at 3.
[190] UP's 6/22/23 Comments at 3.
[191] *Id.*
[192] BNSF's 6/30/23 Comments at 1; ASLRRA's 6/27/23 Comments at 1.
[193] UP's 6/22/23 Comments at 3-4.
[194] *Id.* at 4.

and that the preliminary project schedule include all activities necessary to complete the work.[195] As to a final project schedule, UP suggests that within 30 calendar days after establishing the "100% design" for the project, that the parties be required to submit the final project schedule with an updated written narrative describing the major work activities, the construction phase, activities on "the critical path," major constraints underlying the sequence and logic of the final project schedule. [196]

107. Second, UP suggests that any standard fixed project schedule exclude projects involving any property interest acquisition, commercial signage relocation or placement, interconnected signal work, and any other circumstance where a party demonstrates that the standard schedule should not apply, and that unless otherwise agreed or ordered, that such an exception apply to the entire project life cycle.[197] BNSF, ASLRR and Great Western agree with UP.[198]

108. BNSF supports proposed Rule 7202, noting that this will dispense with the necessity for railroads to intervene in proceedings that road authorities initiate.[199] It also suggests that the Rule be amended to add "owner of the track" because BNSF and other railroads often to do not own certain portions of industry track, and therefore would have no control over such tracks.[200] BNSF also objects to establishing a proposed presumptive milestone timeline.[201]

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[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] BNSF's 6/30/23 Comments at 1; ASLRRA's 6/27/23 Comments at 1; Great Western's 12/27/21 Comments at 1.

[199] Exhibit B to BNSF's 12/22/21 Comments at 9.

[200] *Id.*

[201] BNSF's 10/7/22 Comments at 1.

109. UP, RTD, and ASLRRA support or do not oppose Consensus Rule 7204(a)(X)(C).[202]

110. BNSF objects to the portion of Consensus Rule 7204(a)(X)(C) that incorporates the 90-day timeline from proposed Rule 7212(e).[203]

c. Discussion, Findings, and Conclusions

111. As the CCUA notes, Rule 1403(a) of the Commission's Rules of Practice and Procedure, 4 CCR 723-1, allows the Commission to decide uncontested applications without a hearing when the application is unopposed and other conditions are met. Under Rule 1403(b), a proceeding will not be considered contested or opposed unless an intervention has been filed that includes a clear statement specifying the grounds on which the proceeding is contested or opposed. As a result, Rule 1403(a) and (b) undermines or negates the intended purpose behind proposed Rule 7202 to streamline rail crossing application proceedings. Specifically, if a railroad is automatically a party to a crossing application proceeding as proposed, to avoid a decision issuing without a hearing under Rule 1403(a), the railroad would still have to file an intervention objecting to the application. Otherwise, under Rule 1403(b), the Commission could not deem the proceeding opposed. Proposed Rule 7202, when read in conjunction with Rule 1403, also creates unnecessary confusion because the proposed Rule purports to eliminate the requirement that railroads file interventions where they oppose an application whereas Rule 1403 plainly contemplates that an intervention must be filed for the proceeding to be deemed opposed. For these reasons, the ALJ concludes that proposed Rule 7202 may ultimately be more harmful than helpful. As such, the ALJ does not adopt the proposed Rule.

[202] *Id.*

[203] UP's 12/21/21 Comments at 2-3; Exhibit B to BNSF's 12/22/21 Comments at 9-10 and 17-18.

112. Suggestions that Rule 7202 establish presumptive reasonable milestone deadlines is addressed (in part) by several other proposed Rules. Specifically, proposed Rule 7212(e) establishes a 90-day timeline to provide a cost estimate and schematic diagram; and proposed Rule 7212(f) establishes deadlines to file C&M agreements. In identifying these timelines, the Commission has chosen to take a balanced approach that does not attempt to control *every step* of a project from before an application is filed to after it is approved. The suggested changes go much further than this. While the ALJ finds that the record establishes that there is a need to include certain deadlines in Rules, the deadlines proposed in other Rules, alongside other Rule changes may address many of the causes for delays in moving crossing projects forward.[204] As such, the ALJ will not adopt changes including a presumptive milestone timeline. For the same reasons, the ALJ does not adopt UP's suggestions to adopt rule language relating to general, preliminary, and final project schedules. The ALJ also finds that such an approach may result in even more delay in completing a crossing project than currently exists.

113. Consensus Rule 7204(a)(X)(C)'s suggestion that the required cost estimate be an "initial" one minimizes the alleged burden on railroads to produce a cost estimate within the timeframe outlined in proposed Rule 7212(e). This change also implicitly means that a railroad may update the initial cost estimate if it later receives additional information impacting the initial cost estimate. At the same time, the Consensus Rule ensures that a road authority has initial cost information that it can rely upon early in a project so that it may secure or maintain funding to move a rail safety crossing project forward. For these reasons, the ALJ adopts Consensus Rule

[204] *See infra,* ¶¶ 163; 199; 201; 211; 214.

7204(a)(X)(C) with minor changes for consistency and clarity and rejects BNSF's argument concerning the 90-day timeline incorporated therein.[205]

114. Specifically, the ALJ adopts Rule 7204(a)(X)(C) as follows:

> (C) the initial ~~detailed~~ written railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track cost estimate, which, as applicable, must include, at a minimum, specific lines for labor, materials, and circuitry costs of the crossing warning devices~~;~~ and must ~~shall~~ be provided by ~~the railroad~~ such entity to the road authority within the timeframe outlined in paragraph 7212(e); and

115. For the same reasons and those discussed later, the ALJ finds that the 90-day timeline incorporated in Rule 7204(a)(X)(D) is reasonable and appropriate. Based on this, and the reasons outlined in the NOPR, and given the dearth of comments suggesting changes to proposed Rule 7204(a)(X)(D), the ALJ adopts Rule 7204(a)(X)(D) as proposed, with minor modifications to improve readability and clarity.

6. Rule 7211 - Crossing Construction and Maintenance

116. Changes to Rule 7211(b), (c), (h), (j) and (k) would eliminate references to the "owner of the track" as unnecessary. Other changes to subparagraph (k) would eliminate language referencing "all points in Colorado where its [track owners] tracks cross any public highway or public pathway at grade," and confirms that the Commission may determine what obstructions must be removed from rail crossings.[206]

[205] This Decision outlines additional reasons for adopting this 90-day timeline later. *See id.*

[206] Decision C21-0737 at 10.

117. Proposed Rule 7211(l) requires railroads, railroad corporations, rail fixed guideways, and transit agencies to coordinate with the relevant road authority when a maintenance or crossing construction project leads to the temporary closure of a highway-rail crossing or public pathway crossing. Proposed Rule 7211(m) requires railroads, railroad corporations, rail fixed guideways, and transit agencies to obtain all required road authority permits and to coordinate with the relevant road authority to provide public notice of detours before performing any construction at a highway-rail crossing or public pathway crossing. Subparagraph (n) requires the same entities to provide road authorities with project support necessary to timely construct and complete any highway-rail or public pathway crossing project. Subparagraph (o) requires the same entities to replace crossing surfaces within 90 days from the date that the road authority informs them that the crossing surface is in disrepair. Finally, subparagraph (p) requires railroads, railroad corporations, rail fixed guideways, and transit agencies to obtain the Commission's approval prior to commencing construction of a new crossing or making any changes at a public crossing.

a. Road Authority Comments

118. The Consensus Rules suggest that the Commission reject changes to Rule 7211(b), (c), (h), (j), and (k) that would eliminate references to "owner of track," and that subparagraph (p) be entirely rejected.[207] The Consensus Rules also propose changes to subparagraphs (l), (m), (n), (o) as follows:[208]

> (l) A railroad, railroad corporation, rail fixed guideway, or transit agency shall be required to coordinate with the road authority any highway-rail and/or public pathway crossing project that will lead to the temporary closure of the highway-rail crossing or public pathway crossing. In the event of an imminent

[207] Consensus Rules at 3-5.

[208] The Consensus Rules' suggested changes to the proposed Rules are underlined (for additions) and stricken through (for deletions).

safety hazard or emergency, the railroad, railroad corporation, rail fixed guideway, or transit agency shall not be required to provide prior notice to the roadway authority for temporary closure but shall provide notice of such closure to the roadway authority as soon as practicable.

(m) A railroad, railroad corporation, rail fixed guideway, or transit agency shall not perform any construction work at a highway-rail crossing and/or public pathway that would lead to temporary closure of the highway-rail crossing and/or public pathway crossing prior to obtaining all required road authority permits pursuant to the road authority's process and coordinating with the road authority to provide public notice and traffic and/or pedestrian and/or bicycle detours. In the event of an imminent safety hazard or emergency, the railroad, railroad corporation, rail fixed guideway, or transit agency shall not be required to provide prior notice to or obtain permits from the roadway authority prior to the temporary closure but shall provide notice of and obtain permits for such closure to the roadway authority as soon as practicable.

(n) A railroad, railroad corporation, rail fixed guideway, or transit agency shall provide road authorities with the necessary project construction support ~~needed by the road authority to construct and complete any highway-rail crossing and/or public pathway crossing project~~ as agreed upon by the railroad, railroad corporation, rail fixed guideway, or transit agency and road authority and/or as ordered by the Commission to construct and complete any highway-rail crossing and/or public pathway crossing project pursuant to the applicable construction and maintenance agreement between the railroad, railroad corporation, rail fixed guideway, or transit agency and the road authority.

(o) A railroad, railroad corporation, rail fixed guideway, or transit agency shall replace crossing surfaces submit a written reply within 90 days of when a road authority informs the railroad, railroad corporation, rail fixed guideway, or transit agency that the receipt of written notification that a crossing surface is in disrepair. Such written notification shall be submitted through the railroad's, railroad corporation's, rail fixed guideway's, or transit agency's designated notice process or by sending notice via certified first-class mail to the railroad's representative on the Commission's Service List. The written reply shall establish a plan to repair the crossing surface, including a proposed timeline, or alternatively shall explain why repair of the crossing surface is not necessary.[209]

119. The CCUA, Douglas County, Broomfield, Greeley, Fort Collins, Aurora, Evans and Timnath, support or do not oppose this Consensus Rule.[210]

[209] Consensus Rules at 4-5.

[210] 12/12/22 Status Report at 2.

120. In comments submitted before the Consensus Rules were reached, the CCUA noted that proposed Rules 7211(l) and (m) are necessary for public safety. Numerous road authorities have experienced crossing closures without prior notice or with insufficient notice for them to take action to protect the public safety.[211] It submits that comments establish that unannounced temporary crossing closures can create safety hazards when road authorities do not have the opportunity to divert automobile and pedestrian traffic.[212] The CCUA explains that when a railroad temporarily closes a crossing without coordinating with the road authority, automobiles and pedestrians may attempt to go around closed gates if they are not provided information or direction on alternative routes.[213]

121. As noted, CDOT does not support the Consensus Rules, but instead continues to support the proposed Rules.[214] CDOT is concerned that the Consensus Rules create ambiguity. As to Consensus Rule 7211(l) and (m), CDOT argues that with so many electronic means of communication available, notifications should be immediate, and suggests that railroads be required to notify the road authority by telephone and email when it identifies an imminent safety hazard or emergency.[215] It submits that this will give the road authority an opportunity to mobilize police or street crews to assist with traffic detours in order to serve public safety.[216]

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[211] *See* CCUA's 4/14/21 Comments at 7 in Proceeding No. 21R-0100R at 7, referencing comments in Proceeding No. 19M-0379R.

[212] CCUA's 9/19/22 Comments at 8, citing its 4/14/21 Comments at 7-8 in Proceeding No. 21R-0100R (highlighting an example of an uncoordinated and uncommunicated crossing closure in Commerce City, Colorado which caused a major disruption to the public and commercial traffic).

[213] CCUA's 9/19/22 Comments at 8, citing Increase in Drivers Going Around Gates, Colliding with Trains, NHTSA https://www.nhtsa.gov/increase- drivers-going-around-gates-colliding-trains (citing 10-year high of drivers defeating closed railroad gates in 2018).

[214] CDOT's 1/6/23 Comments at 1.

[215] CDOT's 1/27/23 Comments at 1-2.

[216] *Id.*

122. As to Consensus Rule 7211(o), CDOT submits that railroads should be required to identify to the Commission the referenced "designated notice process" and the contact information to whom notices should be sent via first-class mail.[217] CDOT argues that a railroad should not justify delay in responding because it failed to update its contact information with the Commission. CDOT also states that the timeline in the railroad's written reply should have a limit within which the work must be done, with one year after the request as the maximum.[218]

123. CDOT objects to deleting proposed Rule 7211(p), arguing that railroads should not be excluded from submitting applications to the Commission for projects at public crossings. CDOT explains that many railroad crossing modifications impact crossing users, road approaches, and may affect interconnected traffic equipment operation, all of which could present a safety hazard.[219]

124. Windsor supports the proposed Rule, explaining that road authorities and railroads have a shared responsibility for crossing safety, and that railroads should be required to apply to the Commission for projects at crossings just as road authorities.[220] Windsor adds that railroads should be required to replace crossing surfaces expeditiously where the state of disrepair represents an imminent threat to safety at the crossing. It suggests that the Commission add the following language to Rule 7211(o), "A crossing surface in disrepair which presents an imminent threat to public safety at a crossing shall be replaced within 7 days of notification."[221]

[217] *Id.* at 2.
[218] *Id.*
[219] *Id.*
[220] Windsor's 12/14/21 Comments at 5.
[221] *Id.*

b. Railroad Comments

125. UP, BNSF, ASLRRA, and RTD support or do not oppose Consensus Rule 7211.[222]

126. As to Consensus Rule 7211(o), UP submits that the Commission should control the notice process by assembling a service list using the information in the Commission's E-Filing System and publishing a list of the name, title, address, phone number, fax number, and email address of the Chief Executive Officer or designated agent for every railroad operating in Colorado.[223] It points to the process that the Illinois Commerce Commission (Illinois Commission) uses as an example the Commission could follow.[224] Specifically, the Illinois Commission's rules require rail carriers to provide it with the appropriate service information and to update that information within 15 days of changes to the same.[225] Alternatively, UP suggests that the Commission designate a page on its website "to provide the various railroads' appropriate processes regarding notice," which could be a link to the railroad's website, or an email or mailing address.[226] It submits that this would give road authorities easy access to the relevant railroads' notice information in one location.[227]

c. Discussion, Findings, and Conclusions

127. Consensus Rule 7211(b), (c), (h), (j), and (k) make minor changes to the proposed Rule by suggesting that the Commission maintain references to "owner of the track." For the

[222] *See* 12/12/22 Status Report at 1; ASLRRA's 12/16/22 Comments at 1; BNSF's 1/6/23 Comments at 1-2.
[223] UP's 1/27/23 Comments at 5; UP's 5/30/23 Comments at 2.
[224] UP's 5/30/23 Comments at 2; UP's 6/16/23 Comments at 1. *See* Exhibit A to UP's 6/16/23 Comments.
[225] *See* Exhibit A to UP's 6/16/23 Comments.
[226] UP's 1/27/23 Comments at 5.
[227] *Id.* at 5-6.

same reasons discussed elsewhere, the ALJ agrees that "owner of the track" should remain in these Rules, and thus does not adopt those changes. The ALJ adopts the remaining changes to such paragraphs, as proposed in the NOPR.

128. The ALJ finds that to improve clarity and avoid confusion, the substance of proposed Rules 7211(l) and (m) should be combined into one Rule, under subparagraph (l). The ALJ finds merit to the changes suggested in Consensus Rules 7211(l) and (m).[228] The Consensus Rules' proposed changes promote public and rail crossing safety by recognizing that there may be situations where the safety risk of waiting to coordinate with a road authority before closing a crossing is higher than the risks associated with closing the crossing without first coordinating with the road authority. The ALJ finds that this concept should be incorporated into Rule 7211(l). The ALJ agrees with CDOT's comments that given the various means to communicate electronically, there is no reason for delayed communication with the road authority. For the reasons discussed, the ALJ largely adopts Consensus Rule 7211(l) and (m) but modifies the Rule to ensure that notice and coordination are not conflated, and to establish a firm and expedient timeframe within which notice and coordination should take place in emergency situations. This will promote railroads' employees' safety while performing the emergency work at the crossing by avoiding unreasonable delay in providing public notice that diverts traffic away from the crossing, consistent with the Commission's authority under §§ 40-4-106(1)(a) and (2)(a), and 40-2-108(2), C.R.S. It will also help minimize the risk of accidents at the subject crossing by ensuring that traffic is diverted away from the crossing without unreasonable delay, thereby reducing the risk of unsafe and accident-causing behavior at the subject crossing, consistent with the Commission's authority under §§ 40-4-106(1)(a) and (2)(a), and 40-2-108(2), C.R.S.

[228] Consensus Rules at 4.

Establishing a timeframe for after-the-fact notice and coordination also provides helpful guardrails to ensure that the emergency exception does not undermine the purpose of the Rule.

129. The adopted changes also eliminate language in proposed Rule 7211(m) relating to obtaining permits. Whether the Commission has a rule requiring railroads to obtain permits does not impact whether railroads, in fact, have to get permits. Local governments' permitting requirements exist with or without such a Commission Rule, rendering the Rule unnecessary. What is more, including permitting requirements in the Rule may ultimately require the Commission (in a CPAN proceeding), to delve into local governments' permitting requirements and processes, which adds an unnecessary level of complexity to CPAN proceedings that go beyond the Commissions' typical role with rail crossing projects. The ALJ finds that local governments are better suited to enforce their own permitting requirements.

130. Consensus Rule 7211(n) strikes an appropriate balance between the need to ensure railroads work with road authorities as necessary to move a crossing safety project forward while ensuring that railroads have a say in what that looks like. It also reaffirms that railroads must comply with a Commission order directing them to take action. The ALJ adopts the concepts in Consensus Rule 7211(n) but makes minor, non-substantive changes to improve readability and clarity.

131. Consensus Rule 7211(o) would require railroads to provide a written reply within 90 days of receiving written notification from a road authority that a crossing surface is in disrepair (rather than replacing the crossing surface within 90 days); would require that written notice of such disrepair be provided through the railroad's "designated notice process," or by certified first-class mail to the railroad's representative on the Commission's service list; and requires the railroad's written reply to establish a plan to repair the crossing surface, including a

timeline, or explain why repair is unnecessary. Except as discussed below, the ALJ finds that the Consensus Rule balances the various competing interests and creates a reasonable process to ensure that crossing surfaces in disrepair are timely addressed.

132. The ALJ agrees with CDOT's suggestion that the railroad's response to a notice of disrepair include a timeframe within which the work must be done, with one year as the maximum, and will adopt language incorporating this concept. The adopted Rule is intended to apply to non-emergency situations, such that the state of disrepair does not present an imminent safety hazard. In such circumstances, railroads are expected to take action as soon as possible to nullify the safety hazard. Indeed, Rule 7211(l) contemplates such scenarios. To ensure that this intent is clear, the ALJ adopts rule language capturing this concept.

133. As to the proposed notice process, the ALJ rejects suggestions that the Rule refer to railroads' "designated notice process."[229] This would result in a Rule that essentially approves and adopts private parties' processes to which the Commission is not privy. What is more, this approach may amount to incorporating outside materials into a Commission Rule, which raises numerous concerns. Assuming *arguendo* that the materials qualify to be incorporated into a rule under § 24-4-103(12.5), C.R.S., the Rule would have to "fully" identify such materials, including by version date, state that the rule does not include any later amendments or additions of the materials, and identify where copies of the materials are available.[230] The Commission would also have to maintain a copy of such materials; make such documents readily available to the public for inspection; and identify where the public may access the materials on the internet at no cost or

[229] *Id.* at 4.

[230] § 24-4-103(12.5)(a)(II), C.R.S.

provide a copy of the materials to the state publications depository and distribution center.[231] To say that this would unnecessarily complicate matters is an understatement.

134. As to the suggestion that notice be provided via certified mail to railroads using information in a Commission service list, it is important to understand that notice would be provided at a time where there is no formal proceeding before the Commission, and therefore, the Commission has not generated a service list. This suggestion would require Commission staff to regularly confirm that the information on file for the railroads that will be used in a hypothetical service list is continually updated to reflect any changes railroads make. Given the suggested 15-day timeframe for railroads to update service information with the Commission, and potential delay inherent with Commission staff having to update this information on the service list, the ALJ is concerned that a Commission-controlled service list will not be updated in a sufficiently timely manner, resulting in an inaccurate and unreliable service list. This may impede the parties' ability to meet the Rule's requirements. Particularly given that compliance with the Rule may result in civil penalties and could result in unnecessary delay in repairing crossing surfaces that present a public safety hazard, this is untenable.

135. That said, comments suggest that there is a need for the Commission to play a role to aid stakeholders with providing notice to each other in matters involving public and crossing safety when there is no formal proceeding pending before the Commission. As such, the ALJ will adopt a new rule requiring that railroads conspicuously post on their websites the name, email address, and mailing address for the railroad's designated agent to receive service of notices and that any changes to this information be updated within one business day of such changes. This removes the so-called middleperson (*i.e.*, the Commission), and ensures that the entity who has

[231] *See* § 24-4-103(12.5)(a)(II) to (V), and (c), C.R.S.

the most control over updating changes in service information does so without needless delay. In addition, the ALJ will adopt rule language allowing notices to be served either by email or by certified first-class mail at the addresses on the railroads' website. Given that many notices (including notices of disrepair) directly play an important function related to public and rail crossing safety, the ALJ finds that notice via email is appropriate and serves the public interest. For the reasons discussed, except as noted, the ALJ will adopt rule language that captures the substance of Consensus Rule 7211(o) (renumbered as Rule 7211(n), as set forth below).

136. The Consensus Rules suggest that the Commission entirely reject proposed Rule 7211(p).[232] Given the significant support that the Consensus Rules received from stakeholders on all sides of the spectrum, the ALJ does not adopt the proposed Rule, consistent with the Consensus Rules' suggestion. In doing so the ALJ recognizes the Commission's differing authority over actions that railroads take to modify crossings to comply with federal regulations.[233]

137. For the foregoing reasons, the ALJ adopts and renumbers (as necessary) Rule 7211(l), (m) and (n) as follows, and does not adopt subparagraphs (m) and (p) proposed in the NOPR:

> (l) A railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track ~~shall be required to~~ must coordinate with the road authority to provide public notice and traffic and/or pedestrian and/or bicycle detours and may not close the crossing or perform any construction work at any highway-rail crossing and/or public pathway crossing that will lead to temporary closure of the highway-rail crossing and/or public pathway crossing prior to coordinating with the road authority to provide the referenced notice and detours. In the event of an imminent safety hazard or emergency, the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track is not required to coordinate with the road authority before closing the crossing or performing construction but must

[232] Consensus Rules at 5.

[233] This is not intended to be a ruling on whether proposed Rule 7211(p) is preempted by federal law; the ALJ explicitly does not decide that question. Nor is this intended to mean that railroads need not obtain Commission approval for highway-rail and/or public pathway crossing projects. *See e.g.,* existing Rules 7203(a), (c), (d), (e), (f), 7204, 4 CCR 723-7.

provide notice to and coordinate with the road authority as soon as practicable, but not less than 24 hours after such crossing closure or construction commences.

(~~n~~ m) A railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track must ~~shall~~ provide road authorities with the project construction support necessary ~~needed by the road authority~~ to construct and complete any highway-rail crossing and/or public pathway crossing project, as agreed upon by the railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track and road authority pursuant to the applicable construction and maintenance agreement, and as ordered by the Commission.

(~~o~~n) Within 90 days of receiving a written notice that a crossing surface is in disrepair, ~~A~~ a railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track ~~shall replace crossing surfaces within 90 days of when a road authority informs the railroad, railroad corporation, rail fixed guideway, or transit agency that the crossing surface is in disrepair.~~ must provide a written reply that establishes a plan to repair the crossing surface, including a proposed timeline to repair the crossing surface that does not exceed one year from the date of the notice, except for crossing surface disrepairs that present an imminent safety hazard, which must be repaired as soon as practicable. If the railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track believes repair is unnecessary, its written reply must explain why repair is unnecessary. The written notice to a railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track must comply with subparagraph 7208(e)(I).

138. For the reasons discussed, the ALJ adopts new paragraph (e) to existing Rule 7208 (Notice) as follows:

(e) Notices outside of formal proceeding.

(I) Whenever these rules require written notice to a railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track outside of a formal Commission proceeding, such written notice must be provided by email or certified first-class mail to the person or persons that the railroad, railroad corporation, rail fixed guideway, or transit agency designate on their websites using the email or mailing address that such entities conspicuously publish on their websites as required by subparagraph 7208(e)(II).

(II) A railroad, railroad corporation, rail fixed guideway, transit agency, and owner of the track must conspicuously publish information on its website identifying the name, email address, and mailing address of the person or persons that such entities designate to receive written notices that are required by these Rules outside of a formal Commission proceeding. Such entities must update their websites within one business day of any changes to this information.

7. Rule 7212 – Crossing Safety Diagnostics and Cost Estimates

139. The NOPR proposes changes to Rule 7212(a) that delete references to "owner of the track," and clarify references to joint determinations by replacing that terminology with "agree" and "agreement."

140. The NOPR also adds new subparagraphs (c) through (i). Proposed Rule 7212(c) requires that the road authority, with any needed support from the Commission, review and confer on numerous identified items during crossing safety diagnostic meetings held at at-grade highway-rail crossings and pedestrian crossings. Proposed Rule 7212(d) prohibits railroads and their consultants from requiring road authorities to accept the results of or pay for the preparation of any study or report that the road authority does not expressly request. Proposed Rule 7212(e) requires that railroads provide road authorities a cost estimate and schematic diagram within 90 days of a road authority's request for the same and that those documents include all the information required in Rule 7204(a)(X)(D) consistent with the road authority's identified configuration. Proposed Rule 7212(f) requires that a signed C&M agreement or evidence of a signed intergovernmental agreement be filed with the Commission within 90 days of the Commission's order authorizing the project, or at least 30 days before the proposed start date for construction, whichever is later.

141. Proposed Rule 7212(g) limits railroad consultants' billable hours to eight, and the scope of such consultant's work to "preemption calculation verification based on road authority provided traffic signal timings to complete any necessary project review and client report for at-grade highway-rail or pathway-rail grade crossing projects." The proposed Rule also establishes process for railroads to seek and obtain an extension of the time permitted to complete project review and "client report." Proposed Rule 7212(h) allows railroads to assess costs for new

or new portions of revised easements and prohibits railroads from assessing costs for existing easements at existing public highway or public pathway crossings. Proposed Rule 7212(i) states that if a road authority alleges that it has lost funding to complete a highway-rail or pathway crossing project as a result of delay caused by a railroad, the road authority may file a formal complaint with the Commission identifying the alleged cause of delay and the amount of lost funding, and request that the Commission allocate the lost funding to the railroad, or request other relief, including that the Commission impose a civil penalty against the railroad.

142. Stakeholders submitted proposed Consensus Rules addressing proposed Rule 7212(a), (c), (d), (e), and (h). Those are addressed first. Portions of proposed Rule 7212 to which no consensus was reached (subparagraphs (f), (g), and (i)) are addressed second, under separate headers.

a. Road Authority Comments on Rule 7212(a), (c), (d), (e), and (h)

143. The Consensus Rules suggest the Commission reject changes to Proposed Rule 7212(a) that would delete references to "owner of the track."[234] The Consensus Rules also suggest the following changes to proposed Rules 7212(c), (d), (e), and (h):

> (c) During a crossing safety diagnostic held at an at-grade highway-rail crossing or pedestrian crossing, the road authority, and railroad, railroad corporation, rail fixed guideway, transit agency, or owner of track, and with any necessary assistance from Commission staff, shall review, and confer on the following:
>
> (I) the need for and selection of appropriate safety devices;
>
> (II) the appropriate preemption operation and the timing of traffic control signals interconnected with highway-rail grade crossings adjacent to signalized highway intersections; and
>
> (III) the appropriate exit gate operating mode and exit gate clearance time.

[234] Consensus Rules at 5.

(d) An applicant and its consultants ~~railroad, railroad corporation, rail fixed guideway, or transit agency and their consultants~~ may not require a road authority, railroad, railroad corporation, rail fixed guideway, or transit agency ~~and their consultants a road authority~~ to ~~accept the results of or~~ pay for the preparation of any study or report not expressly requested by the road authority, railroad, railroad corporation, rail fixed guideway, or transit agency unless the parties have entered into an agreement for payment, e.g., reimbursement agreement which includes a general scope for the required study or report, and such study or report relates to the project.

(e) Every railroad, railroad corporation, rail fixed guideway, or transit agency shall provide to a road authority, no more than 90 days after a request has been submitted in accordance with the railroad's appropriate process, or by sending notice via certified first-class mail to the railroad's, railroad corporation's, rail fixed guideway's, or transit agency's representative on the Commission's Service List, and the road authority has provided all necessary documents, the initial cost estimate (labor, materials, and circuitry costs) and schematic diagram, with all of the information required to be shown on the schematic diagram as set forth in subparagraph 7204(a)(X)(D), for the specific configuration requested by the road authority.

(h) A railroad, railroad corporation, rail fixed guideway, or transit agency may assess costs for new, or the new part of, revised easements or licenses but may not assess any costs for existing easements at existing public highway, utility, or public pathway crossings. If a new or expanded easement or license is required as a part of a public highway, utility, or public pathway crossing project proposed by a road authority, and in the event that the road authority cannot provide recorded documentation of existing leases or licenses, then the costs associated with researching, documenting, and recording of such easements or licenses may be assessed.[235]

144. The CCUA, Broomfield, Aurora, Fort Collins, Greeley, Evans and Timnath support or do not oppose this Consensus Rule.[236]

145. As to Rule 7212(e), Fort Collins explains that historically, the railroad does not begin work on the estimate and schematic diagram until they have reviewed and approved the

[235] *Id.* at 5-6

[236] Status Report at 2. *See supra*, ¶¶ 10-11.

road authority's final plans.[237] As such, a timeline for this action is necessary and appropriate. Windsor, Greeley, Aurora, and Broomfield agree.[238]

146. Windsor notes that crossing safety diagnostics would be more productive if the railroad comes to the meeting with necessary information as to the vintage of existing active warning equipment, circuitry type, and railroad signal house capacity for upgrades.[239] Windsor explains that railroad representatives often do not have this information available; do not have field signal staff in attendance; and do not obtain this information before the field safety diagnostic so it can be shared with the crossing safety diagnostic attendees.[240] Given that it regularly takes three to four months to coordinate a diagnostic meeting so that everyone necessary can attend, Windsor submits that it is reasonable to require that the railroad request the signal staff check the signal house and circuitry at the subject crossing and provide that information to railroad staff that attend the diagnostic meeting so that individual can share it with others at the diagnostic meeting.[241]

147. The City of Thornton (Thornton) comments that only the road authority should have the authority to make final decisions on timing and operation of traffic signals interconnected with highway-rail grade crossings following consultation with the railroad.[242]

148. Other road authority comments submitted prior to the Consensus Rules state that the issues addressed during a diagnostic meeting depend upon the type of vehicular traffic using

[237] Fort Collins' 12/10/21 Comments at 4 and 6.

[238] *See* Windsor's 12/14/21 Comments at 3-4; Greeley's 12/21/21 Comments at 5; Aurora's 1/5/22 Comments at 4; Broomfield's 4/13/21 Comments at 1-4 in Proceeding No. 21R-0100R.

[239] Windsor's 12/14/21 Comments at 5.

[240] *Id.* at 5-6.

[241] *Id.* at 6.

[242] Thornton's 12/22/21 Comments at 1.

the crossing, and that road authority's traffic engineer must evaluate these issues.[243] Likewise, such comments suggest that it is wholly inappropriate for the railroad to hire a vehicular traffic engineer to evaluate the crossing; force their requirements on the road authority; and withhold plan review comments, railroad estimates and schematic diagrams if the road authority disagrees.[244] This would be similar to a road authority hiring a railroad signal engineer, placing demands on the railroad, and withholding permits or clearances until the railroad agrees to comply with the road authority's railroad signal engineer consultant's requirements.[245]

149. As noted, CDOT objects to the Consensus Rules. As to Consensus Rule 7212(c), CDOT explains that road authorities, with Commission Staff's approval, should be the only agencies making decisions on design elements related to vehicular traffic, and that the Rule should be modified to state that the "road authority and PUC Staff, with suggestions from the railroad."[246] CDOT submits that this will confirm that the road authorities will review and confer on the topics in the rule, and that railroad input about roadway or traffic elements may be considered, at the road authority's discretion.[247]

150. As to Consensus Rule 7212(d), CDOT notes that currently, railroads do not ask road authorities to agree to pay for a project report or for the railroad's consultants, instead passing along these costs through the cost estimate, wherein such expenses are disguised under a variety of names such as "traffic engineering," "engineering study," and "general engineering."[248]

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[243] Fort Collins' 12/10/21 Comments at 5. *See* Greeley's 12/21/21 Comments at 6; Aurora's 1/5/22 Comments at 5.

[244] Fort Collins' 12/10/21 Comments at 5. *See* Greeley's 12/21/21 Comments at 6; Aurora's 1/5/22 Comments at 5.

[245] Fort Collins' 12/10/21 Comments at 5. *See* Greeley's 12/21/21 Comments at 6; Aurora's 1/5/22 Comments at 5-6.

[246] CDOT's 1/27/23 Comments at 3.

[247] *Id.*

[248] *Id.*

This makes it difficult for a road authority to determine if they are being charged for the railroad's unsolicited report. CDOT states that unless the railroad explicitly identifies how it is paying for its own consultant's report, that the rule may not address these issues.[249]

151. CDOT comments that Consensus Rule 7212(e) should require railroads to clearly identify with the Commission, the referenced "appropriate process" and contact information to whom notice should be sent, explaining that delay in responding should not be excused because a railroad failed to update its contact information.[250] CDOT adds that railroads should have to clearly identify the "necessary documents" referenced in the Consensus Rule, and that the Rule should include a deadline to develop the estimate, and schematic design, such as six months from the initial request.[251]

152. In comments submitted prior to the Consensus Rules, Aurora noted that in its experience, railroad companies' cost estimates and schematic diagrams take months to produce, and usually expire within six months.[252] Road authorities often see the cost estimates and diagrams expire due to other railroad delays or action that takes a prolonged amount of time.[253]

153. Turning to Consensus Rule 7212(h), CDOT explains that because railroads did not allow easements to be filed for many years, the majority of roadway easements for existing public roadways crossing railroads cannot be found.[254] CDOT asserts that paying railroads to research a public crossing to attempt to find an existing easement is not reasonable, and that the current practice is that when neither the railroad nor the road authority have documentation about the

[249] *Id.*
[250] *Id.*
[251] *Id.* at 3-4.
[252] Aurora's 1/5/22 Comments at 2.
[253] *Id.*
[254] CDOT's 1/27/23 Comments at 4.

existing easement, that the easement is defined as the edge of surface roadway/curb and gutter/sidewalk on one side to the edge of the surface roadway/curb and gutter/sidewalk on the opposite side.[255] CDOT states that any additional easement that a road authority needs should only be assessed a cost by the railroad if it is beyond the limits of the existing physical surface roadway/curb and gutter/sidewalk infrastructure at the crossing.[256]CDOT submits that its proposed approach would save the time that railroads take to research easements, and would identify a clear and fair assessment of what is considered the existing public roadway easement at every public crossing in the absence of documentation on the same.[257]

154. As to Rule 7212(h), Colorado Springs requests that the Commission require railroads to cooperate with road authorities by providing title due diligence supporting the railroads ownership of land adjacent to the railway and require a deadline for responding to requests from road authorities for a cost proposal for acquiring new easements.[258]

b. Railroad Comments on Rule 7212(a), (c), (d), (e), and (h)

155. As noted, UP, RTD, ASLRRA support or do not oppose Consensus Rules 7212(a), (c), (d), (e) and (h).[259] Except for Consensus Rule 7212(e), BNSF also supports these Consensus Rules.[260]

156. As to Consensus Rule 7212(e), BNSF only objects to the 90-day deadline for a railroad to provide an initial cost estimate and schematic diagram, instead suggesting that the

[255] *Id.*
[256] *Id.*
[257] *Id.*
[258] Colorado Springs' 12/21/21 Comments at 3-4.
[259] *See* Status Report at 2; *supra*, ¶¶ 10-11.
[260] *See* BNSF's 1/6/23 Comments at 1.

deadline be 120-days.[261] BNSF explains that it cannot meet a 90-day turnaround but could comply with a 120-day turnaround.

157. UP supports the proposed notice process in Consensus Rule 7212(e) for the same reasons that it supports Consensus Rule 7211(o)'s proposed notice process.[262] In response to concerns that the ALJ raised during the January 17, 2023 public comment hearing about Consensus Rule 7212(e)'s language requiring road authorities to provide "all the necessary documents" before the 90-day response time is triggered, UP states that its publicly available Public Projects Manual can be used to provide a list for major categories of work on projects.[263] UP notes that due to the varying types of work and projects that road authorities pursue, it would be impossible for it to create an extensive list of documents required for every type of project, but it is confident that its Public Project Manual covers all major project categories.[264] UP provided excerpts from this Manual, including checklists of required documents.[265]

c. Discussion, Findings, and Conclusions on Rule 7212(a), (c), (d), (e), and (h)

158. For the reasons already discussed, the ALJ does not adopt changes to Rule 7212(a) that delete references to the "owner of the track."[266] The ALJ adopts the other minor changes to Rule 7212(a) as proposed in the NOPR.

[261] *See id.*
[262] UP's 5/30/23 Comments at 1-2.
[263] UP's 1/27/23 Comments at 2.
[264] *Id.*
[265] *Id.* at 2-4.
[266] *Supra,* ¶ 92.

159. As to Rule 7212(c), leaving out railroads from a crossing safety diagnostic meeting makes little sense given that existing Rule 7212(a) allows them to request such a meeting. What is more, railroads can contribute their specialized rail expertise to such diagnostic meetings, which promotes public and rail crossing safety. As such, the ALJ will adopt the changes suggested in Consensus Rule 7212(c) to include railroads. However, to CDOT's point, including the railroad in the diagnostic meeting does not mean that railroads control that meeting, or aspects of the crossing related to vehicular traffic engineering. Indeed, as noted in comments, 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. Road authorities' expertise in this area is required by operation of Colorado statutes that give them the responsibility and authority to place and maintain traffic control devices, among other statutes and standards authorizing and requiring them to be responsible for traffic and highways.[267] While road authorities and the Commission may consider input from railroads at a diagnostic meeting, the railroads do not control vehicular traffic choices. As such, the ALJ adopts language to capture this concept.

160. Turning to Rule 7212(d), the ALJ finds that the Consensus Rule strikes a reasonable balance between the stakeholders' competing interests. While CDOT's comments have

[267] *See e.g.,* § 42-4-105, C.R.S. *See* § 42-4-106(1), (3) to (7), C.R.S. (authority to restrict the operation of vehicles on highways in the state; temporarily close highways due to weather conditions; and temporarily close highways and create detours due to construction, road maintenance, parades and special events); § 42-4-104, C.R.S., (requiring CDOT to adopt a uniform system of traffic control devices consistent with the provisions of article 42 for use upon highways within the state and must issue a traffic control manual supplement approved by the transportation commission); § 42-4-114(1), C.R.S., (authority to require property owners to trim or remove vegetation that obstructs the view of traffic, any control devices, or otherwise constitutes a hazard to drivers or pedestrians); § 42-4-601, C.R.S. (CDOT to place and maintain traffic control devices as it deems necessary to carry out article or warn, regulate or guide traffic; local authority must get CDOT's permission to place or maintain traffic control devices on state highways). *See* https://www.codot.gov/safety/traffic-safety/assets/documents/mutcd (not adopting MUTCD Part 8, Chapter 8A.01, paragraph 05, instead replacing it with the following language "[t]he regulatory agency with statutory authority, with the advice of CDOT if requested, shall determine the need and selection of devices at a highway-rail crossing."

merit, the ALJ disagrees that the Consensus Rule fails to address the difficulties with determining whether a railroad has charged a road authority for consultants' research and reports. The suggested language would require that the road authority explicitly request the study or report in order to be responsible for its costs. The proposed language also places the same requirements on road authorities such that both railroads and road authorities are held to the same standard. As such, the ALJ adopts Consensus Rule 7212(d).

161. The ALJ notes that the Consensus Rule 7212(e) represents a significant compromise from stakeholders, particularly as to the 90-day timeline proposed therein. That said, the ALJ is concerned about two items in the Consensus Rule: the referenced "appropriate notice process" and the requirement that the road authority must have provided the railroad with "all necessary documents" before the other timelines in the Consensus Rule are triggered.[268] As to the first item, for the reasons discussed in adopting Rules 7211(n) and 7208(e), the ALJ rejects suggested language concerning notice to railroads, and will adopt language incorporating the notice process in Rule 7208(e)(I).

162. As to the second issue, as explained during the January 17, 2023 public comment hearing, including a requirement that the road authority has to provide "all the necessary documents" without clearly identifying the necessary documents creates numerous problems. While the ALJ does not question that a railroad will require certain documents from the road authority in order to create a cost estimate and schematic diagram, unless the road authority has notice that its submission does not include all the required documents, the Consensus Rule will have little or no value. For example, if the road authority provides all documents that it believes are necessary based on its review of a railroad's public projects manual, but the railroad

[268] Consensus Rules at 4-5.

determines that it requires additional documents, then the 90-day period in the Consensus Rule may not be triggered, unbeknownst to the road authority. This is a reasonably foreseeable outcome given UP's comments that it cannot anticipate every document that may be required for any particular crossing project (in a publicly available manual). The Consensus Rule does not require the railroad to inform the road authority that it has not provided all the necessary documents. And nothing in the Consensus Rule would prevent a railroad from waiting out the entire 90-day period, and then informing the road authority that it has not provided all required documentation to obtain the cost estimate and schematic diagram. In the meantime, 90 days would have passed with zero forward movement on the project. This is precisely the type of delay that the NOPR seeks to avoid or minimize. For all these reasons, the ALJ does not adopt Consensus Rule 7212(e).

163. Instead, the ALJ will adopt language that attempts to incorporate the concepts in the Consensus Rule but that sets guardrails to avoid the circumstances discussed above. Among those are a requirement that a railroad inform a road authority in writing within 14 days of receipt of a request for a cost estimate and schematic design whether the railroad requires additional documents. This will minimize the type of delay discussed above and provides railroads ample time to review the documents and determine if any are missing. It also accounts for unique projects that may call for more than what is listed in a railroad's public project manual. If the railroad does not inform the road authority that it is missing documents within that timeframe, the adopted Rule creates a presumption that the road authority has provided all the required documents, thereby triggering the 90-day timeframe. As implied, the ALJ rejects BNSF's suggestion that this be a 120-day timeframe. The ALJ finds that 90 days is a reasonable timeframe within which to provide an "initial" cost estimate, and a schematic diagram. BNSF and any other

railroad always have the option of seeking a waiver of this Rule for projects that it believes require more than 90 days to complete an initial cost estimate and schematic diagram or can seek to extend the Rule's 90-day timeframe.

164. To be clear, adopted Rule 7212(e) does not incorporate or otherwise implicitly approve a railroad's determination as to the documents it requires to create an initial cost estimate or schematic diagram. In addition, the adopted Rule language may not be used to circumvent adopted Rule 7212(d)'s requirements that neither a railroad nor a road authority can force the other to pay for the costs of studies or reports they did not request, or to circumvent adopted Rule 7212(g)(discussed in more detail later). The ALJ also makes other minor clarifications.

165. Consensus Rule 7212(h) does not modify the primary substance of proposed Rule 7212(h) but clarifies how costs will be assessed for new or expanded easements. Like the proposed Rule language, it would limit the circumstances under which a railroad could pass along costs for researching easements to a road authority. While the ALJ understands CDOT's desire to minimize delay and costs that may arise in connection with easements, the ALJ is concerned that CDOT's suggestion would result in a one-size fits all approach that creates easement language, despite the fact that not all crossings are the same. For the reasons discussed, the ALJ will adopt Consensus Rule 7212(h) with minor modifications to improve clarity. For the reasons and authorities discussed, the ALJ adopts Rule 7212(a), (c), (d), (e) and (h), as follows:

> (a) A railroad, railroad corporation, rail fixed guideway, transit agency, owner of the track, road authority, or Commission staff may request a crossing safety diagnostic at any existing or proposed crossing to assess the condition of the existing crossing, to discuss proposed changes to an existing crossing, or to discuss a proposed new crossing. A crossing safety diagnostic must be held at least 30 days prior to the filing of an application for a new crossing, for changes to an existing crossing, or for closure of an existing crossing. If the railroad, railroad corporation, rail fixed guideway, transit agency, owner of the track, road authority, and Commission staff ~~determine jointly~~ agree that a crossing safety diagnostic for a specific project for which an application will be sought is not necessary,

Commission staff shall provide written correspondence to the railroad, railroad corporation, rail fixed guideway, transit agency, owner of the track, and road authority memorializing such ~~determination~~ agreement for use in any future application within fourteen days of the date of the ~~joint determination~~ agreement. Applications may be filed 30 days after receipt of either the written correspondence from Commission staff or from the date by which written correspondence is to be received from Commission staff.

(c) During a crossing safety diagnostic held at an at-grade highway-rail crossing or pedestrian crossing, the road authority, and the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track, with any necessary assistance from Commission staff, shall review, and confer on the items in subparagraphs 7212(c)(I) through (III). While this conferral is required, the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track does not have authority to overrule the road authority's determinations as to aspects that directly relate to control and direction of vehicular traffic.

(I) The need for and selection of appropriate safety devices;

(II) the appropriate preemption operation and the timing of traffic control signals interconnected with highway-rail grade crossings adjacent to signalized highway intersections; and

(III) the appropriate exit gate operating mode and exit gate clearance time.

(d) An applicant and its consultants, and a railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track and their consultants may not require a road authority, railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track to accept the results of or pay for the preparation of any study or report not expressly requested by the road authority, railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track unless the parties have entered into an agreement for payment, (e.g., reimbursement agreement which includes a general scope for the required study or report), and such study or report relates to the project.

(e) Every railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track shall provide to a road authority an initial cost estimate (including labor, materials and circuitry costs) and a schematic diagram with all the information required to be shown on the schematic diagram per subparagraph 7204(a)(X)(D) for the specific configuration requested by the road authority no more than 90 calendar days after a road authority has submitted a request to such an entity consistent with the notice requirements in subparagraph 7208(e)(I) and has provided the necessary documents for such entity to create the initial cost estimate and schematic diagram. If the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track determines that 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 for an initial cost estimate and schematic diagram, the railroad, railroad

corporation, rail fixed guideway, transit agency, or owner of the track must notify the road authority in writing of the additional documents that it requires. If the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track 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 served its request for the initial cost estimate and schematic diagram. If the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track provides notice that it requires additional documents, its initial cost estimate and schematic diagram must be provided to the road authority within 90 days of the date that the road authority provides the documents that the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track identified in its written notice to the road authority. This paragraph may not be used to circumvent the requirements in paragraph 7212(d) and (g).

(h) A railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track may assess costs for new, or the new part of, revised easements or licenses but may not assess any costs for existing easements at existing public highway, utility, or public pathway crossings. If a new or expanded easement or license is required as a part of a road authority's public highway, utility, or public pathway crossing project, and the road authority cannot provide recorded documentation of existing easements, leases, or licenses, the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track may assess the road authority its reasonable costs associated with researching, documenting, and recording such easements or licenses.

d. Road Authority Comments on Rule 7212(f), (g), and (i)

166. Fort Collins supports proposed Rule 7212(f), explaining that the biggest source of delay and frustration for road authorities in advancing public projects is getting a C&M agreement in place.[269] Delays could be avoided if railroads establish a template agreement for the most common types of public crossing projects, and a project item list with an approximate item cost, which would allow them to develop estimates more quickly so that a project can advance.[270]

[269] Fort Collins' 12/10/21 Comments at 6.

[270] *Id.* at 1-2.

Fort Collins believes the lack of organization is at the root of the railroad's inability to develop C&M Agreements in a timely manner.[271] Fort Collins notes that it is unclear why railroads have not already established a template of railroad agreement language for the most common types of public crossing projects that could allow parties to input project-specific details and ensure that state requirements for maintenance at the crossing after construction are included.[272]

167. Windsor, Greeley, and Aurora agree with Fort Collins' comments on proposed Rule 7212(f).[273]

168. Aurora expects that railroad delays will continue even if the Commission implements its fining authority through the proposed Rules.[274] Aurora agrees with Fort Collins that a potential solution would be to require railroad companies to create a Commission-approved template agreements for the most common types of public crossing projects that allows for project-specific information to be filled in, and includes state requirements for maintenance at the crossing following construction.[275] This would include agreements for projects at highway-rail at-grade crossings, grade separated crossings, pathway-rail at-grade crossings, pathway grade separated crossings, existing at-grade crossing modifications, crossing closures, crossing active warning signal improvements, crossing passive warning improvements, crossing surface improvements, and sub-surface utilities.[276]

169. Aurora suggests that such templates could allow for project-specific information to be input and should reference state requirements for maintenance at the crossing following

[271] *Id.* at 1.
[272] *Id.* at 1 and 6 (referencing its comments on Proposed Rule 7010).
[273] Windsor's 12/14/21 Comments at 7; Greeley's 12/21/21 Comments at 7; Aurora's 1/5/22 Comments at 6.
[274] Aurora's 1/5/22 Comments at 1.
[275] *Id.* at 1-2.
[276] *Id.*

construction. Aurora submits that template agreements would address the root of railroads' inability to provide C&M agreements in a timely manner and would prevent railroads from seeking concessions that contradict the Commission's decision approving a project.[277]

170. Aurora highlights an example of an experience with UP. UP conditioned its approval of an overpass project on the closure of an unrelated adjacent crossing. This crossing was not in the project area, was not controlled by Aurora, and closure was not feasible for the surrounding properties and roadway network.[278] Based on that experience, Aurora suggests the Commission adopt a rule that provides requirements to address this type of situation where a railroad attempts to condition approval of a new crossing only if an existing one is closed; it believes that some railroads have made this a requirement, even where it is not feasible.[279]

171. Douglas County notes that railroads demand that road local jurisdictions sign agreements that are unlawful and void as a matter of law, without room for negotiation.[280] In support, Douglas County points to an experience with UP on a project intended to improve safety at a busy crossing.[281] Douglas County explains that UP (like all other railroads Douglas County has worked with) required Douglas County to sign a "Reimbursement Agreement" for "Preliminary Engineering Services" (also referred to as a PE agreement) before it would take any action at all.[282] The Agreement was an onerous or bad faith attempt to shift all risks of any kind to the road authority, rather than a good faith attempt to share such risks equally as partners.[283] Other examples include that railroads insist that only they can choose their consultant; that the road

[277] *Id.* at 2.
[278] *Id.*
[279] *Id.*
[280] Douglas County's 2/18/22 Comments at 1.
[281] *Id.*; Exhibit A to Douglas County's 2/18/22 Comments.
[282] *See* Douglas County's 2/18/22 Comments at 1; Exhibit A to Douglas County's 2/18/22 Comments.
[283] *See* Douglas County's 2/18/22 Comments at 1; Exhibit A to Douglas County's 2/18/22 Comments.

authority has to pay for all consultants' costs (without a limit); and that the road authority has to accept all consequences, even if the railroad's consultant is incompetent.[284]

172. Even more troubling to Douglas County is that these types of agreements are often patently illegal under Colorado law and void on their face because they are essentially open ended financial obligations that do not establish the County's maximum financial obligation, which violates § 29-1-110, C.R.S.[285] Even so, railroads demand that local jurisdictions sign the agreements anyway, and outright refuse to negotiate agreement terms that are not legal under Colorado law.[286] Indeed, in response to Douglas County's request to amend agreement terms that violate § 29-1-110, C.R.S., UP responded, "[a]s a general statement UPRR is not agreeable to modifying the body of the agreement. Specifically, UPRR is not agreeable to any language which sets a maximum amount for this type of agreement, including others which have been executed in the State of CO."[287] This refusal to amend contract terms to comply with Colorado law means that public safety projects cannot proceed.[288] For all these reasons, Douglas County urges the Commission to take action to address these issues.

173. Douglas County and Louisville both suggest that CDOT lead the charge on a workshop to create and finalize template agreements.[289]

174. CDOT explains that it has master agreement templates with BNSF and UP, which allow them to contract for the design and construction processes that comply with state law and

[284] Douglas County's 2/18/22 Comments at 1.
[285] *See id.* at 1; Exhibit A to Douglas County's 2/18/22 Comments. Douglas County explains that under § 29-1-110, C.R.S., it cannot pay more than is appropriated, which means the contracts must establish a maximum amount to avoid running afoul of § 29-1-110, C.R.S. Douglas County's 2/18/22 Comments at 1.
[286] *See* Douglas County's 2/18/22 Comments at 1-2; Exhibit B to Douglas County's 2/18/22 Comments.
[287] Exhibit B to Douglas County's 2/18/22 Comments at 1.
[288] *See* Douglas County's 2/18/22 Comments at 1.
[289] Louisville's 9/16/22 Comments at 7; Douglas County's 9/15/22 Comments at 5.

federal guidelines.[290] CDOT also has an ongoing process with the railroads to renew master agreements before their expiration date. Given that CDOT's master agreements are working well, CDOT requests that it be permitted to continue to use these agreement templates.[291] CDOT is willing to provide copies of these template agreements upon request to assist in this determination. As to leading workshops to create new template agreements, CDOT submits that road authorities (or local governments) are better positioned to lead this process since they can ensure that templates meet their needs, given that most, if not all road authorities' governing processes require the local agencies to review and approve railroad projects within their own jurisdiction.[292] CDOT does not oversee this or have enough familiarity with local jurisdiction's requirements to assist in creating templates that would work for them all. CDOT also notes that road authorities also face issues such as Home Rule Cities, and their local funding and contracting requirements on which CDOT lacks resources to comment.[293]

175. As noted, CDOT states that the primary obstacles it faces in completing crossing projects is the lack of predictability in timing and costs. Railroads require CDOT to pay railroad consultants' costs, including travel, accommodations, rental car, per diem, and hourly rates; such costs are passed onto Colorado taxpayers.[294] Although road authorities are not given input on selecting the consultants, the costs, which road authorities bear, can range from $10,000 to $100,000.[295] Those costs can be unpredictable, and consultant invoices often lack enough detail for CDOT to understand the charges. CDOT states that it and the other road authorities create

[290] CDOT's 5/25/23 Comments at 1.
[291] *Id.*
[292] *Id.* at 1.
[293] *Id.* at 1-2.
[294] CDOT's 9/16/22 Comments at 3.
[295] *Id.*

roadway plans in strict compliance with state and local laws, and that if a railroad seeks to review such plans, it should bear the costs of the review, and such review should not delay the project.[296]

176. As to Rule 7212(f), Timnath has experienced significant delays in moving projects forward for reasons it cannot control, which often revolve around obtaining a C&M agreement after obtaining Commission approval to move forward on a project.[297] These delays have added years to complete Commission-approved projects.[298] Timnath submits that the Rule changes (overall) will improve public safety by getting projects completed and will allow road authorities to rely on project timelines and funding.[299]

177. Also relevant to proposed Rule 7212(f), Colorado Springs has experienced major delays arising from railroad companies' refusal to standardize agreements with language permissible under state and local law, and by requirements to engage with multiple railroads to perform projects on lines with separate owners and operators.[300] Colorado Springs explains that railroads demand that language be included in PE and C&M agreements that conflict with state law or its City Charter.[301] For instance, railroads frequently require language that requires the road authority to pay for all work that the railroad's contractor deems necessary, regardless of budgets, cost estimates, or appropriation limits.[302] An example is UP's PE Agreement, which states, "[n]otwithstanding the Estimate, Agency agrees to reimburse Railroad and/or Railroad's third-party consultant, as applicable, for one hundred percent (100%) of all actual costs and expenses incurred for the PE work."[303] But, state law prohibits Colorado Springs and all other state

[296] *Id.*
[297] *See* Timnath's 12/21/21 Comments at 1.
[298] *Id.*, citing Proceeding No. 18A-0888R and its comments in Proceeding No. 19M-0379.
[299] Timnath's 12/21/21 Comments at 1.
[300] Colorado Springs' 12/21/21 Comments at 1-2.
[301] *Id.* at 2.
[302] *Id.*
[303] *Id.*

municipalities from entering into agreements or contracts that may require payments in excess of appropriated sums.[304] Colorado Springs faces delays associated with renegotiating the same agreement language repeatedly with railroads; this process has also led to inconsistencies in how the same issues are addressed in different projects.[305] For example, one existing project has been delayed for approximately two years due to railroads' refusal to accept changes to agreements arising from appropriations requirements that conform to state and local law, and staffing changes.[306]

178. Colorado Springs recommends that the Rules be modified to clarify that railroads may not make demands that would violate state or local law and that railroads may not invoice costs in excess of their estimates unless a change order is agreed to by the road authority.[307]

179. The CCUA supports proposed Rule 7212(f), noting that it has become common practice in Colorado for railroads to delay or refuse to negotiate C&M agreements to extract concessions from road authorities.[308] For example, railroads have demanded that C&M agreements allocate costs for maintenance and construction in a manner that differs from Commission decisions approving the project, or from requirements in the Commission's rules.[309] The CCUA states this happened in Proceeding Nos. 18A-0888R and 17A-0268R.[310] Other examples include railroads requiring road authorities to agree to waive statutory governmental immunity afforded or available under the Colorado Governmental Immunity Act, §24-10-101,

[304] *Id.*, citing § 29-1-110, C.R.S. and the Charter for the City of Colorado Springs, § 7-60.
[305] *Id.*
[306] *Id.*
[307] *Id.* AT 2-3
[308] CCUA's 4/14/21 Comments at 10 in Proceeding No. 21R-0100R.
[309] *Id.*
[310] *Id.*

C.R.S., *et seq.*; and to agree to future fiscal appropriations and to indemnify the railroad in violation of Article X, § 20 of the Colorado Constitution.[311]

180. The CCUA explains crossing projects are often tied to state, federal, or bond funding, which requires that construction begin by a date certain. To avoid losing such funding, many road authorities have been forced to execute unreasonable C&M agreements which contain provisions that contradict Colorado law.[312] CCUA says that in some cases, road authorities have been forced to abandon a crossing project entirely due to railroad demands during C&M agreement negotiations. The CCUA states that without Commission authority to ensure good faith negotiations of C&M agreements, many crossing improvements never get constructed or are delayed for years.[313] For this reason, the CCUA recommends that the Commission add language to Rule 7212(f) requiring railroads and road authorities to negotiate a C&M agreement in good faith.[314] The CCUA submits that such language will avoid railroads negotiating C&M agreement terms that are clear violations of a Commission rule or state law.[315]

181. Fort Collins supports proposed Rule 7212(g), explaining that railroad consultants' should focus on reviewing calculations and providing recommendations for their client, the railroad.[316] In its experience, railroad consultants have recommended that the road authority add a variety of additional equipment at the road authority's cost (both to install and maintain), and has resulted in a "conservative enough assessment to push the combined preemption time over the 50 second maximum threshold beyond which the railroads have indicated that constant warning

[311] *Id.* at 10-11.
[312] *Id.* at 11.
[313] *Id.*
[314] *Id.*
[315] *Id.*
[316] Fort Collins' 12/10/21 Comments at 6.

time circuitry fails to behave as intended."[317] Given that this runs contrary to railroads' standards or preferences for preemption times less than 50 seconds, this example makes Fort Collins question whether the railroad's consultants' role is primarily to look for ways to delay public projects.[318]

182. Windsor, Greeley, and Aurora agree with Fort Collins' comments on proposed Rule 7212(g).[319]

183. Thornton is concerned that proposed Rule 7212(g)'s reference to "billable hours" implies that the railroad can charge the road authority for up to eight hours of its consultant's work.[320] It suggests that the Commission delete "billable" from the Rule, or that the Rule be otherwise modified to clarify that road authorities are not responsible for paying for such consulting work.[321]

184. While the CCUA supports limits on consultants' review time on crossing projects as suggested in proposed Rule 7212(g), it notes the proposed Rule is unclear as to whether the eight-hour limit is only for preemption calculation verification or all aspects of a railroad's review of project plans.[322] The CCUA submits that the limitation in billable hours should cover all aspects of project review.[323] The CCUA also states that railroads typically require an application review processing agreement (also referred to as a PE agreement agreement) and fee before they will do anything on a proposed project.[324] This agreement and associated fee are not always used to cover

[317] *Id.*
[318] *Id.*
[319] Windsor's 12/14/21 Comments at 7; Greeley's 12/21/21 Comments at 7-8; Aurora's 1/5/22 Comments at 6.
[320] Thornton's 12/22/21 Comments at 1-2.
[321] *Id.* at 2.
[322] CCUA's 4/14/21 Comments at 12 in Proceeding 21R-0100R.
[323] *Id.*
[324] *Id.*

review fees and has sometimes been a separate charge wholly within the railroad's discretion.[325] These costs can be exorbitant. For example, OmniTrax's Public Projects Manual lists preliminary engineering review application fees as between $8,000 to $25,000, which covers some, but not all, of the costs of engineering review.[326] Other railroads do not make information as to their fees publicly available, thereby creating more problems for road authorities (consistent with Colorado Springs' comments).[327] For these reasons, the CCUA asks that the Commission clarify whether railroads' required application review fees that are unrelated to billable review time are precluded by proposed Rule 7212(g).[328]

185. The CCUA also asks that the Commission expand Rule 7212(g) to include grade separated highway crossings and utility crossings, noting that CCUA members have also experienced lengthy and costly review processes for such projects even though they present fewer safety concerns than at-grade crossings.[329] The CCUA suggests that the Rule could also be amended to include the opportunity for additional review time upon a showing of good cause.[330]

186. The CCUA also supports proposed Rule 7212(i), explaining that road authorities' funding deadlines give railroads considerable leverage over road authorities in all aspects of crossing design and construction (including C&M negotiation).[331] Creating a process by which a road authority could file a formal complaint with the Commission when it loses funding will help level the playing field between road authorities and railroads, and will incentivize railroads not to unreasonably delay projects in order to extract concessions from road authorities.[332]

[325] *Id.*
[326] *Id.*, citing OmniTrax's Public Projects Manual at 9.
[327] *Id.*
[328] *Id.* at 12-13.
[329] *Id.* at 13.
[330] *Id.*
[331] CCUA's 4/14/21 Comments at 14 in Proceeding No. 21R-0100R.
[332] *Id.* at 14-15.

187. Fort Collins, Greeley, and Aurora support proposed Rule 7212(i).[333] Windsor also supports proposed Rule 7212(i), noting that its experience with quiet zone projects evidences the need for this Rule amendment.[334] Railroad delays threatened FRA grant funding for the project.[335]

e. Railroad Comments on Rule 7212(f), (g), and (i)

188. As noted, UP objects to rule changes establishing a fixed project schedule or any project schedule.[336] BNSF and ASLRR agree.[337]

189. UP states that it has never denied a road authority the "opportunity to retain" its own qualified consultant; that it aggressively negotiates the contractual prices of its vendors; and that it only selects consultants experienced in designing highway-rail crossing projects.[338]

190. UP explains that many steps leading to a project's completion are not in the railroad's control, but the rules would set finite limits and penalties for missing deadlines, including the deadline to file C&M agreements (in proposed Rule 7212(f)). UP notes that road authorities often take a significant amount of time in vetting and planning a project (often years) before involving the railroad, yet under the proposed Rules, the railroad would be required to follow an expedited timeline, which is unreasonable and unfair.[339] At the very least, the timing requirements would circumvent years of legitimate negotiations and resulting contracts, and new

[333] Fort Collins' 12/10/21 Comments at 7; Greeley's 12/21/21 Comments at 8; Aurora's 1/5/22 Comments at 7.

[334] Windsor's 12/14/21 Comments at 8.

[335] *Id.*

[336] *See* UP's 6/22/23 Comments at 3.

[337] BNSF's 6/30/23 Comments at 1; ASLRRA's 6/27/23 Comments at 1.

[338] UP's 10/7/22 Comments at 1.

[339] UP's 12/22/21 Comments at 5.

contracts will not be entered into in the spirit of cooperation, but under duress, and directly contradictory to "what has been contemplated by the U.S. Department of Transportation."[340]

191. Nonetheless, UP agrees that template agreements help further its operational processes and procedures and can help accommodate the unique needs of certain projects.[341] UP requests that if the Commission pursues requiring template agreements, that the Commission allow interested participants to hold an informal workshop and require them to submit a joint status report sharing the results of the workshop with any proposed consensus or partial consensus template agreements.[342] It further submits that it is vital that template agreements be created before the adopted Rules are effective so that railroads are not subject to civil penalties due to template agreement negotiations.[343] BNSF and ASLRRA agree with these comments.[344]

192. AAR objects to Rule 7212(f), arguing that it imposes an arbitrary deadline.[345]

193. As to Rule 7212(f), BNSF does not object to a requirement that project agreements be filed with Commission but asks that the Rule require that the agreements and related technical information about the crossing be maintained as confidential and not be publicly available.[346] BNSF also suggests that proposed Rule 7212(f) be amended so that the required agreement be filed "30 days prior to the start of construction" rather than the "proposed start date for construction," which BNSF argues is arbitrary. BNSF asserts that any requirement that a railroad

[340] *Id.* at 4.
[341] UP's 6/22/23 Comments at 2.
[342] *Id.*
[343] *Id.*
[344] BNSF's 6/30/23 Comments at 1; ASLRRA's 6/27/23 Comments at 1.
[345] AAR's 3/29/22 Comments at 2.
[346] Exhibit B to BNSF's 12/22/21 Comments at 18-19.

enter into agreements by a date unrelated to the actual start of construction, or face civil penalties, interferes with private contract rights, and is beyond the scope of the Commission's jurisdiction.[347]

194. BNSF objects to proposed Rule 7212(g) because it limits BNSF's reliance on expert consultant opinions for the purpose of maximizing safety and quality of crossing design, which it asserts is beyond the Commission's statutory authority.[348] BNSF assert that because road authority-initiated projects typically do not benefit BNSF, it is appropriate that road authorities bear the costs of its consultants as necessary to work on project design.[349]

195. AAR objects to proposed Rule 7212(g), arguing that it places an arbitrary limit on the amount of time railroads can devote to studying safety related issues at highway-rail grade crossings.[350]

196. UP objects to proposed Rule 7212(i) because it imposes a large and oppressive remedy without context for how a violation would be determined, thus making it categorically arbitrary and capricious and therefore unlawful.[351] UP explains that the Rule provides a significant remedy without defining what triggers the violation and remedy.[352] While the proposed Rule would make railroads liable for lost funding and penalties, it is unclear at what point the railroads become at fault. UP explains that it is unclear how the Commission would address situations where the railroad causes a minor delay, but the road authority causes a bigger (or main) delay.[353]

[347] *Id.*
[348] *Id.* at 18-19.
[349] *Id.* at 17.
[350] AAR's 3/29/22 Comments at 6.
[351] UP's 12/22/21 Comments at 3.
[352] *Id.*
[353] *Id.*

For example, UP questions whether a railroad would be found liable under the proposed Rule if it causes a minor delay of 48 hours while a road authority causes a 3-month delay.[354]

197. BNSF objects to proposed Rule 7212(i) because it is needlessly duplicative of other Commission rules that allow the Commission to consider formal and informal complaints and impose civil penalties.[355] BNSF also asserts that the Commission lacks authority to allocate funding to a railroad that a road authority has lost.[356] BNSF explains that delays can arise for many reasons over the course of a project, and the railroad should not be the only entity subject to rule enforcement.[357] For example, BNSF asserts that road authorities cause delay by refusing to accept their standard agreement forms. At minimum, BNSF argues that the Commission should attempt to adopt rules that are reciprocal, such that railroads also be allowed to recover costs when road authorities cancel projects.[358]

198. RTD argues that proposed Rule 7212(i) exceeds the Commission's constitutional authority because Art. XXV of the Colorado Constitution provides the Commission authority to regulate public utilities' rates, charges, services, and facilities, which does not encompass an award of monetary compensation as the proposed Rule suggests.[359] RTD submits that awarding monetary compensation or credit to make an aggrieved party whole treads into the realm of constitutionally created state courts. As such, RTD suggests that proposed Rule 7212(i) be revised

[354] *Id.*
[355] Exhibit B to BNSF's 12/22/21 Comments at 19, citing Rules 1301 and 1302, 4 CCR 723-1.
[356] *Id.*
[357] *Id.* at 20.
[358] *Id.*
[359] RTD's 4/15/21 Comments at 7 in Proceeding No. 21R-0100R.

to add railroads the ability to also file a complaint, and to delete language allowing complaints to request the Commission allocate lost funding.[360]

f. Discussion, Findings, and Conclusions on Rule 7212(f), (g), and (i)

199. By establishing a deadline to file C&M agreements, proposed Rule 7212(f) attempts to solve a common issue in rail crossing application proceedings, that is, significant delay in executing C&M agreements. Such agreements are a necessary step before construction on a Commission-approved crossing safety project may proceed. In the past, the Commission has managed this issue by ordering those agreements be filed within a specified timeframe in individual proceedings to avoid substantial delay in construction on approved crossing safety projects. As discussed herein and in the NOPR, substantial delay in safety improvements at crossings creates negative impacts on public and rail crossing safety. As such, the Commission's efforts, whether through rules or prior orders, to avoid substantial delay 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.

200. The record reflects a variety of reasons why there is significant delay in executing C&M agreements, ranging from comments that railroads use the negotiation process to extract unreasonable concessions knowing that road authorities must timely move projects forward or

[360] *Id.* at 8.

risk losing funding, to comments that railroads insist that road authorities enter into agreements that are unlawful under Colorado law, to comments that road authorities refuse to accept railroads' form agreements and insist on negotiating different terms. The record most definitely establishes that railroads have insisted (at least initially) that road authorities execute C&M agreements that violate, are contrary to, or are inconsistent with Colorado law.[361] It is unreasonable for road authorities and railroads to continue to waste time and resources negotiating terms that should be well-established within the parameters of Colorado law. Delay in moving a project forward due to contract negotiations around terms that violate or are contrary to Colorado law is particularly inexcusable given that Commission-approved projects are safety-related. Ultimately, these issues may come down to the lack of template agreements consistent with Colorado law for the most common types of crossing projects in Colorado.

201. For these reasons, and the many other reasons reflected in public comments, the ALJ will adopt a new Rule 7214 that requires parties to use template agreements for the most common types of public crossing projects in Colorado over which the Commission has jurisdiction. The template agreements will be developed through a workshop process, in a Commission miscellaneous proceeding, which will be initiated within 90 days of this Decision's mail date. Participants must include road authorities (including CDOT), and railroads, railroad corporations, rail fixed guideways, transit agencies, and owners of tracks over which the Commission has jurisdiction. The ALJ defers to the Commission how this process will be managed, which may include requiring formal or informal workshops lead by certain stakeholders, status reports, and proposed consensus template agreements. Once complete, the template agreements will be made publicly available on the Commission's website.

[361] *See supra,* ¶¶ 171-172; 177.

Understanding that this will take some time to develop, the ALJ will also adopt rule language that puts this new requirement into effect approximately 14 months after this Decision's mail date.[362] This should allow enough time for all stakeholders to work together on template agreements, and for the Commission to approve and publish those agreements. Given that CDOT's template agreements have worked well and are unique to CDOT, the Rule will exempt parties to a CDOT project from using the Commission-approved template agreements. Nonetheless, CDOT will be required to file its template agreements in the miscellaneous proceeding opened for the purpose of creating and approving template agreements. Stakeholders may use those templates as a starting point in crafting language for new template agreements.

202. The final template agreements must comply with the following minimum standards. First, they must allow parties to input details of a specific project, including any special terms and conditions that relate to the unique nature of the project. Second, the agreements may not include terms that violate any Colorado law, including but not limited to the following examples. First, consistent with § 29-1-110, C.R.S., agreements must include the road authorities' maximum financial obligation, but the template could include language stating that this maximum

[362] As the ALJ cannot know when these Rules will be effective given the potential for appeals, or whether the Commission will ultimately accept or modify this Rule, the ALJ choses this Decision's mail date as a date certain.

financial obligation may be modified by later written amendments as necessary.[363] And, consistent with the General Assembly's clear intent behind the Colorado Governmental Immunity Act (§§ 24-10-101 to 24-10-120, C.R.S.) (Governmental Immunity Act), unless a governmental entity has waived the immunity granted in the Governmental Immunity Act consistent with the requirements of § 24-10-104, C.R.S., template agreements cannot include terms that purport to waive governmental immunity. Likewise, template agreements must avoid language that violates Colo. Const. art., X, § 20. Template agreements cannot shift crossing-related obligations (financial or otherwise) that the law or a Commission order places on one party to the other (*e.g.* crossing maintenance and related costs). Agreements must be consistent with the Commission's decision approving the individual crossing project, which means the templates must allow the parties to input the unique requirements in a Commission decision approving a project and must ensure that no terms in the agreement conflict with the Commission's decision. An example of potential template language that could facilitate is, "[t]he parties intend that this Agreement be consistent with and not conflict with the Commission's decision approving the subject project. To the extent that an Agreement term is inconsistent with or conflicts with the Commission's decision approving the subject project, such terms are void, and the Commission's requirements control."

203. While template agreements do not solve all potential disputes and delays associated with entering into agreements, the public comments from road authorities and railroads

[363] Understandably, Colorado governmental entities regularly contract with private parties, and therefore have significant experience with ensuring that compliance with § 29-1-110, C.R.S., does not impair the parties' ability to reach agreements. Allowing for contract amendments to increase the government entities' financial obligations, rather than using contract language that does not set a financial obligation maximum, is one way that governmental entities do this.

suggest that once the template agreements are in place, they will greatly minimize the delays, disputes, and associated increased costs that have become common in Commission application proceedings.

204. Turning to proposed Rule 7212(f), 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, the template agreements will greatly reduce time-consuming negotiations. Even so, if a party requires more time, as they have always been able to do, the party may file a motion seeking additional time to file a C&M agreement. Nonetheless, the ALJ finds that several minor changes to the proposed Rule are necessary. Most importantly, delaying the effective date of the Rule to align with the template agreement rule (above) will help facilitate the parties' successful compliance with the Rule, and avoid potential civil penalties against railroads while the template agreements are in process. The ALJ will also clarify that the 90-day timeframe is triggered from the Commissions' final decision date, and that the Rule's reference to the proposed start date is to the Commission-approved start date.

205. The ALJ rejects arguments concerning filing a C&M agreement within 30 days of the proposed start date as moot since the ALJ is adopting Rule language referencing the Commission-approved start date. Doing so ensures that the Commission's conclusions as to the timeline within which a project should begin construction, based on the record in specific cases, is the basis for the referenced deadline. This is plainly not arbitrary. This approach also ensures that a project can move forward consistent with the Commission's timeline determinations, which inherently involve public safety considerations. BNSF's comments to the contrary ignore the fact that Commission-approved projects all arise out of the Commission's jurisdiction over crossings to protect the public and crossing safety. Ensuring that safety-related projects move forward on a

reasonable schedule is both appropriate and consistent with the Commission's statutory authority and obligations under §40-4-106(1)(a) and (2)(a), C.R.S. The ALJ highlights that the Rule also allows the C&M agreement to be filed on the later of 90 days after the Commission approves the application, or within 30 days before the approved construction start date. The ALJ makes minor changes to clarify that the 30-day timeframe includes anytime within the 30-day period that precedes the Commission-approved start date. Put differently, under this deadline, the C&M agreement could be filed the day before the Commission-approved construction start date.

206. Turning to proposed Rule 7212(g), as the Commission noted, this Rule is intended to minimize delay resulting from railroad consultants' involvement in public projects, which can lead to public safety concerns.[364] The Commission has statutory authority to promulgate rules to require the performance of an act that it finds the public health or safety may demand.[365] Here, the record establishes that railroad consultants' work on public projects are a common cause of delay in moving projects forward, which creates crossing safety concerns.[366] In promulgating this Rule, the Commission determines that the Rule establishes requirements that the public health and safety demands. For these reasons and authorities, the ALJ rejects arguments that the Commission lacks authority to promulgate the Rule.

207. Turning the substance of Rule 7212(g), the ALJ finds that road authorities and railroads each raise valid concerns. On the one hand, while road authorities have no choice in selecting railroads' consultants and directing their scope of work, including the speed within

[364] Decision No. C21-0737 at 16.

[365] § 40-4-106(1(a), C.R.S. In addition, § 40-4-106(2)(a), C.R.S. also gives the Commission authority to determine, prescribe and order "such other means as may to the commission appear reasonable and necessary to the end, intent, and purpose that accidents may be prevented and the safety of the public promoted."

[366] Fort Collins' 12/10/21 Comments at 6; Windsor's 12/14/21 Comments at 5-7; Greeley's 12/21/21 Comments at 6-8; Aurora's 1/5/22 Comments at 6; CCUA's 4/14/21 Comments at 12 in Proceeding No. 21R-0100R; Fort Collins' 12/10/21 Comments at 5-6.

which consultants perform work, railroads have passed such costs onto road authorities. And the scope of consultants' work has included vehicular traffic engineering matters, an area where road authorities are well-versed through their own experts. Given that, it is questionable whether road authorities (or the public safety) benefit from railroads hiring consultants to advise on vehicular traffic engineering matters. Even so, this has put road authorities in a difficult position and resulted in delay in moving public projects forward, which negatively impacts public and crossing safety.

208. On the other hand, railroads assert that they have limited staff that can do the necessary work on public projects, which means they need consultants, and they do not believe they should bear any consultant costs because they experience no benefits from the public projects.

209. Railroads appear to give no room for the possibility that it may be unreasonable to require road authorities to bear the costs for a consultant they do not chose; who they cannot vet for expertise and reliability; whose scope of work they have no ability to direct, including to ensure the work is done in an efficient and timely manner; and whose costs they cannot manage or predict.

210. Railroads submit that limiting the time that consultants can bill will negatively impact safety analyses. These concerns are nullified by explicit language in proposed Rule 7212(g) that the railroad may request that the Commission extend the presumptive time limits for good cause, including "that additional time is necessary to ensure safety considerations and the scope of the work to be performed." Such concerns also overlook the fact that the Commission uses its specialized expertise to carefully review each crossing project application in its role to protect the public and crossing safety. This includes the issues on which railroad consultants

advise. By promulgating Rule 7212(g), the Commission confirms its role in ensuring crossing safety, and indicates that its role to ensure the safety at crossings is not negatively impacted by limiting the scope of railroad consultant's reviews.

211. The Rule encourages railroads to ensure that their consultants perform only the necessary work by establishing a limited scope and amount of time for the work. Given that railroads typically pass on their consultants' costs to road authorities, the current system provides railroads little or no motivation to ensure that their consultants work efficiently and timely to address the necessary items. Indeed, the record establishes that railroad consultants' work often delves into matters that are within the road authority's (not the railroad's) purview and expertise, such as vehicular traffic matters. As already noted, the road authority, with the Commission's approval, is in the best position to determine issues surrounding vehicular traffic engineering issues.[367] In fact, in the NOPR, the Commission explained that the proposed Rule is intended to clarify "that road authorities need not redesign their projects to conform with railroad specifications when they conflict with what the road authority determines is needed for the safety of the traveling public."[368] The ALJ will modify the Rule to better accomplish this goal by explaining that traffic engineering matters are outside the scope of railroad consultants' purview. While it is difficult to determine with precision how much time the railroad or its consultant would need to perform the necessary evaluation, that time will be reduced if railroad's consultants

[367] *Supra,* ¶ 159.
[368] Decision No. C21-0737 at 16.

focus on matters within the railroad's purview and expertise, rather than including traffic engineering issues in their evaluation. The limitations on the scope of the consultant's review in proposed Rule 7212(g) will reduce the burden on the railroad and its consultants by clarifying this and will create a clearer line between matters that fall within the railroad's and the road authority's purviews and expertise. Nonetheless, to balance concerns about limiting consultants' time to complete work, the ALJ will modify the Rule 7212(g) to change this limit to twelve hours. Based on the Commission's specialized expertise in rail matters, the ALJ finds that twelve hours is a sufficient default amount of time to perform the limited scope of the work identified in the adopted Rule. And, as already noted, the Rule allows the railroad to request to extend this time when necessary. To be clear, the adopted Rule does not dictate the scope of a railroad's contracts with its consultants. Railroads remain free to contract with their consultants as they deem appropriate. Rather, the Rule 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.

212. The ALJ also clarifies that the limit is intended to apply to the entirety of a consultants' work on a public project. While the ALJ declines to delete references to hours being "billable," the use of this word does not amount to a determination that road authorities are responsible for the costs of the consultant's billable hours. Indeed, adopted Rule 7212(d) requires both that the road authority expressly request a study or report prepared by the railroad or its consultants, and a written agreement for payment or reimbursement of such work.

213. As to proposed Rule 7212(i), while the ALJ is concerned that delay in moving crossing projects forward has resulted in the loss of crossing project funding, the ALJ finds merit

in comments challenging this proposed Rule. The Commission's authority over complaints arises from § 40-6-108(1), C.R.S., but nothing in that statute expressly or impliedly authorizes the Commission to grant the type of relief that the proposed Rule contemplates.[369] And while § 40-4-106(2)(b), C.R.S., gives the Commission authority to allocate certain crossing-related costs between a railroad and road authority, the manner in which this authority has to be applied does not align with the proposed Rule. For example, when allocating costs to install, reconstruct, or improve signals and devices under § 40-4-106(2)(b), C.R.S., the Commission has to consider the benefit to the railroad that will accrue.

214. For the reasons discussed, the ALJ adopts Rule 7212(f), and (g), does not adopt proposed Rule 7212(i),[370] and adopts new Rule 7214, as set forth below:

> (f) The signed construction and maintenance agreement or evidence of a signed intergovernmental agreement between any railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency, or owner of the track shall be filed with the Commission within 90 calendar days of the Commission's final decision ~~order~~ authorizing the highway-rail crossing project, or anytime within the 30-day~~s~~ period preceding ~~before~~ the Commission-approved ~~proposed~~ construction start date ~~for construction~~, whichever comes later.
>
> (g) If ~~Any consultant of~~ a railroad, railroad corporation, rail fixed guideway, ~~or~~ transit agency or owner of the track uses a consultant to perform a public project review on its behalf, the consultant's review is limited to 12~~, shall be afforded up to eight~~ billable hours of expenses for the entirety of the consultant's public project review. The consultant's public project review is ~~and~~ 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 ~~based on road authority provided traffic signal timings to complete any necessary project review and railroad client report~~ for at-grade highway-rail or pathway-rail grade crossing projects. The 12 billable hours

[369] The separation of powers doctrine mandates that agencies act only within the scope of their delegated authority. *Hawes v. Colo. Div. of Ins.,* 65 P.3d 1008, 1016 (Colo. 2003). *See* Colo. Const. art. III.

[370] Road authorities are still free to file complaints with the Commission, as permitted by § 40-6-108(1), C.R.S., and Rule 1302, 4 CCR 723-1. And the Commission retains authority to enforce rules and orders through the civil penalty Rules adopted by this Decision.

allotted for the consultant's public project review may not include traffic engineering matters, which are under the road authority and Commission's purview and expertise. The railroad, railroad corporation, rail fixed guideway, or transit agency, or owner of the track may request from the Commission an extension of the 12 billable hours ~~permitted time~~ to complete any necessary project review and client report for good cause including, without limitation, that additional time is necessary to ensure safety considerations are addressed and the scope of the work to be performed. Such request must ~~shall~~ be made prior to using additional time or performing such work.

Rule 7214 – Template Agreements

Starting November 22, 2024, road authorities, railroads, railroad corporations, rail fixed guideways, transit agencies, and owners of the track are required to use Commission-approved template Construction and Maintenance Agreements and Preliminary Engineering Agreements for public crossing projects over which the Commission has jurisdiction, including the following types of public crossing projects: highway-rail at-grade crossings, grade separated crossings, pathway-rail at-grade crossings, pathway grade separated crossings, existing at-grade crossing modifications, relocating crossings, traffic signal interconnection, crossing status change (private to public or public to private), crossing closures, crossing active warning signal improvements, crossing passive warning improvements, and crossing surface improvements. Parties to contracts with the Colorado Department of Transportation are exempt from this requirement.

215. Because new Rule 7214 is being added to the 7200 series of Rules, the ALJ also adopts changes to Rules 7200, and 7201 to include a reference new Rule 7214.

8. Rule 7213 – Minimum Crossing Safety Requirements

216. Proposed Rule 7213(a) provides:

All public crossings in the state of Colorado shall have posted, at a minimum, one MUTCD R15-1 crossbuck sign, one MUTCD R15-2P number of tracks sign for crossings with more than one track, ~~and~~ 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 that crosses the tracks. Any signage configuration different from these minimum standards require approval from the Commission through the filing and granting of an application.

217. Thus, the proposed changes would add another emergency notification sign to the existing list of required crossing safety warning signs at all public crossings.

a. Road Authority Comments

218. Consensus Rule 7213(a) would modify the proposed Rule as follows:

> All public crossings in the state of Colorado shall have posted, at a minimum, one MUTCD R15-1 crossbuck sign, one MUTCD R15-2P number of tracks sign for crossings with more than one track, ~~and~~ one MUTCD R1-2 yield sign, or one MUTCD R1-1 stop sign, and one MUTCD I-13 emergency notification sign mounted on the same support, for each direction of vehicle and/or pedestrian traffic that crosses the tracks. Any signage configuration different from these minimum standards require approval from the Commission through the filing and granting of an application.

219. By replacing "and" with "or," the Consensus Rule would require only one of the first three signs, and the MUTCD I-13 emergency notification sign.

220. The CCUA, Broomfield, Aurora, Fort Collins, Greeley, Evans and Timnath support or do not oppose this Consensus Rule.[371]

221. CDOT comments that the use of a stop sign at a crossing is a function of vehicular traffic, which the road authority's traffic engineer should evaluate, with Commission concurrence.[372] CDOT submits that railroads should not have the option to install a stop sign at a crossing without the road authority's evaluation and agreement.

b. Railroad Comments

222. BNSF, UP, RTD, and ASLRRA support or do not oppose this Consensus Rule.[373]

c. Discussion, Findings, and Conclusions

223. For the reasons discussed, the ALJ rejects Consensus Rule 7213(a). Under § 42-4-104, C.R.S., CDOT is required to adopt a manual and specifications for a uniform system of traffic control devices consistent with article 4, title 42, Colorado Revised Statutes for use upon

[371] Status Report at 2. *See supra*, ¶¶ 10-11.
[372] CDOT's 1/27/23 Comments at 4.
[373] *See* Status Report at 2; *supra*, ¶¶ 10-11.

highways within Colorado. The uniform system must correlate with, and as possible, conform to the system set forth in the most recent edition of Manual on Uniform Traffic Control Devices for Streets and Highways, known as the MUTCD, and other related standards issued or endorsed by the federal highway administrator.[374] CDOT complies with § 42-4-104, C.R.S., by publishing a state manual, or by issuing a traffic control manual supplement adopting the national manual, and other related standards, subject to adaptions, additions and exceptions necessary for lawful and uniform application in the state.[375]

224. Consistent with § 42-4-104, C.R.S., CDOT has adopted the MUTCD, and a supplement to the MUTCD, which includes exceptions, adaptations, or additions to the MUTCD where necessary.[376] Thus, as a starting point, the Rule has to comply with the standards that CDOT has adopted.

225. The Consensus Rule falls short of meeting such standards. Specifically, MUTCD § 8B.04, paragraph 01, requires that a grade crossing crossbuck assembly "consist of a Crossbuck (R15-1) sign, and a Number of Tracks (R15-2P) plaque if two or more tracks are present, that complies with the provisions of Section 8B.03, and either a Yield (R1-02) or Stop (R1-1) sign installed on the same support, except as provided in Paragraph 8." As noted, by replacing "and" with "or," the Consensus Rule would require only one of the following signs (in addition to the MUTCD I-13 emergency notification sign): an R15-1 sign, an R15-2P sign, or either a yield

[374] § 42-4-104, C.R.S.
[375] *Id.*
[376] *See* https://www.codot.gov/safety/traffic-safety/assets/documents/mutcd.

R1-02 sign or Stop (R1-1) sign. This is not consistent with MUTCD § 8B.04, paragraph 01, (which CDOT has adopted).[377]

226. Also, by adding the option of a R1-1 stop sign, the Consensus Rule circumvents, undermines, or contradicts MUTCD § 8B.04, paragraph 05, which CDOT has adopted.[378] That paragraph states that "[a] YIELD sign shall be the default traffic control device for Crossbuck Assemblies on all Highway approaches to passive grade crossings unless an engineering study performed by the regulatory agency or highway authority having jurisdiction over the roadway approach determines that a STOP sign is appropriate."[379] This default standard to use a yield sign plainly indicates that installing a stop sign over a yield sign is a far more complicated process that requires a thoughtful engineering analysis resulting in a finding that a stop sign is appropriate. Modifying the Rule as suggested does not acknowledge this and, as noted, may circumvent, undermine, or contradict this MUTCD and CDOT standard. For the reasons discussed, the ALJ rejects the Consensus Rule and adopts Rule 7213(a) as proposed in the NOPR.

9. Rule 7301 – Installation and Maintenance at Crossing Warning Devices.

227. Existing Rule 7301(a) requires that all passive and active warning devices at public crossings in the state of Colorado be installed and efficiently maintained and kept in good condition or good operating condition by the railroad, railroad corporation, rail fixed guideway, transit agency, or owner the track at the crossing at the railroad, railroad corporation, rail fixed guideway, rail fixed guideway system, or transit agency's expense for the life of the crossing. The NOPR seeks to delete the Rule's reference to the "owner of the track."

[377] *Id.*

[378] *Id.*

[379] MUTCD § 8B.04, paragraph 05.

a. Road Authority Comments

228. Windsor asserts that it was extorted by a railroad into agreeing to pay an annual fee for ". . .inspections and related administrative costs for the incremental additional cost of inspecting, maintaining and repairing exit gates . . . including flashing light signals, gates, crossbucks and signage. . ." as part of Windsor's Quiet Zone project.[380] Windsor requests that an additional sentence be added to 7301(a) that states: "This sub-section shall supersede any agreements between any railroad, railroad corporation, rail fixed guideway, rail fixed guideway system or transit agency and a road authority predating the adoption of this sub-section."[381]

229. The CCUA states that it is aware of instances among its membership where a railroad has attempted to require road authorities to assume the cost of maintenance for signalization for the life of a crossing in C&M agreements. The CCUA appreciates the Commission's restatement that maintenance of signalization is the railroads' responsibility, not the road authorities'.[382]

b. Railroad Comments

230. UP states that federal authorities expressly prohibit states from allocating crossing maintenance costs to railroads when federal funds are involved.[383] It argues that where a road authority receives federal funds for an at-grade crossing improvement, 23 CFR § 646.210(a) expressly prohibits states from "requiring railroads to share in the cost of work for the elimination of hazards at the [federally funded] railroad-highway crossing."[384] As such, the proposed Rule could not be applied to a federally funded project, but promulgating it with this exception would

[380] Windsor's 12/14/21 Comments at 8.
[381] *Id.*
[382] CCUA's 4/14/21 Comments at 15 in Proceeding No. 21R-0100R.
[383] UP's 12/22/21 Comments at 4.
[384] *Id.*, quoting 23 CFR § 646.210(a).

create an inconsistent burden between federal funded and non-federally funded projects; managing this would be a logistical burden.[385] Rather than proceed with the Rule, UP suggests the Commission continue the current process where it can individually engage with stakeholders it believes are not fully in compliance with laws and rules in its jurisdiction.[386]

231. BNSF does not object to proposed Rule 7301.[387]

c. Discussion, Findings, and Conclusions

232. For the reasons discussed, the ALJ rejects UP's argument. UP misstates or misunderstands 23 CFR § 646.210(a), which does not prohibit allocating maintenance costs to railroads when federal funds are involved. Instead, 23 CFR § 646.210(a), provides that "[s]tate laws requiring railroads to share in the cost of *work for the elimination of hazards* at railroad-highway crossings shall not apply to Federal-aid projects."[388] By its plain language, 23 CFR § 646.210(a) prevents states from allocating costs for the work to eliminate hazards where federal funds are used, not from allocating costs to *maintain* passive and active warning devices at public crossings. What is more, UP also appears to mischaracterize the status quo. The only change the NOPR suggests for this Rule is to delete "owner of the track." While the Commission always retains its ability to engage with entities over which it has jurisdiction about compliance with relevant laws, the language requiring that railroads be responsible for maintaining passive and active warning devices at public crossings is already in place and has been for years.

233. Windsor's suggestion would essentially create a rule that on its face would retrospectively apply to what could be vested rights arising out of pre-existing contracts. Doing so

[385] *Id.*
[386] *Id.*
[387] Exhibit B to BNSF's 12/22/21 Comments at 20.
[388] 23 CFR § 646.210(a) (emphasis added).

may result in creating a new obligation, imposing a new duty, or attaching a new disability with respect to past events, or eliminating or impairing existing vested rights.[389] This raises concerns under Colorado's constitutional ban on passing retrospective laws.[390] As such, the ALJ rejects Windsor's suggestion.

234. For the same reasons discussed elsewhere, the ALJ does not adopt changes deleting "owner of the track." As such, the ALJ does not adopt any changes to Rule 7301(a).

B. Other Rule Changes Proposed in the Consensus Rules

235. The Consensus Rules also suggest changes to Rules 7001 and 7002. The NOPR does not propose changes to such Rules, but as the ALJ has already found, proposed changes to such Rules are reasonably within the scope of the NOPR because they relate to other proposed Rule changes in the NOPR.[391]

236. The Consensus Rules propose to add Rule 7001(h) to define "imminent safety hazard" to mean "an imminent and unreasonable risk of death or severe personal injury; and to add Rule 7001(i) to define "Alterations" or "changes" or "modifications" at a public crossing to include, but are not limited to "installing sidewalk panels, installing passive warning devices other than crossbucks and yield signs, installing active warning devices, changing crossing detection circuitry, interconnecting a crossing with a traffic signal or queue cutter signal, and adding or removing additional tracks."[392]

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[389] *City of Colo. Springs v. Powell,* 156 P.3d 461, 465 (2007).

[390] Colo. Const. art II, § 11. *See Abromeit v. Denver Career Service Bd.,* 140 P.3d 44, 50 (Colo. App. 2005), *cert. denied* August 14, 2006 (prohibition under Colo. Const. art II, § 11 on passing retrospective laws applies to agency rules, which are an exercise of an agency's legislative function).

[391] Decision No. R23-0274-I at 2-3; 7. As a result, considering or adopting the suggested changes does not run afoul of § 24-4-103, C.R.S. In an abundance of caution and to increase transparency and serve the public interest, Decision No. R23-0274-I provided public notice that the Commission may adopt such changes, and scheduled the June 1, 2023 hearing to take comment on such changes, among other matters.

[392] Consensus Rules at 7.

237. Consensus Rule 7002(a) seeks to modify the existing rule as follows, "Commission action shall ~~may~~ be sought regarding any of the following matters unless otherwise excepted by these rules through the filing of an appropriate application [:]."[393]

a. Road Authority Comments

238. The CCUA, Broomfield, Aurora, Fort Collins, Greeley, Evans and Timnath support or do not oppose these Consensus Rules.[394]

239. CDOT does not object to Consensus Rules 7001(h) and (i).[395] CDOT appears to object to Consensus Rule 7002(a), noting that the Commission should not make exceptions to the requirement that applications relating to work at public crossings be submitted to the Commission.[396] CDOT states that just as a road authority has to apply for Commission consent for crossing modifications, so should railroads.[397]

b. Railroad Comments

240. BNSF, UP, RTD, and ASLRRA support or do not oppose these Consensus Rules.[398]

c. Discussion, Findings, and Conclusions

241. The ALJ finds that the added definitions in Consensus Rule 7001(h) and (i) will provide needed clarity to terms that are used in newly adopted Rules, and for this reason, adopts

[393] *Id.* at 8.
[394] Status Report at 2. *See supra*, ¶¶ 10-11.
[395] CDOT's 5/25/23 Comments at 1.
[396] CDOT's 1/27/23 Comments at 4.
[397] *Id.* 4-5.
[398] *See* Status Report at 2; *supra*, ¶¶ 10-11.

them (but numbers the subparagraphs as 7001(a) and (c), so the definitions are alphabetical). As to Consensus Rule 7002(a), the proposed language does not create an exception to the requirement that applications for modifications at crossings be filed. To the contrary, it replaces permissive language "may" with mandatory language, "shall," thereby achieving the opposite result. The proposed language also acknowledges that *if* another Rule creates exception, that Rule 7002(a)'s requirement does not apply. This can hardly be considered a substantive change, but merely would act to align the Rules to avoid a potential internal inconsistency (if any). For the reasons discussed, the ALJ approves Consensus Rules 7002(a). Consistent with the above discussion, the ALJ adopts the following Rule additions and changes:[399]

> 7001(a) "Alterations" or "changes" or "modifications" at a public crossing include, but are not limited to installing sidewalk panels, installing passive warning devices other than crossbucks and yield signs, installing active warning devices, changing crossing detection circuitry, interconnecting a crossing with a traffic signal or queue cutter signal, and adding or removing additional tracks.
>
> 7001(c) "Imminent safety hazard" means an imminent and unreasonable risk of death or severe personal injury.
>
> **7002. Applications.**
>
> (a) Commission action shall ~~may~~ be sought regarding any of the following matters unless otherwise excepted by these rules through the filing of an appropriate application:

V. CONCLUSIONS

242. This Proceeding has been long and arduous. When it first began, stakeholders could not be further apart on the issues. With some nudging, many stakeholders worked together to reach the partial Consensus Rules that reduced or minimized many of their concerns. The ALJ applauds their efforts. The ALJ has endeavored to approve the Consensus Rules where possible. Nonetheless, as this Decision makes clear, stakeholders remained a world apart on many

[399] This also results in renumbering other subparagraphs in Rule 7001.

significant issues. This Decision has attempted to balance stakeholders' competing interests while safeguarding and serving the public interest, public safety, and rail crossing safety.

243. For the reasons discussed, the ALJ adopts Rules consistent with the above discussion, as set forth in Attachments A and B hereto.[400]

244. Being fully advised in this matter and consistent with the above discussion, in accordance with § 40-6-109, C.R.S., the ALJ now transmits to the Commission the record in this proceeding along with this written recommended decision and attachments.

VI. ORDER

A. The Commission Orders That:

1. The Rules Regulating Railroads, Rail Fixed Guideways, Transportation by Rail, and Rail Crossings (the Rules), 4 *Code of Colorado Regulations* 723-7 attached to this Recommended Decision as Attachments A and B are adopted.

2. The rules in redline and final format (Attachments A and B), 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. This Recommended Decision will be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

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

[400] Redlined adopted Rules in Attachment A reflected changes as compared to the existing Rule. If there was no existing Rule to modify, the entire adopted Rule is redlined.

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

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

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

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

Rebecca E. White,
Director