Decision No. C17-0852

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 13A-0081R

IN THE MATTER OF THE APPLICATION OF THE REGIONAL TRANSPORTATION DISTRICT FOR AUTHORITY TO ALTER AN AT-GRADE CROSSING AT SABLE BOULEVARD (U.S. DOT #906047B) IN THE CITY OF AURORA, ADAMS COUNTY, STATE OF COLORADO.

COMMISSION DECISION GRANTING IN PART AND DENYING IN PART VERIFIED MOTION FOR PERMISSION TO AMEND APPLICATION

Mailed Date: October 25, 2017

Adopted Date: September 27, 2017 and October 4, 2017

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I. BY THE COMMISSION

A. Statement

1. On September 5, 2017, the Regional Transportation District (RTD) filed a Verified Motion for Permission to Amend Application (Motion). In its Motion, RTD requests authority to construct civil engineering improvements that it has already constructed and requests regulatory approval to allow an additional 15-second wireless crossing activation buffer time (WCABT) to the already approved warning time for the subject crossing.

2. On September 19, 2017, RTD filed an additional Unopposed Motion to Extend Response Time to Motion for Permission to Amend Application (Extension of Time). In the Extension of Time, RTD clarifies that its request for an additional 15 seconds of WCABT was actually a regulator acceptance of up to an additional 15 seconds of time (a variable time) at the crossing. Additionally, responses to the Motion by the parties were due on September 19, 2017. RTD states that discussions with Union Pacific Railroad Company (UPRR) had been prevented to date because of schedules of key technical personnel. RTD requested an extension of time to September 22, 2017 for parties to file responses to the Motion. RTD conferred with the parties UPRR and City of Aurora (Aurora) and all consented to the Extension of Time.

3. On September 22, 2017, Aurora filed a Response to the Motion. While Aurora does not object to the civil engineering changes proposed by RTD, Aurora does object to the proposed changes in the warning time with the additional 15-second WCABT. Aurora requests the Commission issue an order requiring RTD to provide additional information and background verifying that the WCABT is a safe and appropriate means to address the ongoing concerns regarding crossing operations.

4. On September 22, 2017, Joint Applicant UPRR filed a Motion for Extension of Time to Respond to Motion to Amend Application (UPRR Motion). UPRR states that it has not had sufficient time to evaluate the impact of the additional 15 seconds of WCABT on operations and safety at the crossing. With UPRR's recent reorganization that resulted in changes in personnel as well as counsel, UPRR's ability to review the RTD proposal has been affected. UPRR did raise some concerns that it states that it needs to discuss further with RTD. UPRR states that if the UPRR Motion is denied, UPRR requests the right to file its response within seven days of when the UPRR Motion is denied if, by that time, UPRR determines that it is opposed to the relief sought in RTD's Motion.

5. Now, being fully advised in the matter, we grant in part, and deny in part RTD's Motion consistent with the discussion below.

B. Findings and Conclusions

1. Civil Engineering Changes

6. RTD requests authority for changes that it has already made at the subject crossing. These changes include changes to Exhibit E-1 showing changes to the phasing of the traffic signal pre-signal and to show the pre-signal channel revision from 11 to 14 for compatibility with the traffic signal firmware and changes to Exhibit E-2 showing movement of the advance warning signs along Smith Road to be posted adjacent to the crossing pavement markings on Smith Road.

7. Aurora does not object to the civil engineering changes at the Sable Boulevard crossing.

8. UPRR is silent regarding the civil engineering changes.

9. We have reviewed the above proposed changes that have already been implemented and do not see any safety issues with the proposed changes.

2. Crossing Warning Time Change

10. RTD proposes to change Exhibit F-2 at the crossing to change the warning time at the crossings from that which was originally applied for and approved by the Commission to adding an additional 15 seconds of WCABT. RTD clarified in its Extension of Time that the 15 seconds of time would be a variable time and not a constant time.

11. As grounds for the Motion, RTD makes the following arguments:

1) 49 CFR 234.225 sets a specific standard of 20 seconds of minimum time, but does not set a specific standard for a maximum warning time;

2) The additional 15 seconds of buffer time to the currently approved warning time accommodates the operational realities of the A-Line commuter rail without creating excessive warning time such as could be likely to cause bad motorist behavior;

3) The crossings have been constructed with entrance and exit gates (different configurations for each crossing) to serve to deter vehicle entry into the crossings during the duration of the warning time;

4) The electrified power system of the A-Line makes the use of traditional technology for warning circuits impractical. According to RTD this made the implementation of a wireless crossing activation system necessary. RTD states its Concessionaire has optimized and improved the operation and reliability of the wireless crossing warning time system and believes it has taken every reasonable step possible within the operational context to meet the prescribed warning times and that the addition of this 15 second wireless crossing activation buffer time is the realistic, safe solution to the wireless crossing environment issues. RTD argues that the continuing sustainable operation of the A-Line far outweighs any risk that could be attributable to the additional 15 second buffer time.

12. In Aurora's Response to the Motion, Aurora states that RTD asserts several items as "fact" in the Motion without providing supporting information to substantiate its assertions and does not provide document time calculations and methodology. Aurora is concerned with

the crossing operations and reliability including whether RTD's proposal is a safe and appropriate means to address said concerns.

13. In the UPRR Motion, UPRR raises a number of concerns including:

> 1) The proposed 15 WCABT will lead to incidences of gates down/no train up to 50 seconds before train arrival. Such excessive warnings are known to contribute to driver behavior that increases the risk of an incident at the crossing;
>
> 2) The proposed 15 WCABT creates a design that results in warning time inconsistency between UPRR and RTD trains. Inconsistent warning times will also foster driver behavior that increases the risk of an incident at the crossing; and
>
> 3) UPRR is not satisfied there is a technical justification for adding the additional 15 seconds WCABT for the system proposed – a predictive constant warning time system should only require the buffer time necessary for the system to activate and there is no support in the Motion for the need for that system time to activate to be 15 seconds.

14. Pursuant to § 40-4-106(2), C.R.S., the Commission's statutory charge, as pertinent to these crossings, is to "prescribe the terms and conditions of installation and operation, maintenance, and warning at all such crossings that may be constructed including … the installation and regulation of … means or instrumentalities 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*." (emphasis added).

15. Under § 40-4-106, C.R.S., the Commission has jurisdiction over public safety at all railroad crossings. And specifically, § 40-4-106(2)(a), C.R.S., states that the Commission has the authority to determine the terms and conditions of installation, operation, maintenance, and warning at all such crossings. The Federal Railroad Administration (FRA), on the other hand, has authority over the safety of railroad operations and it implements rules to reduce railroad-related accidents. See 49 U.S.C. § 20101. As such, the FRA has prescribed a minimum warning

time of 20 seconds. § 49 C.F.R. § 234.225. Under 49 U.S.C. § 20106, a state may adopt a more stringent regulation or order related to railroad safety as long as the state regulation or order is "(A) necessary to eliminate or reduce an essentially local safety or hazard standard; (B) is not incompatible with a law, regulation or order of the United States Government; and (C) does not unreasonably burden interstate commerce." It is important to note that the Commission decision here is not more stringent that the FRA rule; rather it is enforcing the warning time previously approved by the Commission.

16. No FRA statute or rule speaks to the safety of a greater than 20 second warning time, which is what RTD is requesting here. Also, the FRA letter conditions its approval of longer warning times and removing flaggers on the Commission approving the same. The letter specifically states: "Nothing in this decision letter preempts [. . .] a regulation, order, or requirement of another regulatory agency (e.g., the Colorado Public Utilities Commission)."

17. The arguments that RTD and its Concessionaire make in support of its request for an additional 15 seconds of WCABT contradict the testimony and exhibits that are part of the record supporting the constant warning times that have already been approved by the Commission in these matters. Testimony provided by the RTD Concessionaire team in these matters included no discussion of potential operational issues now being used as a reason for needing longer warning times at the crossings to accommodate the wireless crossing activation system operations. Additionally, testimony provided by the RTD Concessionaire team specifically discusses that studies have shown that if crossing lights flash for too long, people become distrustful of whether there is a train coming at all.

18. Addressing RTD's first argument that 49 *Code of Federal Regulations* (CFR) 234.225 sets a specific minimum standard of 20 seconds of minimum time, but does not set a specific standard for a maximum warning time, this argument seems to imply that it is federal jurisdiction that establishes warning times at crossings. It is not. Jurisdiction of determining the proper warning time at a crossing falls to the states, and in the state of Colorado to this Commission.

19. The minimum 20-second warning time rule is found both in FRA rules and Federal Highway Administration (FHWA) rules as contained in the Manual on Uniform Traffic Control Devices. The minimum 20 seconds of warning time provides for a minimum of three seconds of flashing light time, an approximate time of 12 seconds for gates to descend, and a requirement that entrance gates be in the full down position at least five seconds before the train arrives at the crossing. The minimum three seconds of flashing light time provides driver reaction time as drivers approach a crossing to make a decision about whether they have enough time to enter the crossing or whether they should stop at the crossing. The gate descent time and the minimum five seconds between gate down and train arrival not only provides for stopping drivers from entering a crossing, but also provides a period of time for any vehicle that has entered the crossing to be able to exit the crossing before the train arrives at the crossing.

20. While the 20-second minimum warning time is included in these two federal rules, neither the FRA nor the FHWA have authority to designate the actual prescribed warning time at the crossing since that jurisdiction falls to the states. As such, the lack of a specific standard for a maximum warning time is not justification for why additional time is necessary at the subject crossing.

21. Addressing RTD's second argument that the additional 15 seconds of buffer time does not create excessive warning time such as could be likely to cause bad motorist behavior, RTD provides no evidence to support this statement and it contradicts the previous testimony provided by RTD that longer warning times contribute to bad driver behavior. The warning times at these crossings are already longer than what we normally see at typical crossings in Colorado because of the large width of the crossings along this alignment. With the currently approved times at the crossings, drivers are already waiting 36 seconds at Sable Boulevard. Additionally, providing such an inconsistent warning time goes against what we have been training drivers to expect at railroad crossings since the late 1970s and early 1980s through the implementation of constant warning time systems. Drivers that regularly use these crossings would see a variation of up to an additional 50 percent of the time they have already waited at the crossings before trains would arrive at the crossings.

22. The UPRR Motion notes that the proposed RTD change creates a design that results in warning time inconsistency between UPRR and RTD trains. This inconsistent warning time will foster driver behavior that increases the risk of an incident at the crossing. UPRR also notes that the excessive warning times prior to train arrival are known to contribute to driver behavior that increases the risk of an incident at the crossing.

23. With the inconsistency of operations the Commission was seeing at the crossings prior to RTD starting revenue service at the crossings, because of the longer than ordered warning times and the erratic operation of the gates at the crossings, the Commission ordered that flaggers be placed at the crossings to prevent drivers from exhibiting bad behavior because of the excessive warning times. What was to be a short-term solution (in terms of a couple of

months) while the bugs were still being worked from the system and the warning times were brought to those ordered by the Commission has now turned into human intervention at the subject crossings for a year and a half. With such an extended period of human intervention and the fact that it has been publicized that the reason the flaggers are still there is because of the gates being down too long at the crossings, it begs the question of how are timings that the Commission has been saying are too long should now all of a sudden be acceptable.

24. RTD's Concessionaire knew, or should have known, how the commuter rail line would be operated, but anticipated none of the issues that it now claims is creating the need to extend warning times at the crossings up to an additional 15 seconds that the Concessionaire is apparently unable to accommodate to create safe and proper operations at the crossings.

25. Addressing RTD's third argument that the crossings have been constructed with entrance and exit gates to serve to deter vehicle entry into the crossings during the duration of the warning time, these supplemental safety measures were installed to make the crossings compliant with the quiet zone establishment provisions of the FRA Train Horn Rule. This rule requires that a crossing in a quiet zone be equipped with a constant warning time detection system. The request by RTD to now provide up to an additional 15 seconds of warning time means the crossings would no longer provide a constant warning time, but rather an inconsistent warning time of anywhere from the warning time prescribed by the Commission to an additional 15 seconds above that prescribed warning time. This puts establishment of the quite zones along these commuter rail corridors at jeopardy of not being able to be established because of inconsistent warning times at the crossings.

26. RTD's fourth argument is that the electrified power system makes use of traditional technology for warning circuits impractical and made the implementation of a wireless crossing activation necessary. While we agree that the electrified power system makes use of traditional technology for warning circuits impractical, we disagree that the electrified power system made implementation of a wireless crossing activation system necessary. There are a number of electrified power commuter rail systems throughout the country where the problems experienced by the RTD Concessionaire have been addressed without the use of a wireless crossing activation system. RTD's Concessionaire chose to use a new wireless crossing activation system technology as part of its operations, and it is not working the way it needs to work to provide safe and constant warning time to drivers. If RTD's Concessionaire has optimized and improved the operation and reliability of the wireless crossing system warning time as best as they can and still needs additional time, then RTD's Concessionaire is unable to make its system work as was applied for and approved by the Commission.

27. While RTD's Concessionaire may believe that the additional 15 seconds is a realistic, safe solution to the wireless crossing environment issue, we disagree. Perhaps RTD's Concessionaire has reached the point in time where the path forward to complete this project is a different warning system that will provide the required warning times at the crossing within an electrified power system environment.

28. We will note that RTD and its Concessionaire have again made changes to its system before seeking and being granted Commission authority to make such changes. We have previously brought RTD's General Manager before the Commission regarding this matter and were provided with a plan and assurances that this behavior would end. It appears that plan was

unsuccessful. The ongoing decision by RTD and its Concessionaire to continue to make changes at the crossings before seeking and being granted authority have added unnecessary additional time and cost to this project with no benefit to public safety.

29. Based on the above discussion, we grant RTD's Motion in part and deny in part.

30. Based on our decision regarding RTD's Motion, the request made by Aurora in its response and UPRR's Motion for Extension of Time to Respond to Motion to Amend Application are denied as moot.

3. Due Process

31. Due process requires that a person or entity receives notice and an opportunity for a hearing before an administrative agency takes away a right it is granted or imposes a new obligation on the utility. *See* generally, § 24-4-105, C.R.S., of Colorado's Administrative Procedure Act. Commissioner Koncilja asserts that "RTD, other interested parties, and the taxpayers who pay the RTD taxes" have not been given due process because there was not a hearing on these motions. She also asserts that it was improper for Commission advisor Dr. Fischhaber to provide recommendations to the Commission. Commissioner Koncilja is incorrect on both accounts.

32. First, parties are not entitled to hearings on motions. Motions generally request a legal determination by the Commission. For Applications, on the other hand, applicants may file testimony and exhibits as evidence, and the Commission can choose whether to hold a hearing or make a decision based solely on the evidence filed. *See* §§ 40-6-109 and -109.5, C.R.S. Typically, the Commission will hold a hearing if intervening parties request one. When RTD filed its application in this proceeding, it had an opportunity to file evidence and present

testimony in a hearing before an Administrative Law Judge (ALJ). The ALJ issued his decisions—including the prescribed warning times—based on evidence RTD presented. Now, with these motions, RTD is asking the Commission to change its decision without a hearing and without providing any additional evidence. The Commission denied the motions because RTD has not presented any evidence that contradicts its previous evidence that a 20 second warning time is necessary to protect public safety at the railroad crossings. RTD could have filed a new application, which would have allowed it to file new evidence and testimony, but it chose instead to file a motion containing only conclusory statements and no additional evidence. RTD, however, has yet another opportunity for due process in this proceeding: it can file an application for rehearing, reargument, or reconsideration (RRR) if it believes it has additional evidence demonstrating that the additional 15 seconds of warning time will be safe. The Commission discussed this option at the October 4, 2017, Commissioners' Weekly Meeting, and noted that it would likely refer the matter to an ALJ for an additional hearing if RTD so requests.

33. Second, RTD is not being denied due process because Dr. Fischhaber is advising the Commissioners in private. It is true that Dr. Fischhaber is trial staff in some proceedings, and in those cases she does not advise the Commissioners due to Commission rules prohibiting ex parte communications. *See* Rule 1106 of the Commission's Rules of Practice and Procedure, 4 CCR 723-1. Here, however, she has been advising the Commissioners on these proceedings since RTD filed its first applications in 2012 and she has not intervened as trial staff. Therefore, there are no due process or ex parte violations with Dr. Fischhaber providing recommendations to the Commissioners in this proceeding and she will remain advisory staff to the

Commissioners. If RTD objects to Dr. Fischhaber's—or any advisor's—recommendations, it can raise those concerns to the Commission in its application for RRR.

34. Nor are RTD's due process rights violated by the RRR process. Under § 40-6-114, C.R.S., RTD may seek rehearing, reargument or reconsideration of the Commission's decision. If after RRR, the Commission determines that it appears that the original decision is in any respect unjust or unwarranted, the Commission may reverse, change or modify the decision. In fact, through the RRR process, the Commission may conduct a rehearing on the matters complained of by the applicant and issue a decision reversing, changing or modifying the original decision. Further, that decision after rehearing is itself subject to RRR as the original decision. The process for review on rehearing is comparable to a motion for a new trial. Pub. Utils. Comm'n v. Northwest Water Corp., 451 P.2d 266 (1969). Additionally, any alteration, rescission, or amendment to the original order must be upon notice to the public utility affected, and after opportunity to be heard. Snell v. Pub. Utils. Comm'n., 114 P.2d 563 (1941). The statute makes ample provision for the protection of due process rights, and the Commission, in following that process here, has done nothing to abrogate RTD's due process rights.

II. ORDER

A. The Commission Orders That:

1. The Verified Motion for Permission to Amend Application filed by the Regional Transportation District (RTD) on September 5, 2017 is granted in part and denied in part consistent with the discussion above.

2. The changes to RTD Exhibits E-1 and E-2 are granted.

3. RTD's request for an additional variable 15 seconds of warning time is denied.

4. The City of Aurora's request for a Commission order requiring RTD to provide additional information and background verifying that the wireless crossing activation buffer time is a safe and appropriate means to address the ongoing concerns regarding crossing operations is denied as moot.

5. The Union Pacific Railroad Company's Motion for Extension of Time to Respond to Motion to Amend Application is denied as moot.

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

7. The Commission takes administrative notice of the Federal Railroad Administration September 28, 2017 Denver RTD Decision Letter in Docket Number FRA-2016-0028 (Attachment A to this Decision).

8. This Decision is effective on its Mailed Date.

B. ADOPTED IN COMMISSIONERS' WEEKLY MEETING September 27, 2017 and October 4, 2017.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

JEFFREY P. ACKERMANN

WENDY M. MOSER

Commissioners

COMMISSIONER FRANCES A. KONCILJA DISSENTING IN PART.

(S E A L)

ATTEST: A TRUE COPY

Doug Dean,
Director

III. COMMISSIONER FRANCES A. KONCILJA DISSENTING IN PART

1. Reading the Majority opinion and listening to the discussion from the bench on October 4th one might have thought there had been an evidentiary hearing or trial in this important matter. One would be wrong. There has been no evidence presented with respect to these crossings since 2013.[1] With no hearing, with no evidence, the Majority refuses to add 15 seconds to the 30-second warning time, even though there is no rule establishing a maximum warning period, only a rule establishing a 20-second minimum warning time. The Majority

[1] *See* Recommended Decision No R13-0906 from Administrative Law Judge G. Harris Adams, dated July 22, 2013, in which the hearing scheduled for June 11, 2013 was vacated, the Application was amended by agreement and was processed without a formal hearing. (Paragraphs 10, 17 and 18 of Decision.) *See* paragraphs 10 and 11 of ordering paragraphs that provide: RTD shall provide 62 seconds of total preemption time final condition and during the interim period shall provide a total of 55 seconds of preemption time.

essentially tells the Regional Transportation District (RTD) to abandon its multi-million dollar wireless warning system and to "try something different." The Commission also refuses the very reasonable requests of the City of Aurora (Aurora) and the Union Pacific Railway Company (Union Pacific) for more time to understand the issues and to review evidence. Instead, the Majority concludes these motions are "moot". Put another way, the Commission has signaled it does not care what the evidence, developed after 2013, is and neither should Aurora or Union Pacific.

2. As a result of this decision of the Majority, RTD is left with two unsatisfactory options: keep the flaggers in place—a solution that RTD has told this Commission is unsustainable, (*See* Paragraph 13 of Verified Motion to Amend Application "Motion to Amend Application")[2] or scrap the system (which will likely cost millions of dollars—we do not know how much) and "try something different."[3]

3. The Commission takes this extreme action, refuses to hear evidence, and also refuses to remand this dispute to an Administrative Law Judge (ALJ), in spite of the fact that the Federal Rail Authority (FRA) believes the extra 15 seconds is acceptable.

[2] The Majority refers to this pleading as "Motion" However, I will use the term Motion to Amend Application because that is more descriptive and also significant to the distinction the Majority draws between motions (not entitled to hearings) and applications (testimony and hearings are proper) at paragraph 32.

[3] I am pleased that after I raised these matters on October 4th, the Majority seems inclined, at paragraph 34, to order a hearing or refer the matter to an ALJ if a party files a Request for Reconsideration, Review or Rehearing.

4. I was originally willing to go along with the recommendation of Commission Rail Expert to deny RTD's Motion to Amend Application[4], because it was my understanding that Aurora, the FRA, and Union Pacific agreed that the additional 15 seconds made the crossings unsafe. The day after the September 27, 2017 decision, the FRA granted a conditional waiver to RTD as follows: "After review of RTD's September 8, 2017 letter and all available safety data, FRA's Railroad Safe Board determined that, subject to certain conditions, granting further relief to RTD on the A- and B-Lines is in the public interest and consistent with railroad safety." The FRA then stated that RTD "must develop, draft and submit" to the FRA a plan for gradually removing the flaggers. (September 28, 2017 FRA Decision) This means that this Commission and the FRA are taking completely opposite positions as to the safety of adding up to 15 seconds of warning time to these crossings. The FRA has decided that flaggers are not necessary, and should be phased out and the Majority of the Commission has decided that flaggers continue to be necessary, unless and until RTD proceeds to complete the project with a "different warning system." *See* paragraph 27.

5. Upon my review of the decision of the September 28, 2017 FRA Decision, I decided to read the actual record in this case. I realized that there was no consensus that the additional 15 seconds made the crossings unsafe because Aurora and Union Pacific wanted more time to analyze the facts. I requested that the matter be placed on the October 4, 2017 agenda to reconsider and stay the September 27, 2017 decision of the Commission. I suggested that in light of the facts, the Commission should hear testimony and or remand the matter to an ALJ for

[4] There is one and only one rail expert at the Commission, whom I will refer to not by name but as Commission Rail Expert. As explained below, the Commission Rail Expert functions as staff and /or advisor.

a full consideration of the evidence and recommendations to this Commission. The other two Commissioners disagree and instead want to hear any additional information only after RTD or some other party files a request for reconsideration and/or rehearing. New evidence is usually not considered in a request for rehearing. However, Chairman Ackerman made it clear that the Commission would modify its procedures to take into account additional evidence, in the likely event that RTD files such a request. Commissioner Moser did not disagree and our attorneys voiced no objection to this process. Therefore, RTD and others will likely be allowed to present evidence, but at some point in the future (likely months) as opposed to hearing the evidence now, on an expedited basis.

6. I now review how this Commission came to arrive at what could be an incorrect and unfounded decision and discuss how I believe the matter should be handled going forward and I also respond to the facts and law raised in the Majority opinion in response to my dissent.

7. Let me state that I do not prejudge this matter. I do not know if the additional 15 seconds of wait time to the current 30 seconds makes the crossings unsafe. There is one and only one rail expert at the Commission, the Commission Rail Expert. I am not an engineer. The Commission Rail Expert is an engineer and much more knowledgeable than I am in this area. However, I am very familiar with the legal principle of due process and, in my opinion, this Commission has not provided RTD, other interested parties and the taxpayers who pay the RTD taxes, due process of law. Instead, this Commission relies on only the information provided by the Commission Rail Expert in private meetings with Commissioners. The information and conclusions have NOT been tested by examination and/or discussion at a public hearing. RTD, and the current intervenors and any additional intervenors, who have an interest in these matters,

should have an opportunity to present evidence to persuade either an ALJ or this Commission that the additional 15 seconds of warning time, results in safe crossings.

8. RTD asserted in its Motion to Amend Application that "RTD's Concessionaire believes that it has taken every reasonable step possible within the operational context to meet prescribed warning times, and that addition of the WCABT [up to an additional 15 seconds] is the realistic, safe solution to the Wireless Crossing environment issues. The benefit of continuing, sustainable operation of the A-Line far outweighs any risk that could be attributable to addition of the 15 second WCABT." *See* paragraph 19d of Motion to Amend Application

9. To understand how the Commission has come to reach this decision and why I believe RTD's due process rights have been violated, one should first understand how this Commission functions. Commissioners have no staff who report to Commissioners. All of the approximately 94 FTEs report to the Director of the Commission. Seven of those FTEs are "advisors" to the Commission. Advisors, with the assistance of our attorneys, prepare written analyses for the Commissioners. These documents are covered by the attorney client and or deliberative process privileges. Advisors do not communicate with parties in contested matters. The remaining 87 FTEs work on various matters of compliance, enforcement, and analysis. At times these staff appear before the Commissioners, as parties in contested matters. Once a matter is contested, then those staff, no longer meet privately with Commissioners on the contested matters because staff has become a party and parties are prohibited from having ex parte communications with the Commission on contested issues

10. As a result of budgetary constraints and the type of expertise needed in rail, there is only one Commission Rail Expert who functions, at times, as advisor and other times, as staff.

As long as Commissioners and our attorneys are sensitive to the types of conflicts of interest and *ex parte* contact that can result, this system works well. The Commission Rail Expert is very knowledgeable, diligent, hardworking, and well respected at the Commission. There is, however, the possibility that the Commission Rail Expert might be incorrect. Interested parties, once a dispute arises, should have an opportunity to establish that the recommendation is incorrect without any ex parte contacts with the Commission inserting a bias or predisposition.

11. The potential for conflict between the role of advisor and staff has not worked well in this situation because neither the Commissioners, the Commission Rail Expert, our attorneys or the Director have requested the normal separation and walling off that should occur at this point. The decision of the Majority indicates that such a request is up to the parties—*See* paragraph 33 of Majority. I believe, however, that the Commission has an affirmative obligation to insure fairness and due process. Due process and fairness are not optional—to be evaluated only if a party objects. Further, I am now making that request for the next stage in these proceedings—assuming that RTD or another party requests a reconsideration and or rehearing, the Commission Rail Expert should not be allowed to participate as both staff and advisor to the Commission in this matter going forward. The unfortunate, but necessary result, is that either the Commission or staff will be deprived of this expertise. However, due process requires this result going forward.

12. The Majority articulate five areas of disagreement with my dissent as follows: first, the Majority asserts at paragraph 15, that the state of Colorado, not the FRA, has authority over these rails crossings. The Majority reaches this conclusion by drawing a distinction between rail operations and rail crossings. Both the state and the FRA have authority over the

safety at rail crossings because the operations of the train, and the warning signals that a train is coming affect safety. To parse the language in this way, as opposed to focusing on safety of the crossings as a whole, is not helpful, but rather appears to be a "technical" reach by the Majority to justify its decision.[5] Further, while the September 28, 2017 FRA Decision does state that it does not preempt any order of this Commission, the fact of the matter is that the FRA has granted RTD a waiver from its previous Order adopting this Commission's Order and directed RTD to develop and submit to the FRA a plan to remove the flaggers. That puts the FRA and this Commission on a collision course—no pun intended. It seems far better and wiser to this Commissioner that the Commission should immediately proceed to conduct an evidentiary hearing on the safety of the additional 15 seconds of warning time.

13. Second, the Majority states, at paragraph 15, that parties are not entitled to hearings on motions because motions raise legal matters. The Majority goes on to state the parties are entitled to hearings only on applications and that RTD could have, but did not file a new Application. I find this argument hyper-technical, circular and bureaucratic. RTD filed a verified Motion to Amend its Application and the basis for the relief RTD requests is fact based, not legal. To require that RTD file a new Application as opposed to allowing a hearing on the proposed Amended Application is inefficient and trivializes the issue of safety. Further, the Commission always has the right sua sponte (meaning on its own motion) to order a hearing, which is what I requested on October 4th.

[5] The Majority also states at paragraph 15 that "It is important to note that the Commission decision here is not more stringent than the FRA rule; rather it is enforcing the warning time previously approved by the Commission." RTD has requested to amend its Application and thus the order that issued approving the Application. Therefore, it is neither important or helpful , in my opinion, to make this distinction.

14. Third, the Majority states at paragraph 32, that it was justified in denying RTD's request because RTD did not request a hearing and did not present testimony. It is true that RTD did not request a hearing. However, Aurora requested that the Commission order RTD to provide additional information. Union Pacific also requested additional information. These requests should have been construed as requests for a hearing as opposed to a "Gotcha Game" that someone did not use the "Magic Words." I requested a hearing. The matters implicated by RTD's request—namely safety and cost, are too important to be ignored and trivialized in this fashion.

15. More importantly, the statutory authority in Colorado, cited by the Majority at paragraph 14 of their opinion, charges the Commission with determining if the terms and conditions we impose at rail crossings are "reasonable and necessary" to prevent accidents and to promote public safety. Thus, the very statute that the Majority relies on as a basis for denying RTD a hearing on these safety matters, requires the Commission to conduct a risk/benefit analysis. The Commission staff has not performed such an analysis. Instead the Majority has issued a denial of the request by RTD to amend its application.[6]

16. The Majority states at paragraph 33, that the Commission Rail Expert has been acting as an "advisor" to the Commission on these matters since 2012 and therefore, there is no due process violation. That statement flies in the face of the facts. The Commission Rail Expert has been meeting with RTD , the intervenors and the Concessionaire. Advisors do not meet with parties. The Majority merely applying the label of "advisor" to the Commission Rail Expert

[6] One could make the argument that RTD, having filed its Verified Motion to Amend Application, that the burden of going forward to establish the condition of the additional 15 seconds of warning time is necessary and reasonable now falls on Commission staff.

does not turn her into an advisor. Nor is the fact that the Commission Rail Expert has never entered an appearance in this proceeding as as party, dispositive of the issue. In fact, this type of definitional voodoo calls into question the credibility of this Commission and its processes. The Commission Rail Expert has been acting as advisor and staff in these matters, in spite of being put on notice that RTD is now contesting the Commission decisions. This is wrong and denies RTD, and intervenors their rights of cross examination and independent fact based decisions.

17. Throughout the Majority opinion, there is criticism of RTD for not anticipating the problems that might occur with the wireless crossing activation buffer. *See* paragraphs 17 and 24. At paragraph 24, the Majority opinion incudes a statement that RTD "knew or should have known, how the commuter rail line would be operated, but anticpated none of the issues that it nos claims is creating the need to extend warning times…" This is a large and complex system, with new technology. Of course there were and are issues that were not anticipated in 2013. Further, the legal concept of "knew or should have known" comes from the civil tort law and has little to no application here. There is no evidence of what RTD "should have known" in 2013 or why that is relevant in 2017 after RTD has constructed, installed and operated the system.

18. The issue before us is whether the refusal of the commission to approve the additional 15 seconds of warning time is reasonable and safe and will promote public safety and avoid accidents. This is an important decision that can cost millions, perhaps tens of millions of dollars, delay economic development and reduce passenger count on these trains. The Commission needs and should order a risk benefit analysis and schedule hearings allowing all

interested parties to present testimony. [7] We may get there, but the current path as set forth in the Majority opinion is circuitous and process heavy.

19. The Horns—the Commission continues to receive numerous complaints about the horns and we are not taking any action or informing citizens who has the authority to deal with the issue of the noise. At paragraph 25, the Majority now states that a variable buffer time of up to 15 seconds means the horns will continue to blow. This information, not discussed on October 4th seems to be an attempt to blame RTD for the ongoing noise issues. Why must the horns be sounded when both the FRA and the Commission ordered the flaggers in place 24/7. We must take steps to determine if there is any relief from the blaring of the horns. Something this important merits a review of the evidence and the legal obligations of the various parties, not merely an add on to the Majority opinion.

20. The following are my suggestions as to the type of evidence (presented by rail staff, RTD, Aurora, Union Pacific, FRA, the City of Denver, and or the Concessionaire) that I believe will be helpful in allowing the Commission and or an ALJ to determine if the additional 15 seconds of warning time results in dangerous crossings:

a. Studies and investigations that establishes the additional 15 seconds will result in safe crossings.

[7] Unfortunately there are no guarantees with respect to safety at rail crossings. This Commission and staff of the Commission, regularly make risk benefit analyses to determine what rail crossings do or not receive expensive crossing warnings and when the installation should occur. There are currently, I believe, over 100 "problematic" rail crossings in primarily rural areas waiting for funding to install warning systems. They are known as Section 130 crossings. Some of these crossings have already suffered fatalities. There are not sufficient funds to make the installations so we do not require the installation of lights and gates at these crossings. See by way of example 16A-0493R. http://www.denverpost.com/2016/06/27/colorado-railroad-crossing-family-killed/ I am troubled that the Commission seems to apply different standards in the rural areas than it does in the Denver metro area.

b. Studies and investigations that establish that an additional 15 seconds of warning time will result in unsafe crossings.

c. Basis for the FRA enacting only a minimum 20-second period and not a maximum wait time.

d. Studies or evidence indicating the types of harm that could result from a longer warning period—does that really cause drivers to drive around crossings that are this wide?

e. Information or experience developed over the last 18 months during which the flaggers have been in place —have drivers displayed annoyance; have drivers attempted to drive around the gates and or flaggers; what is the wait time with the flaggers at the crossings; is traffic backing up; is any back-up of traffic creating problems.

f. Evidence as to the risk and benefits of adding up to an additional 15 seconds of warning time, compared to the costs of the flaggers and or replacing the current wireless system.

g. Do the tort laws provide a reasonable incentive to RTD, the Concessionaire, and or Union Pacific to ensure the safety of the system or does governmental immunity and or federal pre-emption shield these entities from paying the full cost of any loss of life or damages to property? Include an analysis of §24-10-102 *et seq*., C.R.S. which limits damages to $350,000 per individual and $990,000 per occurrence. Include an analysis of federal pre-emption under 23 *Code of Federal Regulations* , § 646.214(b)(3)(4) as well as *Armijo v. Atchesen*, 87 F3d 1188 (10th Cir. 1996).

h. Parties should present testimony as to how they can mitigate the noise impact of the horns that are causing citizens to file comments with this Commission.

21. With the presentation of this type of evidence, and the opportunity for parties to examine the evidence, the Commission and or an ALJ should be in a position to arrive at fact based conclusions as to how RTD must proceed.[8]

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[8] I agree with the decision of the Majority to approve the engineering changes. Therefore, my opinion is a partial concurrence and a partial dissent.

FRANCES A. KONCILJA

Commissioner