

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 16R-0952R

IN THE MATTER OF THE PROPOSED AMENDMENTS TO 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
G. HARRIS ADAMS
AMENDING RULES**

Mailed Date: May 25, 2017

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I. STATEMENT

1. On December 15, 2016, the Public Utilities Commission issued the Notice of Proposed Rulemaking (NOPR) that commenced this proceeding. See Decision No. C16-1146.

The Commission referred this matter to an administrative law judge (ALJ) and scheduled a hearing for January 30, 2017. The purpose of the proposed rules is to implement House Bill 13-1103; incorporate changes in the 2009 Manual on Uniform Traffic Control Devices and the Colorado Supplement to the Federal Manual on Uniform Traffic Control Devices 2009, as adopted by the Transportation Commission of Colorado on December 15, 2011, and updated February 26, 2016; adopt temporary safety measures and implement minimum crossing safety requirements in Colorado; add definitions and change application requirements so only necessary information is provided by type of authority being sought; and amend the current rules to make them consistent with the remaining Commission rules.

2. Written comments were filed with the Colorado Department of Transportation (CDOT); City and County of Denver, Colorado; Union Pacific Railroad Company (Union Pacific); the Regional Transportation District (RTD); and BNSF Railway Company (BNSF). Additional oral comments were provided during the course of the hearing.

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

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

4. The proposed rules, provided with Decision No. C16-1146 in legislative (i.e., strikeout/underline) format and in final format, were made available to the public through the Commission's Electronic Filings (E-Filings) system.

5. The undersigned ALJ has reviewed the record in this proceeding to date, including written and oral comments. This Recommended Decision will generally focus upon comments regarding contested issues addressed during the course of the proceeding.

Not all modifications proposed to the rules are specifically addressed herein. Any changes incorporated into the redline version of the rules attached hereto are recommended for adoption. Any specific recommendations made by interested parties that are neither discussed below nor otherwise incorporated into the redlined rules attached, are not adopted.

A. Discussion

6. Several written comments addressing various matters were filed prior to commencement of the hearing in this matter. During the course of the hearing, Dr. Pamela Fischhaber, Section Chief - Rail and Transit Safety, explained the context and purpose of proposed rule modifications. In many instances, she also addressed and responded to issues raised in written comments.

7. By Attachment A to Decision No. R17-0200-I, issued March 16, 2017, after preliminary consideration of comments, additional redlined modifications (appearing in blue) were provided to interested persons in order to facilitate further discussion and comment during the continued hearing. In many instances, those modifications are incorporated and recommended for adoption.

1. General Provisions – Scope and Applicability

8. Rule 7002 consolidates requirements for information common to all rail application types, including pathways, conforming to the structure of other rules. Comment suggested that Rule 7002 recognize that all Commission requirements cannot be completed prior to construction because some requirements necessarily following completion of construction. The rule will be modified accordingly.

9. Rule 7006 adds rail fixed guideways and transit agencies to those required to file annual reports with the Commission. RTD comments that the filing deadline should be extended

because the report cannot be filed prior to approval by RTD's Board of Directors. While raising a reasonable concern, the Commission cannot extend the deadline for filing information required to meet the statutory deadline for reporting the Form DR525 to the Colorado Department of Revenue. Although the rule will not be modified as requested, Staff will also continue to work with RTD to find a solution to address the timing concern raised within the parameters of the adopted rule.

2. Incorporation by Reference

10. References incorporated into these rules are updated in Rule 7008. Additionally, references included in current Rule 7202 are moved to Rule 7008, updated, and current rule 7202 is removed from the rules.

3. Application Content

11. Changes were made to Rules 7002, 7101, 7102, 7103, and 7204 to make these rules consistent with the remaining Commission rules involving applications. Rule 7002 contains information that is required in all types of rail-related applications to the Commission and removes this similar information from other rules.

12. In Rule 7204, major changes have been made in an attempt to limit and target the information provided in applications to only that information required by the Commission to make a determination on specific types of authorities. This Rule removes the 20 items currently required in all applications for crossings and warning devices and changes the information requirements to authority-specific information. Rule 7204(a)(I) outlines information required in all crossing warning device applications. The remainder of Rule 7204(a) outlines the additional information to provide for applications requesting specific relief.

13. Based upon comment during the course of the proceeding concern was raised about incorporating specific time periods into the application process in light of the myriad of factors affecting feasibility of meeting such time periods.

14. Attachment A to Decision No. R17-0200-I, issued March 16, 2017, proposed further modifications to the rules effectively facilitating a bifurcated process for consideration of applications in the normal course. The rules permit, but do not require, an application requesting preliminary approval of conceptual level design plans and specifications. As a condition of filing an application requesting preliminary approval, the applicant must waive the applicable statutory period and specify when final plans and specifications will be filed. Notice of the application would encompass the entire scope of relief requested in the application. Aspects of construction might then be approved based upon preliminary plans and specifications. Subsequently, final plans and estimates would be filed in the same proceeding for Commission approval. Procedures may then be available to accommodate the unique circumstances of any given proceeding.

15. The adopted process provides several benefits. It responds to comments by all interested persons regarding the logistics and timeline of facilitating construction within a reasonable period, provides a forum to address problems as they arise or circumstances that change throughout the project, and accommodates flexibility to design a project, schedule construction, and complete construction in compliance with Commission decisions. The rule also retains provisions in the temporary rule regarding temporary safety measures.

4. Crossing Construction and Maintenance

16. Rule 7211 makes changes to existing rules regarding crossing construction and maintenance. In part, modifications align language addressing cost allocation among rail and

highway authorities when crossings are constructed or modified as well as for capital construction projects or maintenance.

17. Rule 7211(a) addresses costs allocated to a roadway authority for adding or removing a highway, pathway, or sidewalk at a new or existing crossing.

18. Rule 7211(b) addresses costs allocated to the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track for adding or removing track at a new or existing crossing.

19. Rule 7211(c) addresses cost allocation for projects initiated by a railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track other than adding or removing track (e.g. capital improvement projects).

20. Rule 7211(g), (h), and (i) address cost allocation for maintenance of the roadway and crossing surface.

21. During the course of the hearing, concern was raised regarding practical application of the proposed rule to the maintenance costs for a crossing. As an alternative, CDOT proposed a more efficient and simpler approach of equally sharing maintenance costs between the railroad, railroad corporation, rail fixed guideway, transit agency, or owner of the track and the road authority.

22. Union Pacific supported, or did not oppose, CDOT's proposal. BNSF opposed the concept contending there is no benefit to the railroad.

23. All users of a public crossing benefit from a well-maintained crossing and the opportunity to continued use. Public crossings and public roadways are regularly used by the railroad and railroad employees to move through and assess their railroad systems throughout the state and are used to set-on and off railroad hy-rail equipment. At-grade crossing surfaces are

installed by railroads with little, if any, input from road authorities on design or considerations on when and how construction occurs. Installation of new crossings or replacement of crossing surfaces allows railroads to install new rail, ties, ballast, and address any clean-up or drainage issues that may be occurring in the vicinity of the crossing. Railroads benefit from the ability to use traffic control on their projects to close down entire roadways and detour traffic so the project can be completed as a single project without having to phase the installation with moving traffic from one side of the crossing to the other during maintenance and repair work.

24. Public crossing projects provide benefit to both the traveling public and to railroads. Since these projects are one big project with work and effort being made by both the road authority and the railroad, it is reasonable and in the public interest for the entire cost of the project to be split between these entities.

5. Crossing Safety Diagnostics and Cost Estimates

25. Proposed Rule 7212 originally proposed addition of requirements for a more timely provision of cost estimates to be included in applications, in addition to other changes.

26. The rule will not include all proposed specific timelines in light of the accommodation of preliminary consideration of plans and specifications as well as the availability of a forum to address differences as they arise during the course of the project.

6. Minimum Crossing Safety Requirements

27. Rule 7213 adopts the temporary rules regarding minimum crossing safety requirements adopted by the Commission in proceeding No. 16R-0674R effective September 7, 2016, and adds some additional minimum crossing safety requirements regarding use of pavement markings and requirements for crossings with limited storage distance.

B. Conclusion

28. Attachment A to this Recommended Decision represents the rule amendments adopted by this decision with modifications to the prior rules being indicated in redlines and strikeout format (including modifications in accordance with this Recommended Decision).

29. Attachment B to this Recommended Decision represents the rule amendments adopted by this decision in final form.

30. The adopted rules are available as Attachment A and B through the Commission's E-Filings system in this proceeding (16R-0952RTO) at:

https://www.dora.state.co.us/pls/efi/EFL.Show_Docket?p_session_id=&p_docket_id=16R-0952R.

31. It is found and concluded that the proposed rules as modified by this Recommended Decision are reasonable and should be adopted.

32. Pursuant to the provisions of § 40-6-109, C.R.S., it is recommended that the Commission adopt the attached rules.

III. ORDER

A. The Commission Orders That:

1. The Rules Regulating Railroads, Rail Fixed Guideways, Transportation By Rail, and Rail Crossings, 4 Code of Colorado Regulations (CCR) 723-7, contained in redline and strikeout format attached to this Recommended Decision as Attachment A, and in final format attached as Attachment B, are adopted.

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

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

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

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

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director