

Decision No. R06-1295

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 06R-189R

IN THE MATTER OF THE PROPOSED AMENDMENTS TO THE RULES REGULATING
SYSTEM SAFETY PROGRAM STANDARDS FOR RAIL FIXED GUIDEWAY SYSTEMS.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
AMENDING RULES**

Mailed Date: November 3, 2006

I. STATEMENT

1. On April 7, 2006, the Public Utilities Commission issued the Notice of Proposed Rulemaking that commenced this docket. Decision No. C06-0336. The purpose of this proceeding is to amend existing rules pertaining to System Safety Program Standards for Rail Fixed Guideway Systems to comply with new Federal Transit Administration State Safety Oversight rules and to codify the program standard requirements outlined in 49 *Code of Federal Regulations* (C.F.R.) Part 659. The rules were proposed on April 7, 2006.

2. The Commission referred the instant rulemaking docket to an administrative law judge, and scheduled the first hearing for June 2, 2006. *See* Decision No. C06-0336.

3. Written comments were filed with the Commission by the Regional Transportation District (RTD).

4. The first hearing was held as scheduled on June 2, 2006. An appearance was entered on behalf of RTD. Oral comments were received from RTD, the only interested party appearing, and Staff of the Colorado Public Utilities Commission (Staff). Based upon issues

discussed, the ALJ found it beneficial to set additional hearings in this docket to obtain additional information clarifying provisions of 49 C.F.R. § 659. At the hearing held on June 2, 2006, the ALJ orally announced that an additional hearing would be held on June 12, 2006. Written notice of the additional hearing date of June 12, 2006 was given by Decision No. R06-0654, mailed on June 6, 2006.

5. The second hearing was held as scheduled on June 12, 2006. An appearance was entered on behalf of RTD. Additional oral and written comments were received from RTD, the only interested party appearing, and Staff, but the subject issue was not fully and clearly resolved. Following the conclusion of the hearing on June 12, 2006, Staff informed the ALJ that Staff and RTD sought to provide additional comments to assist the Commission in developing a more clear understanding of matters, including such matters as the scope of reporting requirements defined in 49 C.F.R. Part 659.33.

6. By Decision No. R06-0813-I, mailed July 11, 2006, the ALJ set the time and place for a continued hearing in this docket on July 25, 2006 to provide a further opportunity for oral or written comments regarding the proposed rules. The final hearing was held on July 25, 2006 as scheduled. An appearance was entered on behalf of RTD. Additional oral and written comments were received from RTD, the only interested party appearing, and Staff at this time additional hearing.

7. Pursuant to § 40-6-109, C.R.S., the record of this proceeding and a written recommended decision are transmitted to the Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

8. The statutory authority for the proposed rules is found in §§ 40-2-108, 40-18-102, and 40-18-103, C.R.S.

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

10. In accordance with § 659.15(b)(1), the Commission states it is the agency authorized by the Colorado General Assembly to establish an oversight program for the safety and security of rail fixed guideway systems in accordance with section 28 of the “Intermodal Surface Transportation Efficiency Act of 1991,” 49 U.S.C. § 5330. The Commission's authority is codified in Title 40, Article 18, C.R.S. Based on this authority, the Commission’s policies have been to work in a proactive and cooperative manner to provide system safety and security oversight to all transit agencies in the State of Colorado. The Commission’s roles and responsibilities, in addition to requirements that ensure on-going communication with each affected rail transit agency in the State of Colorado regarding safety and security information and oversight, are outlined in rules 7340 through 7354. As part of its role and responsibilities, the Commission will comply with all Federal Transit Administration (FTA) initial, annual and periodic submissions imposed upon it in 49 C.F.R. Part 659, including annual submissions before March 15 of each year in accordance with § 659.39(c) of a publicly available annual report summarizing the Commission’s oversight activities for the preceding twelve months (including a description of causal factors of investigated accidents, status of corrective actions, updates and modifications to rail transit agency program documentation, and the level of effort used by the Commission to carry out its oversight activities), in accordance with § 659.39(c)(1); a report documenting and tracking findings from three-year safety review activities, and whether a three-year safety review has been completed since the last annual report was submitted, in accordance with § 659.39(c)(2); program standard and supporting procedures that have changed during the

preceding year, in accordance with § 659.39(c)(3); certification that any changes or modifications to the rail transit agency system safety program plan or system security plan have been reviewed and approved by the oversight agency, in accordance with § 659.39(c)(4); any periodic submission requests by FTA to obtain program information, in accordance with § 659.39(d); submission of all FTA required reports electronically using a reporting system specified by FTA, in accordance with § 659.39(e); annual certification that the Commission has complied with the requirements of the Part 659 rules, in accordance with § 659.43(a); electronic submission of each certification to FTA using a reporting system specified by FTA, in accordance with § 659.43(b); and maintaining a signed copy of each annual certification to FTA, subject to audit by FTA, in accordance with § 659.43(c).

11. In accordance with § 659.15(b)(2), the Commission states that it employs its rulemaking process, as required by § 24-4-103, C.R.S., for any development, review, and adoption of the program standard, the modification and/or update of the program standard, and the process by which the program standard and any subsequent revisions are distributed to each affected transit agency. As part of its rulemaking process, the Commission gives notice to all affected transit agencies of any proposed changes to the program standard, both by mail and publication in the *Colorado Register*. Affected transit agencies may choose to participate in the rulemaking process. Regardless of whether a transit agency chooses to participate in the rulemaking process, the Commission shall, by mail and publication in the *Colorado Register*, give notice of the final adopted program standard to all affected transit agencies.

12. The basis and purpose of the proposed amendments is to comply with the new FTA State Safety Oversight rules and to codify the program standard requirements outlined in 49 C.F.R. Part 659.

13. Rule 7340 is modified to include the new rules regarding rail fixed guideway systems.

14. Rule 7341 codifies the definitions used throughout rules 7341 through 7354.

15. Rule 7342 is amended to incorporate by reference the most current version of 49 C.F.R. Part 659.

16. Rule 7343 codifies the minimum requirements to be contained in the transit agency's system safety program plan, specifies information to be included in the transit agency's system safety program plan relating to the hazard management process, and includes requirements for on-going communication and coordination relating to the identification, categorization, resolution, and reporting of hazards to the Commission in accordance with 49 C.F.R. § 659.15(b)(8).

17. Rule 7344 codifies the minimum requirements to be included in the transit agency's system security plan in accordance with 49 C.F.R. § 659.15(b)(9).

18. Rule 7345 codifies the Commission's process and timeframes through which the Commission must receive, review, and approve the transit agency's system safety program plan and system security plan, and identifies how the system security plan will be prevented from public disclosure in accordance with 49 C.F.R. §§ 659.15(b)(8) and (b)(9).

19. Rule 7346 codifies the Commission's criteria for the development of corrective action plan(s), the process for the review and approval of corrective action plan(s) developed by the transit agency, identifies the process for verification and tracking of corrective action plan implementation, and processes for managing conflicts with the transit agency relating to investigation findings and corrective action plan development in accordance with 49 C.F.R. § 659.15(b)(7).

20. Rule 7347 codifies the specific requirements for the transit agency to notify the Commission of accidents and includes required timeframes, methods of notification, and information to be submitted by the transit agency in accordance with 49 C.F.R. § 659.15(b)(5).

21. Rule 7348 codifies the thresholds for incidents that require Commission investigation, the roles and responsibilities for conducting investigations including coordination with the transit agency investigation process, the role of the Commission in supporting investigations and findings conducted by the National Transportation Safety Board, including review and concurrence of investigation report findings, and procedures for protecting the confidentiality of investigation reports in accordance with 49 C.F.R. § 659.15(b)(6).

22. Rule 7349 codifies the role of the Commission in overseeing a rail transit agency's internal safety and security review process including a description of the process to receive a rail transit agency's checklists and procedures and approve rail transit agency's annual reports on findings in accordance with 49 C.F.R. § 659.15(b)(3).

23. Rule 7350 codifies the process and criteria to be used in conducting a complete review of each transit agency's implementation of its system safety program plan and system security plan including the process to manage findings and recommendations from this review and the procedure for notifying the Commission before the transit agency conducts an internal review in accordance with 49 C.F.R. § 659.15(b)(4).

24. The proposed rules generated considerable comment by RTD, the only commenting party. Although not all of the comments will be repeated here, each comment was considered in the recommended decision.

25. In its written comments, RTD commented that 49 C.F.R. Part 659 contains language that, on its face, goes beyond its enabling legislation, as well as the local authority

contained in § 40-18-103, C.R.S. RTD proposed modifications to limit potential application of the rules to RTD's operation of its rail fixed guideway system, consistent with the enabling legislation for, and applicability language of, 49 C.F.R. Part 659.

26. “Rail transit-controlled property” is defined in Proposed Rule 7341(o) to mean “property that is used by the transit agency and may be owned, leased, or maintained by the transit agency.”

27. Because RTD, the transit agency operating a rail fixed guideway system, also operates an extensive bus system, RTD is concerned that the requirement in Proposed Rule 7348 (for the Commission to investigate **any** incident taking place on **rail transit-controlled property**) could require reporting and investigation of incidents occurring at RTD bus facilities having nothing to do with operating the rail fixed guideway system. Aside from jurisdictional concerns, such application of the definition would significantly increase RTD’s compliance burden.

28. RTD went through considerable effort to document the opinion of FTA’s Attorney-Advisor in the Office of Chief Counsel that the Federal Transit Administration reporting requirements in 49 C.F.R. Part 659 only apply to rail-related areas of a transit agency system operating a unified or combined bus-rail system. See Hearing Exhibits 1 and 3.

29. RTD argues that FTA has exceeded its enabling legislation by amending 49 C.F.R. Part 659 and that the Commission will exceed its authority under § 40-18-103 C.R.S. by adopting the proposed rules.

30. In response to industry comments, Staff disagrees with the comments of RTD. Given the statutory definition of “transit agency” as an entity operating a rail fixed guideway system, it does not appear to Staff that it was the intent of the legislature to expand that definition

to all other possible transit agency operations, such as bus operations. It is Staff's opinion that a "transit agency," defined in § 40-18-101(6), is limited to the entity's operations of the rail fixed guideway system. Therefore, it is Staff's opinion that the definition for rail transit-controlled property should remain as FTA defined it and that the applicability language found at 7340 should remain as noticed, with the understanding that the intent of these rules is to apply them within the context of the statutory authority granted to the Commission in Title 40, Article 18, C.R.S. over rail fixed guideway systems.

31. The Commission is "is authorized to establish an oversight program for the safety and security of rail fixed guideway systems in accordance with section 28 of the 'Intermodal Surface Transportation Efficiency Act of 1991', 49 U.S.C. sec. 5330." § 40-18-102 C.R.S. To implement the program, among other things, the Commission "shall promulgate rules to establish a system safety oversight program for rail fixed guideway systems operating within the state that, at a minimum, meets the requirements of 49 C.F.R. Part 659, 'Rail Fixed Guideway Systems; State Safety Oversight.'" § 40-18-103(2) C.R.S.

32. The Commission's adoption of the definition of "rail transit-controlled property" could potentially be adopted pursuant to § 40-18-103(1)(b) C.R.S. or § 40-18-103(2) C.R.S. Based upon the clear and unequivocal statements of Staff, the Commission Staff does not seek adoption of the rule under § 40-18-103(1)(b) C.R.S. Thus, consideration of the proposed rules will be based upon § 40-18-103(2) C.R.S.

33. While the Commission is charged with establishing a system safety oversight program, the Legislature mandated that the Commission, at a minimum, meet FTA's rules implementing such a program under its authorizing statute. Thus, it is not within the Commission's discretion whether to adopt FTA's rules promulgated under 49 C.F.R. Part 659,

unless such rules are plainly erroneous, inconsistent with the regulation, or conflict with the authority granted the Commission in § 40-18-102 C.R.S. (i.e. if FTA exceeds its jurisdictional authority).

34. RTD raises understandable concerns regarding potential expansion of responsibilities based upon the definition of rail transit-controlled property. Staff makes clear that it is not the intent of the Commission's proposed rules to expand the scope of the definition beyond the rail-filed guideway system.

35. RTD provided no jurisdictional basis for this Commission to modify or disregard FTA's rules in 49 C.F.R. Part 659. As to State authority, RTD cites 40-18-103(2) C.R.S. for the proposition that the Commission's authority to regulate extends only to establishment of a system safety oversight program for rail fixed guideway systems. RTD argues that because the definition of "rail transit-controlled property" is not limited to property comprising a rail fixed guideway system, the rule exceeds FTA's and the Commission's authority.

36. Courts defer to construction of a regulation by the agency that is charged with administering the regulation. *Jones v. Federal Deposit Insurance Corp.*, 748 F.2d 1400, 1405 (10th Cir. 1984). Deference by the Commission to FTA's rules administering the Intermodal Surface Transportation Efficiency Act of 1991 is due as a product of extensive proceedings by the Federal agency charged with implementation of the controlling Federal legislation. *Pennsylvania Public Utility Commission v. Bell Atlantic-Pennsylvania, Inc.*; *AT&T Communications of Pennsylvania, Inc. v. Bell Atlantic-Pennsylvania, Inc.* Docket Number R-00963578; Docket Number R-00963578C0001, 1996 Pa. PUC LEXIS 209, 40-41 (Pa. PUC 1996).

37. In 1991, the United States Congress required FTA to establish a program providing for the State-conducted oversight of the safety and security of rail systems not regulated by the Federal Railroad Administration. See Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102–240, Sec. 3029, also codified at 49 U.S.C. 5330.

38. FTA most recently enacted new rules on April 29, 2005, to become effective May 1, 2006, regarding state safety oversight of rail fixed guideway systems. The new FTA State Safety Oversight rule is found at 49 C.F.R. Part 659. The new FTA rule revised the State Safety Oversight rule by adding clarifying sections, provided further specifications concerning what states must require to monitor safety and security of non-Federal Railroad Administration (FRA) rail systems, and incorporated into the body of the regulation material not previously incorporated by reference. These changes should ensure greater compliance of the state oversight agencies, enhance safety and security of rail fixed guideway systems, and make the regulation easier to understand. *See* Commission Decision C06-0336 and Rail Fixed Guideway Systems; State Safety Oversight, 70 Fed. Reg. 22,562 (2005) (Final Rule).

39. 49 C.F.R. § 659.5 provides: “Rail Transit-Controlled Property means property that is used by the rail transit agency and may be owned, leased, or maintained by the rail transit agency.” 70 Fed. Reg. 22,562, 22578.

40. Application of the plain reading of the definition generally extends reporting and investigation of incidents occurring on property used by the rail transit agency without regard to whether such property is used to operate the rail fixed-guideway system. Rather, FTA’s rules focus upon modified thresholds for the notification and investigation of accidents. Rulemaking Overview/Summary of Rule Changes, 70 Fed. Reg. 22,562, 22,563.

41. The Commission is responsible for establishing a system safety program standard that includes sections regarding accident notification and investigation. § 40-18-103(2) C.R.S. and 49 C.F.R. § 659.15, 70 Fed. Reg. 22,562, 22,579.

42. The Commission must:

require the rail transit agency to notify the oversight agency within two (2) hours of any incident involving a rail transit vehicle or taking place on rail transit-controlled property where one or more of the following occurs:

- (1) A fatality at the scene; or where an individual is confirmed dead within thirty (30) days of a rail transit-related incident;
- (2) Injuries requiring immediate medical attention away from the scene for two or more individuals;
- (3) Property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities and non-transit property that equals or exceeds \$25,000;
- (4) An evacuation due to life safety reasons;
- (5) A collision at a grade crossing;
- (6) A main-line derailment;
- (7) A collision with an individual on a rail right of way; or
- (8) A collision between a rail transit vehicle and a second rail transit vehicle, or a rail transit non-revenue vehicle.

49 C.F.R. § 659.33, 70 Fed. Reg. 22,562, 22,582 and § 40-18-103(2) C.R.S.

43. The Commission must also “investigate, or cause to be investigated, at a minimum, any incident involving a rail transit vehicle or taking place on rail transit-controlled property meeting the notification thresholds identified in Paragraph 42 above. § 40-18-103(2) C.R.S. and § 659.35, 70 Fed. Reg. 22,562, 22,582.

44. The definition of rail transit-controlled property does not require interpretation as the language is clear and unambiguous. However, it is noteworthy that some of the very concerns raised by RTD were considered and rejected by FTA in adopting and applying the definition.

The ALJ also understands that it was not Staff's intention to mandate reporting of qualifying incidents occurring on rail transit-controlled property, but statutory mandates do not allow such an exercise of discretion. The Commission enjoys more discretion as to the investigation required, but this discretion does not extend to the scope of reporting. Perhaps RTD is suffering unintended consequences of FTA's rule, but that must be addressed with FTA, rather than this Commission.

45. The proposed rule clearly expands notification requirements, shifting emphasis from location of an incident to the conditions requiring notification. The modified reporting ensures full disclosure and allows the Commission (rather than the operator) to determine the scope of incidents affecting the safety and security of rail fixed guideway systems. Further, the rule avoids the need to draw a line for the operator as to how close in proximity a qualifying incident must occur to rail operations to be reported for the Commission's consideration.

46. There is ample evidence that FTA contemplated the effects of adopting the definition of rail transit-controlled property. In FTA's rulemaking, a few commenters specifically suggested that FTA either remove the definition of "rail transit-controlled property" or limit its applicability to only areas that support operations, including revenue facilities. Section by Section Discussion of the Comments, 70 Fed. Reg. 22,562, 22,565.

47. FTA rejected such comments stating: "It is important to maintain consistency within FTA's data collection programs, specifically state safety oversight and the National Transit Database (NTD). Furthermore, through its definition of rail transit-controlled property, FTA expects that safety or security incidents occurring on property controlled by the rail transit agency that meet the accident notification thresholds must be reported to the oversight agency. We believe that the rail transit agency's hazard identification process should include all incidents

that occur on its property, regardless of whether or not the activity supports revenue operations.” Section by Section Discussion of the Comments, 70 FR 22,562, 22,565. While it is not clear that FTA considered specific applicability of the definition to the issues raised by RTD, it is clear that FTA intended to modify reporting requirements.

48. In the context of notification requirements of 49 C.F.R. § 659.29, FTA noted that “[s]ome commenters objected to the proposed location of the incident ‘involving a rail transit vehicle or taking place on rail transit-controlled property,’ suggesting that FTA should limit the requirement for notification to those instances where an event has occurred only when it involves the operation of the rail transit vehicle, and not in such places as offices, parking lots and other areas that do not involve rail transit operations.” Section by Section Discussion of the Comments, 70 Fed. Reg. 22,562, 22,569. Thus, FTA specifically considered and rejected comments that incidents on property having nothing to do with operation of the rail fixed-guideway system should not be subject to notification.

49. In the context of accident investigation requirements of 49 C.F.R. § 659.29, FTA specifically considered and rejected comments suggesting “that the NPRM creates a large investigative workload.” Section by Section Discussion of the Comments, 70 Fed. Reg. 22,562, 22,569.

50. FTA clarified:

“To clarify FTA's intent, FTA has removed the qualifiers and requires notification when an accident equals or exceeds \$ 25,000 in total accident damage....FTA disagrees with recommendations to constrain the applicability of the accident notification and investigation thresholds to only those incidents ‘involving the operation of a transit vehicle,’ ignoring incidents that occur in parking lots, stations, and other areas of rail transit property and responsibility. We believe that this rule limits notification and investigation to only the most serious events that might occur on rail transit property. As such, we believe that in accordance with the intent of state safety oversight, these events should be reported to the state in a

timely manner to ensure the state's ability to investigate and require corrective actions, as required under Section 5330 of the enabling legislation. Furthermore, FTA has interpreted the state safety oversight legislation to include security considerations. In so doing, FTA requires the rail transit agency to report security incidents that meet the notification thresholds to the oversight agency. We believe that passenger safety and security are often interrelated and each passenger should expect to be free from danger, unintentional or intentional, to the extent that it is reasonably practicable. As such, we believe that efforts by the rail transit agency, in accordance with state oversight, should be applied system-wide and not limited to only specific passenger or vehicle operations.”

Section by Section Discussion of the Comments, 70 Fed. Reg. 22,562, 22,571.

Thus, FTA rejected comments to restrict the scope of reporting required by inclusion of rail transit-controlled property.

51. FTA provides the following analysis of the definition:

‘Rail transit-controlled property’ means property that is used by the rail transit agency and may be owned, leased, or maintained by the rail transit agency. FTA does not distinguish between different types of rail transit-controlled property, meaning that an accident meeting the notification and investigation thresholds of this section must prompt notification of the oversight agency, regardless of where it occurred on rail transit-controlled property.

Section by Section Analysis, 70 Fed. Reg. 22,562, 22,573.

52. FTA’s analysis of 49 C.F.R. § 659.33 acknowledges broad application of incidents meeting specified criteria with little regard to location of the incident: “These events could take place on a rail transit vehicle or on rail transit-controlled property, and could involve rail transit passengers, employees, contractors, rail transit facility occupants, other workers, trespassers, or other persons. Section by Section Analysis, 70 Fed. Reg. 22,562, 22,575.

53. While the Commission is independently charged with implementing Colorado law incorporating Section 28 of the Intermodal Surface Transportation Efficiency Act of 1991 (49 U.S.C. § 5330), deference should be given to FTA’s interpretation of its governing statute and regulations that establish the minimum criteria required in § 40-18-103(2) C.R.S., unless it is

plainly erroneous, inconsistent with the regulation, or conflicts with implementation of Colorado law.

54. Upon review of the above-referenced rules, RTD has not demonstrated that the Commission's adoption of FTA rules is plainly erroneous, inconsistent, or conflicting with Colorado law.

55. The crux of RTD's jurisdictional argument challenges whether FTA can require the **operator** of a rail fixed guideway system to report qualifying incidents occurring on any property used by such operating entity, without regard to purpose of use or whether the property is owned, leased, or maintained by the operator. As applied to RTD, the rule does not impose jurisdiction over bus operations; rather, the rule requires notification and investigation by the operator of a rail fixed guideway system.

56. Primarily, RTD should address FTA jurisdictional concerns to FTA. As to the Commission's authority, RTD failed to demonstrate that the proposed rule exceeds the Commission's authority in establishing an oversight program for the safety and security of rail fixed guideway systems in accordance with section 28 of the "Intermodal Surface Transportation Efficiency Act of 1991," 49 U.S.C. § 5330, and § 40-18-105 C.R.S.

57. Proposed Rule 7341(o) reflects, the definition of the identical term found at 49 C.F.R. § 659.5.¹ The proposed rule will be adopted, consistent with 49 C.F.R. Part 659 and the legislative mandate of §§ 40-18-102,103(2) C.R.S. RTD's comments in opposition thereto will be rejected. Despite the wishes of RTD and the intentions of Staff, FTA's rule must be adopted in this regard.

¹ The federal rule references a "Rail Transit Agency," defined at 49 C.F.R. §659.5, whereas Rule 7348 references a "transit agency," defined at § 40-18-101(6) C.R.S. Although the defined terms referenced differ, the definitions of both terms are the same.

58. In this adoption, the ALJ is mindful of the clarifying comments RTD provided of FTA's Attorney-Advisor in the Office of Chief Counsel. However, such comments cannot be fully reconciled with the final rule adopted by FTA and cannot supplant the official statements of FTA in adopting the rule.

59. Illustratively, Hearing Exhibit 3 indicates that FTA reporting requirements in 49 C.F.R. Part 659 apply only to incidents having an undefined nexus to the provision of rail services. However, in adopting the rule, FTA rejected reporting limitations based upon the purpose for which property was used and focused upon reporting thresholds.

60. The second area of written comment by RTD proposed a modification to Rule 7348(d)(V) to clarify and confirm that the Commission considers that investigative reports in Rule 7348 would be "investigative reports of the commission", as referenced in Section 40-18-104 C.R.S.

61. Staff notes that RTD's proposed modification to Proposed Rule 7348(d)(V) eliminates the portion of the rule stating that such reports are to be submitted under seal in compliance with the Commission's rules of practice and procedure. Staff agrees with RTD's proposal to add language regarding investigative reports of the Commission, but disagrees that the confidentiality procedural reference should be removed. Considering both concerns, Staff proposes the following modification:

Such reports are investigative reports of the Commission under Title 40, Article 18, C.R.S. and shall be submitted under seal in compliance with the confidentiality provisions of the Commission's Rules of Practice and Procedure. The Commission and its staff shall treat such investigative reports of the Commission as confidential pursuant to § 40-18-104, C.R.S.

62. The ALJ will adopt an alternate approach intended to address the concerns raised by both RTD and Staff. While protecting the substantive statutory confidentiality afforded by

§ 40-18-104, C.R.S., extraordinary procedural protections will be afforded to these filings pursuant to Commission rules. Thus, procedures will be in effect for the filings and confidentiality will be assured in accordance with statutory requirements.

63. Rule 7348(d)(V) shall be amended to read as follows:

The transit agency shall submit its investigation report, including its CAP and implementation schedule, to the Rail/Transit Safety Section of the Commission. Such report shall be submitted under seal and identified as a Highly Confidential Report filed in accordance with extraordinary protections afforded by Commission rules and § 40-18-104, C.R.S. Upon submission, such report is an investigative report of the Commission, defined in § 40-18-104 C.R.S., that shall be afforded extraordinary protections as highly confidential information. Unless modified by subsequent Commission decision, such extraordinary protections shall restrict access to the Highly Confidential Report only to Commissioners, Administrative Law Judges, Commission Advisory Staff, Commission Litigation Staff, and legal counsel for each of these groups.

64. It is found and concluded that the proposed rules as modified by this recommended decision are reasonable and should be adopted.

65. 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 regarding railroads in redline and strikeout format attached to this Recommended Decision as Attachment A 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.

(SEAL)



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

COLORADO DEPARTMENT OF REGULATORY AGENCIES

Public Utilities Commission

4 CODE OF COLORADO REGULATIONS (CCR) 723-7

PART 7

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

BASIS, PURPOSE, AND STATUTORY AUTHORITY

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

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

* * *

[signifies omission of unaffected rule sections]

7002. Applications.

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

- (a) For a certificate of public convenience and necessity, as provided in rule 7101.
- (b) To amend a certificate of public convenience and necessity, or to change, extend, curtail, abandon, or discontinue any service, as provided in rule 7102.
- (c) For authority to transfer a certificate of public convenience and necessity, to obtain a controlling interest in any utility, to transfer assets or stock, or to merge a utility with another entity, as provided in rule 7103.
- (d) For authority to construct, alter, or abolish a utility crossing, a railroad-highway crossing, a railroad crossing, or a highway-railroad crossing; or for authority to install or modify crossing warning devices, as provided in rule 7204
- (e) For authority to allocate costs for railroad-highway grade separations, as provided in rule 7205.

- (f) For approval of a transit agency's system safety program plan, as provided in rule 734~~34~~,or system security plan, as provided in rule 7344.
- (g) For any other matter provided by statute or rule but not specifically described in this rule.

* * *

System Safety Program Standards for Rail Fixed Guideway Systems

7340. Applicability.

Rules 7341 through 734~~954~~ apply to all transit agencies and rail fixed guideway systems operating within the State of Colorado, which systems are regulated by the Commission pursuant to Title 40, Article 18, C.R.S.

7341. Definitions.

[§659.5] The following definitions apply only in the context of rules 7341 through 734~~954~~:

- (a) "Contractor" means an entity that performs tasks required on behalf of the Commission or transit agency. The transit agency is not a contractor for the Commission.
- (b) "Corrective action plan" ("CAP") means a plan developed by the transit agency that describes the actions the transit agency will take to minimize, control, correct, or eliminate hazards, and the schedule for implementing those actions.
- (c) "Finding" means non-compliance with the transit agency's SSPP, SSP, rules, procedures, programs, or other regulatory guidelines, which results in the formulation of a CAP.
- (d) "FRA" means the Federal Railroad Administration, an agency of the United States Department of Transportation.
- (e) "FTA" means the Federal Transit Administration, an agency of the United States Department of Transportation.
- (f) "Hazard" means any real or potential condition (as defined in the transit agency's hazard management process) that can cause injury, illness, or death; damage to or loss of a system, equipment or property; or damage to the environment.
- (g) "Individual" means a passenger; employee; contractor; other rail transit facility worker; pedestrian; trespasser; or any person on rail transit-controlled property.
- (h) "Investigation" means the process used to determine the causal and contributing factors of an accident or hazard, so that actions can be identified to prevent recurrence.
- (i) "New starts project" means any rail fixed guideway system funded under FTA's discretionary construction program in 49 U.S.C. 5309.
- (j) "NTSB" means the National Transportation Safety Board.

- (k) “Passenger” means a person who is on board, boarding, or alighting from a rail transit vehicle for the purpose of travel.
- (l) “Passenger operations” means the period of time when any aspect of transit agency operations are initiated with the intent to carry passengers.
- (m) “Program standard” means the standards in rules 7340 through 7354, that codify the policies, objectives, responsibilities and procedures used to provide transit agency safety and security oversight.
- (n) “Rail fixed guideway system” means those rail fixed guideway systems as defined in rule 7001(c) of which:
- (I) The rail fixed guideway’s route miles are Included in FTA’s calculation of rail fixed guideway route miles;
- (II) The rail fixed guideway system receives funding under FTA’s formula program for urbanized areas; or
- (III) The rail fixed guideway system has submitted documentation to FTA indicating its intent to be included in FTA’s calculation of fixed guideway route miles to receive funding under FTA’s formula program for urbanized areas.
- (o) “Rail transit-controlled property” means property that is used by the transit agency and may be owned, leased, or maintained by the transit agency.
- (p) “Rail transit vehicle” means the transit agency’s rolling stock, including but not limited to passenger and maintenance vehicles.
- (q) “Safety” means freedom from harm resulting from unintentional acts or circumstances.
- (r) “Security” means freedom from harm resulting from intentional acts or circumstances.
- (~~sb~~) "System safety program plan" ("SSPP") means a document developed and adopted by thea transit agency, describing that details its safety and security policies, objectives, responsibilities, and procedures.
- (~~c~~) "System safety program standard" ("SSPS") means a safety standard developed by the Commission in conformance with 49 C.F.R. Part 659. This standard defines the relationship between the Commission and the transit agency, guides the development of the SSPP, and details required components of the transit agency's SSPP.
- (t) “System security plan” (“SSP”) means a document developed and adopted by the transit agency describing its security policies, objectives, responsibilities, and procedures.

7342. Incorporation by Reference.

References in these rules to 49 C.F.R. 659 are rules issued by the FTA and are hereby incorporated by reference in these rules. References in these rules to 49 C.F.R. 15 are rules issued by the Office of the Secretary of the U.S. Department of Transportation and are hereby incorporated by reference in these rules. References in these rules to 49 C.F.R. 1520 are rules issued by Transportation Security Administration Department of Homeland Security and are hereby incorporated by reference in these rules. These rules may be found at 49 C.F.R. 15, 659, and 1520 revised as of ~~October 1,~~

2002 October 1, 2005. References to 49 C.F.R. 15, 659 and 1520 do not include later amendments to, or editions of, 49 C.F.R. 15, 659 and 1520. References in these rules to standards of the American Public Transit Association are standards contained in its "Manual for the Development of Rail Transit System Safety Program Plans" published on August 20, 1991. References to standards of the American Public Transit Association do not include later amendments to, or editions of, this Manual. A copy of all material that has been incorporated by reference is maintained at the offices of the Colorado Public Utilities Commission, 1580 Logan Street, Office Level 2, Denver, Colorado 80203, and is available for inspection during normal business hours. Copies of the incorporated rules shall be provided at cost upon request. The Director of the Commission, 1580 Logan, Office Level 2, Denver, Colorado 80203, will provide information regarding how 49 C.F.R. 15, 659 and 1520 and the "Manual for the Development of Rail Transit System Safety Program Plans" may be obtained or examined. This incorporated material may be examined at any state publications depository library.

7343. System Safety Program Plan ~~and Standard~~.

§659.17 a Every transit agency shall establish and maintain a written system safety program plan, ~~that is a separate document from the SSP, that~~ complies with the program standard and includes the following system safety program standard sections:

- (a) Introduction. The Introduction section of the SSPP shall contain the following:
 - (I) §659.19 a A policy statement supporting the SSPP from the General Manager/Executive Director of the transit agency.
 - (II) A statement of the legal authority for the SSPP.
 - (III) A description of the purpose and scope of the SSPP.
 - (IV) §659.19 b A clear definition of the gGoals and oObjectives of the SSPP.
 - (V) A statement of management responsibilities to ensure the goals and objectives of the SSPP are achieved.
 - (VI) §659.19 e Specifications of policies in place to support implementation of the safety and security portions of the SSPP and a description of the specific activities required to implement the system safety program including:-
 - (A) Tasks to be performed by the rail transit safety function, by position and management accountability, specified in matrices and narrative format.
 - (B) Safety-related tasks to be performed by other rail transit departments, by position and management accountability, specified in matrices and narrative format.
 - (VII) §659.19 d Identification of the process and procedures for controlling updates and modifications to updating/modifying the SSPP including specification of an annual assessment of whether the SSPP should be updated and a requirement of coordination with the Commission, including timeframes for submission, revision, and approval.
 - (VIII) § 659.19 f A description of the process used by the transit agency to implement its hazard management program, including activities for:

(A) Hazard identification.

(B) Hazard investigation, evaluation and analysis.

(C) Hazard control and elimination.

(D) Hazard tracking.

(E) Requirements for on-going reporting to the oversight agency relating to hazard management activities and status.

(IX) **[§ 659.19 g]** A description of the process used by the transit agency to ensure that safety concerns are addressed in modifications to existing systems, vehicles, and equipment, which do not require formal safety certification but which may have safety impacts.

(b) System Description. The system description section of the SSPP shall include the following:

(I) A brief history of the system(s) operated by the transit agency.

(II) The scope of service the transit agency provides.

(III) **[§659.19 c, 1 and 3]** A description of the organizational structure of the transit agency, including organizational diagrams of the transit agency and the system safety unit that identify the lines of authority and communications used by the agency to manage safety issues and define responsibilities within the organization.

(IV) **[§ 659.19 c 2]** A description of how the safety function of the agency is integrated into the rest of the rail transit organization.

(IV) A description of the physical plant including track, signal and communication system, vehicle type and operating characteristics, station facilities and maintenance facilities.

(V) A description of the process to modify the system. The system modification review and approval process shall include the following:

(A) The identification of the unit or group of the transit agency responsible for ensuring that the hazards associated with system expansions or modifications are included in the transit agency's hazard resolution process~~American Public Transit Association's ("APTA") Hazard Resolution Process.~~

(B) Participation of operating and safety department personnel in the design review process for new equipment and system expansions or modifications.

(C) A sign-off and certification process for verification of operational readiness of new equipment and system expansions or modifications prior to entering revenue service.

(D) Documentation of responsibility and authority for approval of modification exceptions to established design criteria for new equipment and system expansions.

- (E) Procurement procedures that preclude the introduction into the rail fixed guideway system of unauthorized hazardous materials and supplies, as well as defective or deficient equipment.

(VII) [§ 659.19 h] A description of the safety certification process required by the transit agency to ensure that safety concerns and hazards are adequately addressed prior to the initiation of passenger operations for new starts projects, and subsequent major projects to extend, rehabilitate or modify an existing system, or to replace vehicles and equipment.

- (c) System Safety Department Activities of the Transit Agency. The system safety department activities of the transit agency section of the SSPP shall contain the following:

- (I) A description of the responsibilities of those in charge of managing the system safety process within the transit agency.

(II) [§ 659.31 a] A description of the process used to identify and resolve hazards during operation including any hazards resulting from subsequent system extensions or modifications, operational changes or other changes within the rail transit environment.

(III) [§ 659.31 b] The hazard management A methodology for hazard identification and a resolution process. This process shall include the following:

- (A) A description of the transit agency's approach to hazard management and the implementation of an integrated system-wide hazard resolution process.

- (B) Specification of the sources of, and the mechanisms to support, the on-going identification of hazards.

- (CA) A description of the process by which identified hazards will be evaluated and prioritized for elimination or control including used to identify and document hazards associated with operations, maintenance, and engineering.

- (DB) A description of the process and mechanism used to track through resolution the identified hazard(s) by which the identified hazards are categorized, analyzed, and resolved for operations, maintenance, and engineering. This process shall include analysis of hazard severity, hazard probability, and use of APTA's Hazard Resolution Matrix.

- (EG) Definition of the minimum thresholds for the notification and reporting of hazard(s) to the Commission Documentation of all maintenance activities associated with inspection and testing of facilities/equipment with safety related characteristics.

- (FD) A description of the process by which the transit agency will provide on-going reporting of hazard resolution activities to the Commission Written rules and procedures for the operation and maintenance of the rail fixed guideway system. These procedures shall be monitored, reviewed, and changed or revised as necessary to maximize system safety.

(IVH) [§ 659.19 i] A procedure for accident/incident and hazard notification, reporting and investigation. This procedure shall comply with rules 7347 and 7348 and shall include the following:

- (A) Notification thresholds for internal and external organizations.
 - (BA) The criteria for determining which accidents/~~incidents~~ require investigation and who is going to conduct the investigation.
 - (CB) A description of the process and procedures used for conducting accident investigations which include the reporting of findings to internal and external organizations, conclusions, development, implementation and tracking of recommended corrective actions that address investigation findings, and follow up to verify corrective action implementation.
 - (D) Coordination with the Commission.
- (IV) [\$659.19 p] An employee and contractor training and certification safety program including training and certification, drug and alcohol testing, as well as information about drug and alcohol abuse. The employee and contractor certification and training program shall include a description of the training material and documentation of training test scores and dates. The employee and contractor training and certification shall also include:
- (A) Categories of safety-related work requiring training and certification.
 - (B) A description of the training and certification program for employees and contractors in safety-related positions including a description of the training material used.
 - (C) Process used to maintain and access employee and contractor records including documentation of training test scores and dates, when applicable.
 - (D) Process used to assess compliance with training and certification requirements.
- (V) [\$659.19 n] A process for internal safety inspection of operation and maintenance facilities and equipment including audits and review of procedures that complies with rule 7349 and includes:-
- (A) Identification of the facilities and equipment subject to regular safety-related inspection and testing.
 - (B) Techniques used to conduct inspections and testing.
 - (C) Inspection schedules and procedures.
 - (D) Description of how results are entered into the hazard management process.
- (VI) [\$ 659.19 k] A description of the process used by the transit agency to develop an approved coordinated schedule for all emergency management program activities including: ~~An emergency plan that includes planning updates, coordination and training.~~ This plan shall include ~~liaison with outside agencies and documentation of emergency drills, which may include assistance from these outside agencies.~~
- (A) Meetings with external agencies.
 - (B) Emergency planning responsibilities and requirements.

- (C) Process used to evaluate emergency preparedness, such as annual emergency field exercises.
 - (D) After action reports and implementation of findings.
 - (E) Revision and distribution of emergency response procedures.
 - (F) Familiarization training for public safety organizations.
 - (G) Employee training.
 - (H) An emergency plan that includes planning updates.
- (VII) [§ 659.19 s] A description of the hazardous materials program including the process to ensure knowledge of and compliance with program requirements program to identify and mitigate hazardous materials usage.
- ~~(IX)~~ (VIII) A contractor safety coordination program.
- (X) [§ 659.19 i] A description of the process used to collect, maintain, analyze, and distribute safety data, to ensure that the safety function within the rail transit organization receives the necessary information to support implementation of the system safety program.
- (XI) [§ 659.19 m] A description of the process used by the transit agency to develop, maintain, and ensure compliance with rules and procedures having a safety impact including:
- (A) Identification of operating and maintenance rules and procedures subject to review.
 - (B) Techniques used to assess the implementation of operating and maintenance rules and procedures by employees, such as performance testing.
 - (C) Techniques used to assess the effectiveness of supervision relating to the implementation of operating and maintenance rules.
 - (D) Process for documenting results and incorporating them into the hazard management program.
- (XII) [§ 659.19 o] A description of the maintenance audits and inspections program, including identification of the affected facilities and equipment, maintenance cycles, documentation required, and the process for integrating identified problems into the hazard management process.
- (XIII) [§ 659.19 q] A description of the configuration management control process including:
- (A) The authority to make configuration changes.
 - (B) The process for making changes.
 - (C) Assurances necessary for formally notifying all involved departments.

~~(XIV) [§ 659.19 r] A description of the safety program for employees and contractors that incorporates the applicable local, state and federal requirements including:~~

~~(A) Safety requirements that employees and contractors must follow when working on, or in close proximity to transit agency property.~~

~~(B) Processes for ensuring the employees and contractors know and follow the requirements.~~

~~(XV) [§ 659.19 t] A description of the drug and alcohol program and the process used to ensure knowledge of and compliance with program requirements.~~

~~(XVI) [§ 659.19 u] A description of the measures, control, and assurances in place to ensure that safety principles, requirements and representatives are included in the transit agency's procurement process.~~

~~(IX) A matrix of safety related tasks that shows responsibility.~~

(d) Safety-related Activities of Other Departments of the Transit Agency. The safety-related activities of other departments of the transit agency section of the SSPP shall contain the following:

(I) A process of coordination of safety related tasks with other departments.

(II) A matrix of safety related tasks that shows department responsibility.

(e) System Safety Program Plan Implementation and Maintenance. The system safety program plan implementation and maintenance section of the SSPP shall contain the following:

(I) Program schedule for implementation and maintenance of the SSPP which shall contain the following:

(A) Specified time intervals between SSPP reviews to determine whether or not the SSPP needs to be revised because of changed operating conditions and/or system modifications.

(B) A detailed description of the SSPP revision process including the identification of the persons responsible for initiating, developing, and approving changes to the SSPP.

(C) A statement that the Commission will be notified of all changes to the SSPP and supplied with a copy of all revised pages.

(II) [§659.19 I] A description of the process and procedure for conducting planned and scheduled internal safety reviews ~~audits~~ to evaluate compliance with the SSPP and comply with rule 7349 including the review and modification of the SSPP based upon audit results. This procedure shall ~~include~~ contain the following:

(A) Identification of departments and functions subject to review.

(BA) The transit agency's schedule for conducting internal reviews ~~audits~~ and the responsibility for scheduling such reviews.

~~(CB)~~ A description of the process for conducting reviews, auditing procedure including the development of written checklists and procedures and the issuing of findings.

~~(DE)~~ Written documentation of the process and procedures of issuing audit findings including an evaluation of the adequacy and effectiveness of the SSPP.

~~(E)~~ A process for the review of reporting requirements.

~~(F)~~ A process for tracing the status of implemented recommendations.

~~(GD)~~ A requirement for a annual audit report, a copy of which must be submitted to the Commission by February 15 each year, which summarizes the results of the internal audits performed during the previous year, including a summary of required corrective actions taken, if any, and provision for follow up to ensure timely implementation and to determine effectiveness.

~~(H)~~ Coordination with the Commission.

(f) System Safety Program Plan Verification. The system safety program plan verification section of the SSPP shall contain the following:

(I) A process to ensure that the design and construction of new systems and/or extensions comply with the SSPP.

(II) A process to ensure compliance of existing operating systems with the SSPP.

(III) A process to ensure that safety audits and review of the SSPP are conducted including consideration of occupational safety and health, fire protection, safety training, and safety information and reporting.

~~(g)~~ Management of Security Activities. The management of security activities section of the SSPP shall contain the following:

~~(I)~~ A security program that shows the division of security responsibilities.

~~(II)~~ A plan for proactive and reactive response.

~~(h)~~ Security Roles and Responsibilities. The security roles and responsibilities section of the SSPP shall contain the following:

~~(I)~~ Security planning activities including proactive and reactive measures.

~~(II)~~ Emergency response training, coordination and management both internal and external.

~~(III)~~ A process for threat and vulnerability identification, assessment and resolution.

~~(IV)~~ A process for the collection and analysis of security data.

~~(V)~~ A matrix of security related tasks that shows responsibility.

~~(i)~~ Security-related Activities of Other Departments. The security-related activities of other departments section of the SSPP shall contain the following:

- ~~(I) Security related activities of other departments of the transit agency.~~
- ~~(II) A matrix of security related tasks that shows department responsibility.~~
- ~~(j) Evaluation of Security Component of the SSPP. The evaluation of security component of the SSPP section of the SSPP shall contain the following:~~
 - ~~(I) An internal review process.~~
 - ~~(II) An external review process.~~

7344. System Security Plan.

Every transit agency shall establish and maintain a written system security plan, as a separate document from the SSPP, that complies with the program standard and includes the following sections:

- ~~(a) **[§ 659.23 a]** Introduction. The Introduction section of the SSP shall contain the following:~~
 - ~~(I) A policy statement supporting the SSP from the General Manager/Executive Director of the transit agency.~~
 - ~~(II) A statement of the legal authority for the SSP.~~
 - ~~(III) A description of the purpose and scope of the SSP.~~
 - ~~(IV) A clear definition of the goals and objectives of the SSP.~~
 - ~~(V) A statement of management responsibilities to ensure the goals and objectives of the SSP are achieved.~~
 - ~~(VI) Specifications of policies in place to support implementation of the security portions of the SSP and a description of the specific activities required to implement the system security program including:
 - ~~(A) Tasks to be performed by the rail transit security function, by position and management accountability, specified in matrices and narrative format.~~
 - ~~(B) Security-related tasks to be performed by other rail transit departments, by position and management accountability, specified in matrices and narrative format.~~~~
 - ~~(VII) Identification of the procedures for controlling updates and modifications to the SSP including specification of an annual assessment of whether the SSP should be updated and a requirement of coordination with the Commission, including timeframes for submission, revision, and approval.~~
- ~~(b) System Security Department Activities of the Transit Agency. The system security department activities of the transit agency section of the SSP shall contain the following:~~
 - ~~(I) **[§ 659.23 b]** A description of the transit agency's process for identifying and managing threats and vulnerabilities, both proactive and reactive, during operations, and for major projects, extensions, new vehicles and equipment including integration with the safety~~

certification process. Such process must include the process for assessment and resolution of the threats and vulnerabilities identified.

- (II) [§ 659.23 c] Identification of controls in place that address the personal security of passengers and employees.
 - (III) [§ 659.23 d] Documentation of the transit agency's process for conducting internal security reviews to evaluate compliance and measure the effectiveness of the SSP.
 - (IV) [§ 659.23 e] Documentation of the transit agency's process for making its SSP and accompanying procedures available to the Commission for review and approval.
 - (V) Emergency response training, coordination and management both internal and external.
 - (VI) A process for the collection and analysis of security data.
- (c) Security-related Activities of Other Departments of the transit agency. The security-related activities of other departments section of the SSP shall contain the following:
- (I) Security related activities of other departments of the transit agency.
 - (II) A matrix of security related tasks that shows department responsibility.
- (d) System Security Plan Implementation and Maintenance. The system security plan implementation and maintenance section of the SSP shall contain the following:
- (I) Program schedule for implementation and maintenance of the SSP which shall contain the following:
 - (A) Specified time intervals between SSP reviews to determine whether or not the SSP needs to be revised because of changed operating conditions and/or system modifications.
 - (B) A detailed description of the SSP revision process including the identification of the persons responsible for initiating, developing, and approving changes to the SSP.
 - (C) A statement that the Commission will be notified of all changes to the SSP and supplied with a copy of all revised pages.
 - (II) A description of the process and procedure for conducting planned and scheduled internal security reviews to evaluate compliance with the SSP and comply with rule 7349 including the review and modification of the SSP based upon audit results. This procedure shall include the following:
 - (A) Identification of departments and functions subject to review.
 - (B) The transit agency's schedule for conducting internal reviews and the responsibility for scheduling such reviews.
 - (C) A description of the process for conducting reviews, including the development of written checklists and procedures and the issuing of findings.

- (D) Written documentation of the process and procedures of issuing audit findings including an evaluation of the adequacy and effectiveness of the SSP.
- (E) A process for the review of reporting requirements.
- (F) A process for tracking the status of implemented recommendations.
- (G) A requirement for an annual audit report, a copy of which must be submitted to the Commission by February 15 each year, which summarizes the results of the internal audits performed during the previous year, including a summary of required corrective actions taken, if any, and provision for follow up to ensure timely implementation and to determine effectiveness.
- (H) Coordination with the Commission.
- (e) System Security Plan Verification. The system security plan verification section of the SSP shall contain the following:
 - (I) A process to ensure that the design and construction of new systems and/or extensions comply with the SSP.
 - (II) A process to ensure compliance of existing operating systems with the SSP.
- (f) A process to ensure that security audits and review of the SSP are conducted including consideration of security aspects of occupational safety and health, fire protection, safety training, and safety information and reporting.

73454. Submittal and Review of the System Safety Program Plan and System Security Plan.

- (a) [§ 659.25(a)] On or before November 1 of the first year of operation for new systems, and each November 1 thereafter, each transit agency subject to rules 7341 through 7354 ~~these rules~~ shall file its SSPP and SSP as separate an-applications for Commission approval. The Commission shall give ten days notice of the filing of the applications.
- (b) [§ 659.25(a)] On or before December 20th of the year in which any applications for SSPP or SSP approval are filed, the Commission shall review each plan and shall approve those plans that comply with rules 7340 through 7354. All plans approved shall be approved by Commission order.
- (c) In the event that the Commission finds that the SSPP does not comply with rule 7343 or that the SSP does not comply with rule 7344, the Commission shall specify the sections not in compliance, recommend appropriate modifications and/or additions necessary to bring the SSPP or the SSP into compliance, and set a time frame for bringing the SSPP or SSP into compliance.
- (d) [§ 659.25(b) and (c) and 659.43 (a)] On or before January 1st of each year, the Commission shall certify to the FTA that each rail fixed guideway system subject to 49 C.F.R. Part 659 has a SSPP and SSP that conforms to the program standard ~~SSPS~~ set forth in rules 73403 through 7354, or in the alternative, when the rail fixed guideway system will have the SSPP or SSP revised and in compliance. Upon receipt of the revised SSPP or SSP, the Commission will review the revised SSPP or SSP. If the Commission finds that the revised SSPP or SSP is in compliance with rules 7343, and 7344, the Commission shall approve the SSPP or SSP and certify to the FTA that the SSPP or SSP is in compliance. If the Commission finds that the

revised SSPP or SSP is not in compliance, the Commission shall set the application for hearing and enter an appropriate order resolving the matter.

- (e) All materials submitted to the Commission in accordance with rule 7345 which pertain to security planning shall be submitted under seal in accordance with Commission rule 1100 regarding confidentiality. The Commission and its staff shall treat such reports as confidential pursuant to Commission rule 1100, and §24-72-204, C.R.S., and 49 C.F.R. Part 15 and Part 1520. All materials submitted to the Commission in accordance with rule 7345 which pertain to security planning shall be returned to the transit agency upon review and approval by the Commission. The transit agency shall keep at least one original copy of every security plan submitted to the Commission under rule 7345 for review and inspection by the Commission. The Commission shall not retain or image any material submitted to the Commission in accordance with rule 7345 that has been marked as sensitive security information pursuant to 49 C.F.R. Part 15 and Part 1520.

7346. Corrective Action Plan

§ 659.37 Every transit agency required to develop a CAP shall develop a CAP that is based upon a hazard analysis, if necessary, and that complies with the following standards:

- (a) CAP Development. The transit agency shall develop a CAP for the following:
- (I) Results from investigations, in which identified causal and contributing factors are determined by the transit agency or Commission as requiring corrective actions.
 - (II) Findings from safety and security reviews performed by the oversight agency.
- (b) Each CAP and associated hazard analysis, if necessary, shall identify:
- (I) The element or activity identified including the assigned tracking number.
 - (II) The action to be taken by the transit agency to prevent recurrence and/or mitigate the element, activity, or hazardous condition(s).
 - (III) The interim measures the transit agency plans to implement to prevent recurrence before the final corrective actions are implemented.
 - (IV) The implementation schedule.
 - (V) The method(s) the transit agency will use to validate the effectiveness of the corrective measures.
 - (VI) The individual or department responsible for the implementation.
 - (VII) Any specific actions required by the Commission.
- (c) A CAP must be reviewed and formally approved by the Commission.
- (I) The Commission shall open an investigation docket and notify the transit agency by order that a CAP is required.
 - (II) The transit agency shall file a CAP and associated hazard analysis, if necessary, in the investigation docket within 30 days of the Commission order.

- (III) The Commission shall issue an order in the investigation docket approving or rejecting the CAP within 15 days of receiving the transit agency's CAP.
- (IV) If the CAP is rejected, the Commission order rejecting the CAP will provide the reasons for rejection and recommended revisions.
- (V) If the CAP is rejected, the transit agency shall submit a revised CAP within 15 days of the Commission's order rejecting the CAP.
- (VI) The Commission shall issue an order in the investigation docket approving or rejecting the revised CAP within 10 days of receiving the transit agency's CAP.
- (VII) If the revised CAP is rejected, the Commission shall initiate its dispute resolution process.
- (d) The Commission's dispute resolution process will be used to resolve disputes between the Commission and transit agency resulting from the development or enforcement of a CAP.
- (e) The Commission will evaluate the findings from any NTSB accident investigation and will determine if a CAP should be developed by either the Commission or the transit agency to address the NTSB findings.
- (f) The transit agency must provide to the Commission the following:

 - (I) Verification that the corrective action(s) has been implemented as described in the CAP, or that a proposed alternate action(s) has been implemented subject to Commission review and approval.
 - (II) Periodic reports requested by the Commission describing the status of each corrective action(s) not completely implemented as described in the CAP.
- (g) The Commission will monitor and track the implementation of each approved CAP using the following procedure:

 - (I) The transit agency shall submit quarterly reports on the status of the actions and activities contained in the CAP. The quarterly report shall address, at a minimum, the following:

 - (A) Activity associated with the CAP that has occurred in the interim or since the last report.
 - (B) A statement as to whether the actions and activities are on-schedule, behind schedule, or ahead of schedule.
 - (C) If actions and activities are behind schedule, a statement as to the causes of the delay and the planned measures to meet the schedule.
 - (D) Any changes in key personnel assigned to implementing the CAP.
 - (E) Any management issues.
 - (F) Effectiveness of interim safety measures.

- (G) A statement as to the effectiveness of actions and/or activities that have already been implemented.
- (H) If a like accident and/or hazardous condition has been identified subsequently to the CAP, a statement about the possible impacts on the CAP.
- (II) The Commission shall actively monitor the progress of the CAP by meeting periodically with the transit agency and shall develop a monitoring plan in cooperation with the transit agency.
- (III) All CAP related correspondence between the Commission and the transit agency will include a tracking number.
- (IV) The Commission shall maintain a computerized log for tracking and recordkeeping of CAP's and shall enter and update all quarterly status reports, additional information, and information from the finalization of the CAP and shall check due dates.

7347. Accident Notification.

- (a) **[§ 659.33]** The Commission shall require the transit agency to notify the Commission's staff within two hours of any incident involving a rail transit vehicle or taking place on rail transit-controlled property where one or more of the following occurs:
 - (I) A fatality at the scene; or where an individual is confirmed dead within thirty days of a rail transit-related incident.
 - (II) Injuries requiring immediate medical attention away from the scene for two or more individuals.
 - (III) Property damage to rail transit vehicles, non-rail transit vehicles, other rail transit property or facilities, and non-transit property that equals or exceeds \$25,000.
 - (IV) An evacuation due to life safety reasons.
 - (V) A collision at a grade crossing.
 - (VI) A main-line derailment.
 - (VII) A collision with an individual on a rail right of way.
 - (VIII) A collision between a rail transit vehicle and a second rail transit vehicle, or a rail transit non-revenue vehicle.
- (b) The Commission shall require each transit agency that shares track with the general railroad system and are subject to FRA notification requirements to notify the Commission within two hours of an incident for which the transit agency must also notify the FRA.
- (c) The Commission's required method of notification of accidents is by telephone first within two hours followed by facsimile or electronic mail of any initial notification checklists and information sheets which shall contain the following information.
 - (I) The nature of the accident as described in rule 7347(a)(I through VIII) above.

(II) The time, date, and location of the accident.

(III) The time and date of the notification to the Commission.

(IV) A description of the vehicles, rail transit vehicles, passengers, individuals, rail transit-controlled property, and other property involved in the accident and the direction they were traveling at the time of the incident, if known.

73485. Investigations and Reporting Procedures for Accidents and ~~Unacceptable Hazardous~~ Conditions.

- (a) [§ 659.35 a] The Commission shall investigate, or cause to be investigated, at a minimum, any incident involving a rail transit vehicle or taking place on rail transit-controlled property meeting the notification thresholds identified in rule 7347(a) or any hazard that meets the definition outlined in rule 7341 and to which rules 7343(c)(II) and (III) apply. For purposes of this rule, the terms "accident" and "unacceptable hazardous condition" shall have the meanings given by 49 C.F.R. 659.5.
- (b) [§ 659.35 b] The Commission shall use its own investigation procedures or those that have been formally adopted from the transit agency and that have been submitted to FTA. Reportable accidents and unacceptable hazardous conditions are those that are associated with the revenue service operation of rail transit vehicles and that meet or exceed the following thresholds:
- (I) ~~any accident resulting in a fatality or serious injury requiring immediate medical treatment away from the scene of the accident;~~
- (II) ~~any accident, collision, derailment, or fire that causes property damage in excess of \$100,000; or~~
- (III) ~~any unacceptable hazardous condition that has been identified by the transit agency and that could cause death or injury to passengers or employees if not immediately corrected.~~
- (c) Each transit agency shall notify the Commission's staff of ~~reportable accidents and unacceptable hazardous conditions~~ by telephone or facsimile as soon as practicable, but not later than 24 hours from the time of occurrence or discovery.
- (d) Investigating accidents and ~~unacceptable hazardous conditions~~.
- (I) Each transit agency shall investigate ~~reportable accidents and unacceptable hazardous conditions~~ on behalf of the Commission's staff. The Commission's staff may also perform separate, independent investigations at its own discretion.
- (II) When investigating an accident ~~as defined in rule 7347(a) that resulted in a fatality or serious injury, as those terms are used in subparagraph (b)(I) of this rule~~, the transit agency shall give prior sufficient telephone or facsimile notice to the Commission's staff of the times that an accident investigation team will convene to conduct interviews, inspections, examinations, or tests to determine the cause of the accident.
- (III) The transit agency shall investigate each ~~unacceptable hazardous condition~~ in compliance with the procedures contained in the transit agency's approved SSPP.
- (IV) The transit agency shall document its investigation in a written report. The transit agency shall submit the report to the Commission on forms available from the Commission. The report shall be submitted within 45 days after the accident occurred or the ~~unacceptable~~

~~hazardous condition~~ was discovered. Reports shall be submitted for all ~~reportable~~ accidents and ~~unacceptable hazardous conditions~~. The Accident/~~Unacceptable Hazardous Condition~~ Report shall contain the following:

- (A) The name of the transit agency, and the name of the rail fixed guideway system if different.
- (B) An indication showing whether the report concerns an accident or whether it concerns an ~~unacceptable hazardous condition~~.
- (C) The following accident data, if applicable: the accident date and time; the accident's location; the type of accident; whether the accident occurred at a grade crossing; the number of fatalities; the number of injuries; and the estimated damage in dollars to the rail fixed guideway system, ~~or vehicles, or other rail transit-controlled property~~.
- (D) The following ~~unacceptable hazardous condition~~ data, if applicable: the date the ~~hazard condition~~ was identified; the location of the ~~hazard condition~~; the type of ~~hazard condition~~; the severity of the ~~hazard condition~~; the name of the person who identified the ~~hazard condition~~; the manner in which such person identified the ~~hazard condition~~; and the probability that the ~~hazard condition~~ could cause death or injury to passengers or employees if not immediately corrected. ~~Ratings of Severity and Probability shall be given in accordance with checklist item No. 7 (Hazard Identification/ Resolution Process), in the American Public Transit Association's "Manual for the Development of Rail Transit System Safety Program Plans" (see rule 7342).~~
- (E) A written description of the accident or ~~unacceptable hazardous condition~~.
- (F) A diagrammatic sketch of the accident or ~~unacceptable hazardous condition~~.
- (G) An explanation of the accident or ~~unacceptable hazardous condition's~~ most probable cause and any additional contributing causes.
- (H) A ~~CAP corrective action plan~~ to prevent recurrence of the accident or to eliminate the ~~unacceptable hazardous condition~~, if a determination is made that a ~~CAP corrective action plan~~ is warranted, or a statement that a ~~CAP corrective action plan~~ is not necessary.
- (I) A copy of the schedule for the implementation of the ~~CAP corrective action plan~~ if a ~~CAP corrective action plan~~ is warranted.
- (J) A signature and title of the person authorized to certify the accuracy of the report, together with the date the report is signed.
- (K) Copies of all photographs regarding the accident or ~~unacceptable hazardous condition~~, or a statement that no such photographs exist.
- (L) A copy of any evidence that exists in the form of magnetic media, such as video or audio recordings of the event, or a statement that none exists.
- (M) Copies of any report from an outside agency that was involved in the investigation (e.g., local police investigation reports or coroners' reports), or a

statement explaining why none is available. Copies of police reports must include, if available, information regarding whether a citation or notice of violation was issued and to whom it was issued.

- (N) A statement regarding whether drug and/or alcohol testing was performed on any transit agency employees or contractors in connection with the accident, and copies of the results of any such drug and/or alcohol tests or an affidavit reporting the results of any such testing.
- (O) Copies of any witness statements.
- (P) Copies of any other information, reports, or statements that would aid in the formation of a conclusion as to the cause of the accident.
- (V) The transit agency shall submit its investigation report, including its CAP and implementation schedule, to the Rail/Transit Safety Section of the Commission. Such report shall be submitted under seal and identified as a Highly Confidential Report filed in accordance with extraordinary protections afforded by Commission rules and §40-18-104, C.R.S. Upon submission, such report is an investigative report of the Commission, defined in § 40-18-104, that shall be afforded extraordinary protections as highly confidential information. Unless modified by subsequent Commission decision, such extraordinary protections shall restrict access to the Highly Confidential Report only to Commissioners, Administrative Law Judges, Commission Advisory Staff, Commission Litigation Staff, and legal counsel for each of these groups. ~~The transit agency shall submit its investigation report, including its CAP corrective action plan and implementation schedule, to the Rail/Transit Safety Section of the Commission. Such report shall be submitted under seal in compliance with the confidentiality provisions of the Commission's Rules Regulating Practice and Procedure. The Commission and its staff shall treat such reports as confidential pursuant to § 40-18-104, C.R.S.~~
- (VI) Commission staff may request that the Commission consider the transit agency's investigation and report thereon. The Commission may, after considering the transit agency's investigation and report, make such order as it deems necessary, including an order mandating a staff investigation. If a staff investigation is ordered, the Commission shall consider staff's report and issue an appropriate order. Nothing in this subparagraph shall preclude Commission staff from, in its discretion, performing its own investigation without an order of the Commission.
- (e) The threshold for the Commission's investigation of accidents ~~or unacceptable hazardous conditions~~ is the same as the transit agency's threshold for reporting accidents and ~~unacceptable hazardous conditions~~ pursuant to rule 7347(a) paragraph (b). All hazards shall be investigated.
- (f) [§ 659.35 c] The Commission authorizes the transit agency to conduct investigations on the Commission's behalf and requires the transit agency to use investigation procedures that have been formally approved by the Commission.
- (g) [§ 659.35 d] Each investigation must be documented in a final report that includes a description of investigation activities, identified causal and contributing factors, and a corrective action plan and hazard analysis if warranted.
- (h) [§ 659.35 e] The Commission shall formally adopt a final investigation report for each investigation. Such adoption shall include the following:

- (I) If the Commission has conducted the investigation, the Commission shall formally transmit its final investigation report to the transit agency.
- (II) If the Commission has authorized an entity other than the Commission (including the transit agency) to conduct the investigation on the Commission's behalf, the Commission shall review and formally adopt the final investigation report.
- (III) If the Commission does not concur with the findings of the transit agency investigation report, the Commission shall either:
 - (A) Conduct a Commission investigation according to rule 7348; or
 - (B) Formally transmit the Commission's dissent to the findings of the investigation, report the Commission's dissent to the transit agency, and negotiate with the transit agency until a resolution on the findings is reached.

(i) [§ 659.35 f] The Commission shall require periodic status reports that document investigation activities and findings on a quarterly basis.

7349. Internal Safety and Security Reviews.

- (a) [§ 659.27 a] The transit agency is required to develop and document the process for the performance of on-going internal safety and security reviews in its SSPP and SSP.
- (b) [§ 659.27 b] The internal safety and security review process must:
 - (I) Describe the process used by the transit agency to determine if all identified elements of its SSPP and SSP are performing as intended.
 - (II) Ensure that all elements of the SSPP and SSP are reviewed in an on-going manner and completed over a three-year cycle.
- (c) [§ 659.27 c] The transit agency must notify the Commission at least 30 days before the conduct of scheduled internal safety and security reviews.
- (d) [§ 659.27 d] The transit agency shall submit to the Commission any checklists or procedures it will use during the safety portion of its review prior to such review.
- (e) [§ 659.27 e] The transit agency shall make available to the Commission any checklists or procedures subject to the security portion of its review, consistent with 49 C.F.R. §659.23(e).
- (f) [§ 659.27 f] The Commission requires the transit agency to annually submit a report documenting internal safety and security review activities and the status of subsequent findings and corrective actions. The security part of this report must be made available for Commission review consistent with 49 C.F.R. §659.23(e).
- (g) [§ 659.27 g] The annual report must be accompanied by a formal letter of certification signed by the transit agency's chief executive, indicating that the transit agency is in compliance with its system safety program plan and system security plan.
- (h) [§ 659.27 h] If the transit agency determines that findings from its internal safety and security reviews indicate that the transit agency is not in compliance with its SSPP, the chief executive must identify the activities the transit agency will take to achieve compliance.

- (i) [§ 659.27 i] The Commission must formally review and approve the annual report.
 - (I) The transit agency shall file its annual report on or before February 15 of the first year of operation for new systems, and each February 15 thereafter as an application for Commission approval. The Commission shall give ten days notice of the filing of the application.
 - (II) On or before April 5 of the year in which the application for approval of the annual report is filed, the Commission shall review the annual report and shall approve those annual reports that conform to rule 7349.
 - (III) In the event the Commission finds that the annual report does not comply with rule 7349, the Commission shall specify the sections not in compliance, recommend appropriate modifications and/or additions necessary to bring the annual report into compliance, and set a time frame for bringing the annual report into compliance.

735046. Commission Safety and Security Reviews.

[§659.29] At least every three years, beginning with the initiation of transit agency passenger operations, the Commission shall complete an on-site safety review of each transit agency's implementation of its SSPP and SSP in an on-going manner. At the conclusion of the three-year review cycle during which all parts of the SSPP and SSP have been reviewed, the Commission shall ~~and~~ prepare and issue a report containing findings and recommendations resulting from that review, which at a minimum must include an analysis of the effectiveness of the SSPP and SSP, and a determination of whether either should be updated.

- (a) [§659.15(b)(4)] The Commission shall conduct six semi-annual safety and security review audits during the three-year review process. The first five semi-annual audits shall involve a review of five to nine areas of interest such that the entire SSPP and SSP are fully examined during the first five semi-annual audits. The sixth semi-annual audit shall be comprised of a review of the auditing process and procedures used during the previous five semi-annual audits in preparation for the next three-year review process.
- (b) For each semi-annual audit during the three-year review process, the Commission staff shall prepare audit checklists that identify the safety and security areas of interest and the compliance criteria to be used for the audit during the specific semi-annual audit.
- (c) For each semi-annual audit during the three-year review process, the Commission staff shall prepare a draft report for the semi-annual audit with completed audit checklists and audit findings. This draft report will be provided to the transit agency for a 30 day review and comment by the transit agency. The transit agency shall provide written responses to all audit report recommendations, any written comments, and proposed CAP's and implementation schedules within 30 days of receipt of the Commission's audit report. The transit agency shall also be allowed to make corrections to any findings outlined in the draft report within the 30 day review period. The transit agency must provide written documentation of the actions implemented to bring any findings into compliance with the accepted criteria as part of the transit agency's written response for the transit agency to avoid inclusion of such findings as documented findings in the final report and avoid development of CAP's for those findings in the final report. The Commission shall incorporate comments, CAP's and implementation schedules in a final audit report for the semi-annual audit. The Commission shall approve the final audit report.
- (d) The transit agency shall notify the Commission prior to the start of any transit agency internal safety and security review as outlined in rule 7349(c).

- (e) The Commission's safety and security review audits may be conducted in conjunction with the transit agency's internal safety and security reviews.
- (I) If the transit agency chooses to conduct its internal safety and security reviews in conjunction with the Commission's safety and security review audit, the transit agency shall inform the Commission of its intentions 30 days before the start of the Commission's audit.
- (II) If the transit agency chooses to conduct its internal safety and security reviews in conjunction with the Commission's safety and security review audit, such combined reviews will consist of the following:
- (A) Pre-audit meetings where areas of interest and checklists can be compared and/or combined and pertinent documents reviewed.
- (B) Joint on-site audit(s) of the areas of interest and checklist items.
- (C) Post-audit meetings where the Commission and the transit agency shall present audit findings and recommended corrective actions.
- (D) Submittal of the joint final audit report for agreement between the Commission and transit agency, or submittal of separate final audit reports for disagreement between the Commission and transit agency.
- (III) At the conclusion of the three-year review cycle, the Commission shall prepare and issue a report as outlined in rule 7350.

7351. Safety Oversight of Rail Fixed Guideway System Design, Construction, Pre-Operational Testing and Operation Start-Up.

The Commission shall provide safety oversight guidance of rail fixed guideway system design, construction, pre-operational testing and operation start-up.

735247. Inspection of Records.

All transit agency records required by these rules shall be made available upon request to authorized personnel of the Commission.

735348. Safety Data Acquisition/Analysis.

The transit agency shall review and analyze all information and documentation required by these rules. The information or data collected shall be analyzed for potential safety impacts, and identified areas of concern shall be reported to appropriate personnel for investigation and resolution.

735449. Variances.

A transit agency may request a variance from these rules. A transit agency seeking such a variance shall comply with the variance request procedures contained in Commission's Rules Regulating Practice and Procedure.

735~~50~~. – 7399. [Reserved].