

Decision No. R21-0308

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 21R-0100R

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

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
G. HARRIS ADAMS
CLOSING PROCEEDING**

Mailed Date: May 24, 2021

I. STATEMENT

1. On March 15, 2021, the Public Utilities Commission issued the Notice of Proposed Rulemaking (NOPR) that commenced this proceeding. *See* Decision No. C21-0129. The Commission referred this matter to an Administrative Law Judge (ALJ) and scheduled a hearing for May 17, 2021. The purpose of the proposed rules is to implement civil penalties for noncompliance with rail crossing safety regulations, among other amendments. *See* Decision No. C21-0129.

2. Written comments were filed by several interested person, including the Union Pacific Railroad Company (UPRR) on April 14, 2021. The BNSF Railway Company filed comments on April 14, 2021 and joins in, and supports, the comments of UPRR.

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

II. FINDINGS, DISCUSSION, AND CONCLUSIONS

A. Discussion

4. At the scheduled time and place, the hearing was convened.

5. After extensive introductory, general, and rule specific oral and written comments, UPRR raised several concerns regarding the Commission's proposed rules.

6. Among those concerns, UPRR comments regarding notification to the general assembly:

One item of uncertainty is whether the requirements within C.R.S. § 24-4-103(a.5) is fulfilled. Since these proposed rules seek to increase fees or fines, the PUC (agency) must notify the members of the general assembly of the proposed rule. This should have already occurred at [the] time of the NOPR. Thus, Union Pacific seeks to confirm that this requirement was met.

UPRR's Comments at page 12.

7. The Colorado Legislature (Legislature) enacted Senate Bill 19-236, in part, amending § 40-4-106, C.R.S., to specify Commission authority to impose civil penalties against a railroad for failure to comply with safety regulations:

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

§ 40-4-106(1)(b) C.R.S. (emphasis added).

8. Separately, § 24-4-103(3)(a.5), C.R.S., provides:

If the agency proposes a rule to **increase** fees or fines, at the time of giving notice of proposed rule-making or within ten days following the adoption of an emergency or temporary rule that increases fees or fines, the agency shall send a written or electronic notification to each member of the general assembly notifying the members of the general assembly of the proposed rule or the adoption of an emergency rule and specifying the amount of the increase in the fees or fines.

§ 24-4-103(3)(a.5), C.R.S. (emphasis added).

9. In rules implementing legislation, the Commission proposes rules permitting imposition of civil penalties upon a railroad company for failing to comply with railroad crossing safety regulations. The undersigned recognizes a potential ambiguity as to whether implementing a statute by promulgating a rule to impose is within the scope of proposing an increase, as addressed in the State Administrative Procedures Act, 24-4-101 *et. seq.*, C.R.S.

10. This proceeding is in early phases with substantial work ahead. The proposed rules will have broad applicability across the State of Colorado and substantial comment thus far indicates a variety of concerns yet to be addressed.

11. The undersigned found no reported opinion addressing the scope of notice required and UPRR cites none. UPRR's comment can readily be resolved by closing this proceeding, reissuing the NOPR, and providing notice to the General Assembly.

12. During the hearing on May 17, 2021, the undersigned announced continuance of the hearing to June 24, 2021 at 1:00 p.m. Closing the proceeding and requesting that the Commission reissue the NOPR to provide procedural clarity now will cause no harm and will introduce only a short additional delay. Further communication with the Legislature can only further encourage a transparent and open processes, even if not statutorily required. During the interim, the Commission may exercise statutory authority as it has in the past.

13. Based on the foregoing, the undersigned concludes the most prudent course is to close the proceeding and request the Commission reissue the NOPR.

14. This Recommended Decision will both memorialize the oral continuance of the hearing and vacate the same so the proceeding can be closed most expeditiously.

15. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

III. ORDER

A. The Commission Orders That:

1. Continuance of the hearing in this matter orally ruled during the noticed hearing to June 24, 2021 at 1:00 p.m. is simultaneously memorialized and vacated.

2. Proceeding No. 14R-0100R is closed.

3. 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.

4. 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.

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

G. HARRIS ADAMS

Administrative Law Judge

ATTEST: A TRUE COPY

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

Doug Dean,
Director