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BEFORE THE ARIZONA CORPORATION COMMISSION
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AZ CORP COMMISSION
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Arizona Corporation Commission
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7 IN THE MATTER OF THE APPLICATION OF
8 THE ARIZONA DEPARTMENT OF
9 TRANSPORTATION TO UPGRADE AN
10 EXISTING CROSSING OF THE BURLINGTON
11 NORTHERN AND SANTA FE RAILWAY
12 COMPANY AT 35TH AVENUE AND US 60 IN
13 THE CITY OF PHOENIX, MARICOPA
14 COUNTY, ARIZONA, AT AAR/DOT NO.
15 R1531C106.

DOCKET NO. RR-02635B-07-0437

**STAFF RESPONSE TO BNSF'S
REQUEST FOR OFFICIAL NOTICE OF
FEDERAL AND STATE LAWS
GOVERNING COST ALLOCATION FOR
THE INSTALLATION OF AUTOMATIC
WARNING DEVICES AT PUBLIC
RAILROAD CROSSINGS**

15 Pursuant to the verbal order of Administrative Law Judge ("ALJ") Marc Stern at the May 27,
16 2008 evidentiary hearing in the above captioned matter, BNSF Railway Company ("BNSF") filed
17 with the Arizona Corporation Commission ("Commission") a Request for Judicial Notice of Federal
18 and State Laws Governing Cost Allocation for the Installation of Automatic Warning Devices at
19 Public Railroad Crossings ("Request") on June 10, 2008. As additionally directed by ALJ Stern,
20 Commission Railroad Safety Section Staff ("Staff") hereby provides a response to BNSF's Request.
21 Staff notes that the discussion provided below is for the purposes of clarification and Staff does not
22 object to official notice of the laws referenced by BNSF.

23 First, Staff notes that the Arizona Corporation Commission ("Commission") has the exclusive
24 power to "determine and prescribe the manner...and the terms of installation, operation, maintenance,
25 use and protection of [railway] crossings." A.R.S. § 40-337(B)(1). See *Southern Pacific*
26 *Transportation Company v. Arizona Corporation Commission*, 173 Ariz. 630, 632 (Ariz.App.1992).
27 Therefore, the Commission has the discretion to determine appropriate upgrades to this crossing
28 regardless of whether federal monies will be used.

1 On the cost allocation issue, BNSF points to 23 C.F.R. § 646.210(a) for the proposition that
2 state laws requiring railroads to share in the cost of work for the elimination of hazards at railroad-
3 highway crossings are preempted whenever federal-aid funds, such as the Section 130 funds, are used
4 for grade crossing improvements. Staff would clarify that Section 130 already contains language
5 designating the proportion of the railroad's cost allocation. As provided by 23 U.S.C. § 130(b), "The
6 percentage so determined shall in no case exceed 10 per centum". Therefore, Section 130 allows for
7 contribution by the railroad up to 10% even when federal monies are used for a federal-aid project.

8 Further, 23 C.F.R. § 646.210 concerns funding of federal railroad-highway projects. The fact
9 that federal funds may be available for a project does not transform the project into a federal project.
10 As related by Staff during the evidentiary hearing on this matter, the use of available federal funding
11 may be foregone by taking the project out of the Section 130 regime. However, Staff does not
12 recommend doing so as that would necessitate determining additional alternative funding sources for
13 the remainder of the project costs.

14 Finally, Staff does not agree with BNSF that, pursuant to A.R.S. § 40-337.01(B), the
15 existence of an agreement between BNSF and ADOT as to the allocation of costs constrains the
16 Commission's cost apportionment authority. Although the parties have already agreed that ADOT
17 will pay 100% of the Project costs using Federal Section 130 funds, the Commission has the
18 authority to determine the appropriate allocation of costs subject to the prescribed limitations of
19 A.R.S. § 40-337.01(B) by foregoing use of the federal funds. A.R.S. 40-337.01(A). However, if
20 Federal Section 130 funds are used, the Commission has the authority to determine the appropriate
21 allocation of funds subject to the limitations set out in 23 U.S.C. § 130(b) (no more than 10%
22 allocated to the railroad).

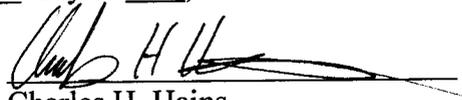
23 A.R.S. §40-337.01 does not confine the Commission's authority to apportion costs solely
24 because parties to a crossing reach a prior agreement regarding the allocation. Rather, the statute
25 mandates that the Commission conduct a public hearing absent an agreement of all interested parties.
26 *Southern Pacific*, 173 Ariz. at 633. As stated by the court in *Southern Pacific*:

27 The legislature apparently did not intend to require the Commission to hold an
28 unnecessary hearing when the concerned parties had already agreed to install safety
equipment at a crossing. Conversely, where no agreement had been reached, a hearing
is necessary to avoid an ill-informed decision by the Commission made before it has

1 gathered relevant information and before it has heard the views of the interested
parties. *Id.* at 633-634.

2 Contrary to BNSF's contention, the existence of a prior agreement is an "exception to the hearing
3 requirement". *Id.* at 633. Clearly the Commission retains the discretion to appropriately re-apportion
4 the costs of automatic warning devices regardless of the existence of a prior agreement so long as a
5 hearing is held and the re-apportionment does not exceed the proportions set out in A.R.S. § 40-
6 337.01(B) and the proportions set out by 23 U.S.C. § 130(b) if Federal Section 130 funds are used.

7 RESPECTFULLY SUBMITTED this 24th day of June, 2008.

8 
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14 Original and thirteen (13) copies
of the foregoing were filed this
15 24th day of June, 2008 with:

16 Docket Control
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18 Copy of the foregoing mailed
19 this 24th day of June, 2008 to:

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