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EXCEPTION



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BEFORE THE ARIZONA CORPORATION COMMISSION

9 IN THE MATTER OF THE APPLICATION
 10 OF THE CITY OF FLAGSTAFF TO
 UPGRADE EXISTING RAILROAD
 11 CROSSING OF THE BNSF RAILWAY
 COMPANY AT STEVES BOULEVARD
 12 AND FANNING DRIVE IN THE CITY OF
 FLAGSTAFF, COCONINO COUNTY,
 13 ARIZONA DOT CROSSING NOS. 025099J
 AND 025129Y
 14

DOCKET NO. RR-02635B-09-0075

15
 16 **BNSF RAILWAY COMPANY'S**
 17
 18 **EXCEPTIONS TO**
 19 **RECOMMENDED OPINION AND ORDER**

October 1, 2009

Arizona Corporation Commission
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1 **INTRODUCTION**

2 Pursuant to A.A.C. R14-3-110(B), BNSF Railway Company (“BNSF”) hereby
3 submits these Exceptions in the above-captioned matter. BNSF supports several of the
4 factual and legal conclusions reached by the Administrative Law Judge (“ALJ”) in what is
5 a complex case of first impression for the Arizona Corporation Commission
6 (“Commission”). In her recommended opinion and order (“ROO”) dated September 22,
7 2009, the ALJ correctly concludes that Federal Railroad Administration’s (“FRA”) Train
8 Horn Rules¹ prevent the Commission from determining safety at public at-grade crossings
9 within quiet zones as they relate to the sounding of a horn, and that the Commission does
10 not have the authority to approve or deny the establishment of a quiet zone. ROO at
11 Findings of Fact ¶ 100, 102. Furthermore, the conclusions reached concerning the City’s
12 non-compliance with federal notice regulations for establishing quiet zones, and BNSF’s
13 non-involvement with the installation of the wayside horns by the City of Flagstaff, are
14 correct. ROO at Findings of Fact ¶ 103, 104. Finally, the ROO confirms that the public
15 highway-rail grade crossings scrutinized in this proceeding are and will be safe. ROO at
16 Findings of Fact ¶ 97, 98, 99.

17 Where the ROO falls short is in its conclusion that the Commission has subject
18 matter jurisdiction over the installation of wayside horns. According to the ROO, the
19 lynchpin of the Commission’s jurisdiction is 49 C.F.R Part 222.7(e), which reads
20 “Issuance of this part does not constitute federal preemption of administrative procedures
21 required under State law regarding the modification of installation of engineering
22 improvements at highway-rail grade crossings.” ROO at ¶ 101. The ROO concludes that
23 because the Commission’s hearing process is an “administrative procedure,” and because
24 the installation of a wayside horn is an “engineering improvement,” Commission

25 _____
26 ¹ 49 C.F.R Part 222.

1 jurisdiction applies. For reasons more fully addressed below, BNSF asserts that this
2 conclusion is not supported by the facts, or State and Federal law.

3 DISCUSSION

4 BNSF asserts that the Commission is without jurisdiction to adopt the Findings of
5 Fact at ¶ 97 and 101 because: (1) the installation of wayside horns at public highway-rail
6 grade crossings is governed by federal rules and procedures; (2) although 49 C.F.R. Part
7 222.7(e) allows for State administrative procedures that govern the modification or
8 installation of engineering improvements, the Commission's hearing process is not an
9 administrative procedure under Arizona law; and (3) the installation of a wayside horn is
10 not an engineering improvement, but rather a one-for-one substitution for the sounding of
11 a train horn, and falls outside the purview of 49 C.F.R. Part 222.7(e).

12 I. 49 C.F.R. Part 222.59 Governs the Procedure for Installing Wayside Horns at 13 Public Highway-Rail Grade Crossings.

14 49 CFR part 222.59(a)(1) states that "A wayside horn conforming to the
15 requirements of appendix E of this part may be used in lieu of a locomotive horn at any
16 highway-rail grade crossing equipped with an active warning system consisting of, at a
17 minimum, flashing lights and gates." Nothing in 49 C.F.R. Part 222.59 requires that a
18 Public Authority or railroad obtain authorization from the state agency with responsibility
19 for public crossing safety before installing the wayside horn, whether or not the public
20 highway-rail grade crossing is included within a quiet zone. In fact, the only requirement
21 set forth in 49 C.F.R. Part 222.59 is one of notice. The Notice of Intent (NOI) requires:
22 (1) the date on which the wayside horn will become operational, (2) identification of the
23 public at-grade crossing by both the U.S. DOT National Highway Grade Crossing
24 Inventory Number and street or highway name, and (3) that the NOI be provided to
25 affected railroads, the Arizona Department of Transportation and the Commission at least

26

1 twenty-one (21) days in advance of the wayside horn becoming operational.² 49 CFR Part
2 222.59(b) and 222.59(c).

3 If the FRA intended for States to be involved in the process of approving the
4 installation of wayside horns at public highway-rail grade crossings, then clearly the Train
5 Horn Rules would contain more than just the notice provisions found in 49 C.F.R. Part
6 222.59. However, wayside horns need only conform to the federal requirements
7 contained in Appendix E, and be installed only at public highway-rail grade crossing
8 equipped with an active warning system that has, at a minimum, flashing lights and gates.
9 In finding that “the use of wayside horns at these crossings is appropriate and will help
10 ensure the continued safety of the crossings, which is in the public interest,” the
11 Commission is making a safety determination about the sounding of a horn that has
12 already been made by the FRA, and which the ROO itself recognizes should be divorced
13 from the inquiry when reviewing such applications. ROO at ¶ 97; footnote 34. As more
14 fully addressed below, the express exception to federal preemption found in 49 C.F.R.
15 part 222.7(e) does not grant the Commission authority to approve or deny the installation
16 of wayside horns despite the conclusions in the ROO to the contrary.

17 **II. Arizona Case Law Establishes that the Commission’s Hearing and Approval**
18 **Process is a Judicial or Quasi-judicial Process, not an Administrative One.**

19 Despite citations to two Arizona Supreme Court (“Court”) cases holding that the
20 Commission acts judicially, or in a quasi-judicial capacity, when rendering decisions or
21 orders, the ROO nonetheless concludes that the Commission’s process is an
22 “administrative one.” ROO at footnote 33. Unfortunately, the ROO fails to provide any
23

24 ² Prior to the FRA adopting revised notice requirements for installation of wayside horns in the
25 2005 Final Rule, there was no requirement for a Public Authority to even notify the state agency
26 with responsibility for public highway-rail grade crossing safety. See “Use of Locomotive Horns
at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register 80 (April 27, 2005), p. 21874.

1 reasoning, legal basis or case law to reject the legal tenet that the Commission's hearing
2 and approval process is judicial or quasi-judicial in nature.³

3 In *Arizona Public Service Co. v. Southern Union Gas Co.*, 76 Ariz. 373, 377, 265
4 P.2d 435, 438 (1954), the Court held that "the corporation commission in rendering its
5 decision **acts judicially** and any matters decided are conclusive, subject only to court test
6 in the manner provided by section 69-247, supra, and in the absence of pursuing such
7 remedy the decision is not subject to collateral attack." [Emphasis added]. Likewise, in
8 *Johnson v. Betts et al., Corporation Commission*, 21 Ariz. 365, 371, 188 P. 271, 273
9 (1920), the Court held that "The commission, in hearing evidence in proof of the charge
10 laid against appellant, and evidence submitted by appellant in rebuttal thereof, and in
11 coming to a decision of the question, was acting in a **judicial** or **quasi judicial**
12 capacity..."]. [Emphasis added]. As these two cases demonstrate, a Commission
13 decision is subject only to a court test as long as statutory procedures are followed, and
14 any failure to pursue the remedy makes the final Commission decision immune from
15 collateral (judicial) attack. A Commission decision or order no longer subject to collateral
16 attack through a judicial appeal is the result of a judicial process.

17 The ROO concludes that the Train Horn Rules do not compromise a State's
18 traditional control over engineering standards or selection of traffic control devices at
19 public highway-rail crossings, and are not intended to preempt administrative procedures
20 required under state law regarding grade crossing warning system modifications and
21 installations. ROO at ¶ 89. Furthermore, the ROO notes that 49 C.F.R. Part 222.7 was
22 added in response to requests for clarification from state agencies concerning whether
23 Public Authorities could bypass approval processes of State agencies with exclusive
24

25 ³ The ALJ cites to Findings of Fact No. 95, but this paragraph deals with the City's Notice of
26 Intent and FRA requirements, and not whether the Commission's hearing process is
"administrative" as that term is used in 49 C.F.R. Part 222.7(e).

1 authority over grade crossing design and modification. *Id.* While these statements are
2 correct, further clarification is needed to discern the FRA's intent in addressing States'
3 concerns.

4 In explaining its adoption of the Final Rule and the exemption found in 49 C.F.R.
5 Part 222.7(e), the FRA used three examples of state requests for clarification. The first
6 two involved the State of Oregon and State of Missouri's Departments of Transportation,
7 and the issuance of administrative orders by their Staff. The third example used by the
8 FRA was a request for clarification by the California Public Utilities Commission
9 ("CPUC"), whose authority over public highway-rail grade crossings is similar to that of
10 the Commission.⁴ In response to the concerns raised, the FRA stated:

11 After reviewing these comments, FRA has revised the final
12 rule by specifically stating, in paragraph (e), that the rule does
13 not preempt State law concerning **administrative**
14 **procedures** for the installation or modification of highway-
15 rail grade **crossing improvements**.⁵ [Emphasis added].

16 The CPUC requires a formal application only whenever a new public crossing is
17 being proposed, or when major alterations to an existing crossing is being proposed. All
18 other public crossing modification requests are submitted to CPUC Staff for **processing**
19 **and approval**. See CPUC General Order No. 88-B.⁶ This type of approval process

20 ⁴ The CPUC has exclusive State jurisdiction over grade crossing design and modifications.
21 ⁵ "Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule," 70 Federal Register
22 80 (April 27, 2005), p. 21854.

23 ⁶ A letter may be submitted to CPUC staff to request authority, pursuant to General Order No. 88-
24 B, for certain minor crossing alterations, such as crossing widening within the existing right-of-
25 way, approach grade changes, track elevation changes, roadway realignment within the existing
26 or contiguous right-of-way, the addition of one track within existing railroad right-of-way,
alteration or reconstruction of a grade-separated crossing, or construction of a grade-separation
that eliminates an existing at-grade crossing.

<http://www.cpuc.ca.gov/PUC/transportation/crossings/Filing+Procedures/crossingAppFAQs.htm>

1 represents the “administrative procedure” referred to in 49 C.F.R. Part 222.7(e), and is
2 separate and distinct from the Commission’s judicial hearing process.

3 **III. Installation of a Wayside Horn Does not Represent an Engineering**
4 **Improvement, Which is Required For 49 C.F.R. Part 222.7(e) to Apply.**

5 As a one-for-one substitute for a train horn, the installation of a wayside horn does
6 not represent an “engineering improvement” that would require State approval – even
7 administrative procedures – pursuant to 49 C.F.R Part 222.7(e). A May 2000 study
8 performed by the Texas Transportation Institute found that wayside horns were just as
9 effective as train horns when comparing driver violation rates. When adopting the Final
10 Rule in 2005, the FRA determined that after five years of data, use of a wayside horn did
11 not result in a significant reduction in driver violation rates. Hence, wayside horns are
12 considered a one-for-one substitute to a train horn.⁷ The existence of a wayside horn at a
13 public highway-rail grade crossing has absolutely no effect on the FRA’s Quiet Zone Risk
14 Index, and does not make that crossing “more” or “less” safe. By contrast, safety
15 measures that had been approved as Supplemental Safety Measures (“SSMs”) were
16 assigned effectiveness rates, and when implemented, have a demonstrated effect on
17 reducing collision risk.⁸

18 The ROO notes that “modification or installation of engineering improvements,”
19 which term was not defined by the FRA, encompasses *changes* to roadway configurations,
20 traffic control devices or measures, pavement markings, and warning systems or devices.
21 ROO at footnote 34. BNSF asserts that for State jurisdiction to apply, the review requires
22 not only an administrative process, but must involve engineering improvements that
23 increase safety – such as is the case with SSMs. The only safety-related purpose for a

24 _____
25 ⁷ “Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule,” 70 Federal Register
26 80 (April 27, 2005), p. 21874.

⁸ *Id.*

1 wayside horn is to supply an alternate means for providing an audible warning at public
2 highway-rail grade crossings, which the FRA expressly allows as a one-for-one substitute.

3 **CONCLUSION**

4 BNSF appreciates the ALJ's efforts in addressing the complex legal issues
5 associated with federal preemption under the Federal Railroad Safety Act. BNSF also
6 recognizes that the Commission takes its authority for safety at public highway-rail grade
7 crossings very seriously, and has participated in this proceeding in order to help address
8 and clarify issues of first impression for the Commission – the establishment of quiet
9 zones and installation and use of wayside horns at public highway-rail grade crossings.
10 Although BNSF ultimately concludes that federal law preempts the Commission from
11 approving wayside horn installations irrespective of whether the Commission's hearing
12 process is administrative or judicial in nature, or that the Commission does not have the
13 authority to approve or deny the establishment of a quiet zone, this does not mean that the
14 Commission should not play an important role in these issues.

15 RESPECTFULLY SUBMITTED this 1st day of October, 2009.

16 FENNEMORE CRAIG, P.C.

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