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Docket # RR-02635B-09-0075

September 1, 2009

TO: Arizona Corporation Commission

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Arizona Corporation Commission

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September 1, 2009

Granted Intervention Status for :

Docket No. RR-02635B-09-0075

ADMINISTRATIVE LAW JUDGE - SARAH N. HARPRING

Commissioners:

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

On November 2, 1994 Congress mandated¹ a standardized set of rules to increase safety at Highway-Rail crossings. The result was the Department of Transportation/Federal Railroad Administration's (FRA), CFR parts 222 and 229, Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule August 17, 2006, (CFR Parts 222 and 229). That rule in effect increased the level and frequency of train horn noise which significantly decreased the quality of life in Flagstaff due to excessive train horn noise. The rule also allows for modification of crossing safety devices which would permit the locomotive horn to cease sounding at specific crossings if certain safety criteria is met. The intent of the FRA regulations was to provide a guideline to preserve an acceptable level of safety for Highway-Rail crossing users and mitigate disruption of local communities due to locomotive horn noise.

In order to accomplish the goals and intent of crossing safety and noise mitigation, the **CFR parts 222 and 229** gives a specific set of rules, and requires a Diagnostic Team to inspect the proposed crossings

¹ Federal Register, PART IV DEPARTMENT OF TRANSPORTATION, Federal Railroad Administration, "49 CFR Parts 222 and 229 Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule", August 17, 2006, **Statutory Mandate**, p. 47614

and make recommendations to the modifications proposed at the individual crossings². Since the **CFR Parts 222 and 229** cannot accurately apply to all of the hundreds of thousands of Highway-Rail crossings across the 50 States, we can assume that the inspection by the Diagnostic Team acts as the FRA's "eyes and ears" and assures that the Highway-Rail crossings users will be adequately protected by the safety devices installed at specific crossings with unique features.

The process of determining the level of Quiet Zone safety as per the rules set forth in the **CFR Parts 222 and 229** is extensively reliant on the value given to the safety feature/features employed at each crossing and calculated by the FRA's Quiet Zone calculator, (a computer program available on line which allows a proposed Quiet Zone to be assigned a value, designated as either *Crossing Corridor Risk Index*³ or *Risk Index with Horns*⁴), and compared to the (*National Significant Risk Threshold*⁵), a value the FRA has determined to be acceptable to preserve safety. The other remedy is the installation of Wayside Horns which the FRA considers a one for one substitution for the Locomotive Horn and not affecting safety by either increasing or lowering the level of safety.

The values assigned by the FRA's Quiet Zone calculator to the Flagstaff Quiet Zone's proposed safety features is the basis for the determination of the BNSF and The City of Flagstaff that the State of Arizona is preempted from the involvement and possibility requiring additional safety features at some or all of the five crossings in the proposed Flagstaff Quiet Zone. In the case of the crossings at Fanning and Steves in which Wayside Horns are the proposed safety feature the City of Flagstaff appears to have met all the requirements and have followed the Diagnostic Team's recommendations to implement the proposed changes. However, since the two Downtown Flagstaff crossings at Beaver Street and San Francisco

² Federal Register, PART IV DEPARTMENT OF TRANSPORTATION, Federal Railroad Administration, "49 CFR Parts 222 and 229 Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule", August 17, 2006, §222.39(b) (i-iii) p. 47640.

³ Federal Register, PART IV DEPARTMENT OF TRANSPORTATION, Federal Railroad Administration, "49 CFR Parts 222 and 229 Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule", August 17, 2006, § 222.9, Definitions, p. 47635.

⁴ Ibid., P. 47637

⁵ Ibid., p.47635

Street have unique features. These specifically have a tremendous amount, (hundreds⁶), of pedestrian and non-motorized traffic and a unique type of pedestrian traffic, (i.e. preoccupied and/or inebriated college students⁷; tourists funneled to “Historic Downtown Flagstaff” who may or may not be able to read the warnings printed in English on signs and on the sidewalk⁸, and/or may be preoccupied with taking pictures or sightseeing, etc.). Additionally, Flagstaff is a “Dark Sky City”⁹. This typically means that total illumination and color perception provided by night time street lighting is reduced and may decrease the time a train engineer could see a pedestrian crossing the Highway-Rail crossing and sounding the locomotive horn as a warning of the approaching locomotive.

The safety ratings assigned by the **FRA’s** Quiet Zone calculator does not realistically represent the safety of these two crossings since the calculator only reports and compares vehicular traffic. *The Crossing Corridor Risk Index* and the *Risk Index with Horns*¹⁰ by definition only applies to “motorized” (i.e. not pedestrian or bicycles) and the safety devices installed at these two crossings will not provide the level of safety as indicated by the Quiet Zone Calculator. This finding is reflected by the recommendations made by the Diagnostic Team¹¹ which specifically reviewed these two unique crossings and, performing their intended function as a group to catch all the crossings which “slip through the cracks” in the regulations, did not fit the crossing model the **CFR Parts 222 and 229** rules were meant to address.

⁶ Arizona Corporation Evidentiary Hearing, July 8, 2009, p.88:9-13

⁷ City of Flagstaff, Applicants Response to Request For Late Filed Exhibits, (July 30, 2009), pp. 42-43./ Plateau Engineering, Rail Crossing Modification Project, 60% Design, (February 8, 2008), *notes from Diagnostic team p. 3, letter from Gannett Fleming* p. 4.

⁸ City of Flagstaff, Applicants Response to Request For Late Filed Exhibits, (July 30, 2009), Exhibit 3:5

⁹ <http://www.flagstaffdarkskies.org/idsc.htm/> http://www.nofs.navy.mil/about_NOFS/staff/cbl/LPSnet/LPS-references.html

¹⁰ Federal Register, PART IV DEPARTMENT OF TRANSPORTATION, Federal Railroad Administration, “49 CFR Parts 222 and 229 Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule”, August 17, 2006, § 222.9, Definitions pp. 47635 & 47637.

¹¹ Walter Robertson, Testimony, (May 28, 2009) Appendix A.8b, p.34/ Gannett Fleming, “Quiet Zone/Wayside Horns Update December 2006, Revised 1-22-2007”, p. 9

The Diagnostic Team recommendations for Beaver and San Francisco Streets are:¹²

Scenario A - Install wayside Horns at all locations.

Scenario B – Install pedestrian Barriers at Beaver and San Francisco streets.

Even **Scenario D**, which is not a recommendation from the Diagnostic Team but listed on the Gannett Fleming 1-22- 2007 report, which the City has partially followed, lists pedestrian barriers as the one safety feature to be used at Beaver and San Francisco streets, not “arches”¹³.

The FRA does not intend that the **CFR Parts 222 and 229** rules confer authority on localities to compromise public safety beyond that which is minimally allowed by the **CFR Parts 222 and 229**.

The State of Arizona Constitution specifically requires the Arizona Corporation Commission to assume “responsibility” for Highway-Rail crossing safety. The City of Flagstaff is a political jurisdiction and a creation of the State of Arizona. Since the City of Flagstaff is under the authority of State safety requirements which aren’t specifically preempted by Federal law due to the fact a majority of the traffic control needed at these two downtown crossings is for pedestrians and since the safety features do not adequately protect non-motorized traffic and are not specifically designed to perform that function and since the Diagnostic Team review never recommended the “arches” and painted strips on the sidewalks, the conclusion of preemption is incorrect and the crossing subject to State regulation.

Federal regulations allow the State of Arizona to become involved as a Recognized State Agency and may become involved at any level approved by, and at the judgment of the Associate Administrator of the FRA.¹⁴

¹² Ibid.,

¹³ Ibid.,

¹⁴ Federal Register, PART IV DEPARTMENT OF TRANSPORTATION, Federal Railroad Administration, “49 CFR Parts 222 and 229 Use of Locomotive Horns at Highway-Rail Grade Crossings; Final Rule”, August 17, 2006, §222.17 p. 47637.

I believe the Associate Administrator will allow the Arizona Corporation Commission, as the State agency responsible for crossing safety, to become involved in requiring State recommended additional safety devices when the level of “oversights” and misleading data is reviewed by the FRA.

Those oversights include:

1. Information required to be reported to the FRA including the inaccurate crossing Inventories and/or type and amount of pedestrian traffic using these two downtown crossings. The information listed on the crossing inventories was reported to be inaccurate to several different members of the Flagstaff City Staff, I believe on at two separate occasions, and which was never reviewed or any attempt made to correct that data. The significance is the FRA would be under the impression the crossing environments at Beaver and San Francisco streets is grossly different from what it actually is and the FRA would assume 4 quadrant gates which provide a sidewalk barrier along with the “arches” would adequately protect pedestrians and be conforming to the Diagnostic Team’s recommendation for pedestrian barriers.
2. The current pedestrian safety features were designed by a group unqualified to meet the qualifications initially established by the City when initially commissioning a design group with the “expertise” to design the Flagstaff Quiet Zone¹⁵. The current design was never recommended by the Diagnostic Team nor is it even the Scenario D design listed on the initial Gannett Fleming study as claimed by the City of Flagstaff.
3. Inaccurate cost estimates presented to the Flagstaff City Council which may have significantly influenced their decision not to follow the Diagnostic Team’s recommendations, and instead follow a convoluted design. The original budget included extensive concrete and sidewalk remodeling which inflated the recommended Scenarios A & B and the “improvements” have

¹⁵ Walter Robertson, Testimony, (May 28, 2009) Appendix A.8b, pp. 2-3

never been installed. The money budgeted for the improvements has been back charged as City Staff fees of which no design work or construction was performed. Since the cost of installing the primary Diagnostic Team's recommendation of all crossings being equipped with Wayside Horns should have been around approximately \$500,000 to \$600,000 I believe the Flagstaff City Council would have opted for all Wayside Horns, the safest option for the conditions at Flagstaff's Beaver and San Francisco streets.

The ultimate decision on how much the State of Arizona can require additional safety devices and even if additional safety features are required will come from the FRA. Since all parties seem amenable to input from the FRA and continued cooperation between the BNSF and all involved government agencies the final decision should be a request from the State to get involved in this process or follow the recommendations of the Diagnostic Team.

Sincerely,

A handwritten signature in black ink, appearing to read "Walter F. Robertson". The signature is fluid and cursive, with a large, stylized initial "W".

Walter F. Robertson

1 original and 13 copies forwarded to:
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