

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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In the Matter of the City of San  
Clemente for an order authorizing  
the alteration and improvement  
of seven existing San Clemente  
Beach Trail At-Grade Crossings

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) Application No. A1108004  
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**BNSF RAILWAY COMPANY AND NATIONAL RAILROAD  
PASSENGER CORPORATION'S COMMENTS ON THE PROPOSED DECISION BY  
ADMINISTRATIVE LAW JUDGE MASON ON CPUC JURISDICTION**

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Here, the California legislature’s statutory language is clear and unambiguous. The ALJ’s construction of *Public Utilities Code* sections 1202 and 7604 in his proposed decision ignores the first rule of statutory construction, which is to forego “construction” and simply apply the statute when the statutory language is certain and unambiguous:

The rules relating to the construction of statutes are applicable only where statutory language is uncertain and ambiguous. Where the meaning of a statute is plain, its language clear and unambiguous, and there is no uncertainty or doubt of the legislative intent, there is no need for construction and the courts should not indulge in it. They must follow the language used and give to it its plain meaning, whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature.

(*Wallace v. Dept. of Motor Vehicles* (1970) 12 Cal.App.3d 356, 360, emphasis added.)

When words of statute are not ambiguous and their effect is not absurd, courts must give the statute its plain meaning, though it may appear probable that a different object was in mind of legislature. (*Smith v. Union Oil Co.* (1913) 166 Cal 217, 224.) Courts cannot depart from the meaning of unambiguous language in a statute, even if the consequence would be to defeat object of the statute. (*Wisdom v. Eagle Star Ins. Co.* (1963) 211 Cal App 2d 602, 605.) No judge has the authority to rewrite a statute, regardless of whether or not the judge believes that the statute comports with legislative intent.

In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

(*Cal. Code Civ. Proc.* § 1858.)

Here, the ALJ’s proposed decision starts with what the ALJ thinks the legislature must have intended in *Public Utilities Code* sections 1202 and 7604. However, the ALJ skipped the first step in statutory construction by failing to first identify any ambiguity in the plain language of the statutes. There is no ambiguity. The ALJ’s reliance on what he believes the legislature intended, while ignoring the clear dictate of the statute, usurps the legislative function and it is not a legitimate exercise of the judicial function.

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**III. CONTRARY TO THE PROPOSED DECISION, PUBLIC UTILITIES CODE SECTION 1202 IS CLEAR THAT THE CPUC HAS NO AUTHORITY TO SILENCE LOCOMOTIVE HORNS AT THE SAN CLEMENTE PEDESTRIAN CROSSINGS**

The proposed decision finds CPUC jurisdiction over the sounding of locomotive horns in Section 1202, subdivisions (a) and (b), which state as follows:

The commission has the exclusive power:

- (a) To determine and prescribe the manner, including the particular point of crossing, and the terms of installation, operation, maintenance, use, and protection of each crossing of one railroad by another railroad or street railroad, and of a street railroad by a railroad, and of each crossing of a public or publicly used road or highway by a railroad or street railroad, and of a street by a railroad or of a railroad by a street.
- (b) To alter, relocate, or abolish by physical closing any crossing set forth in subdivision (a).

*(Cal. Pub. Util. Code § 1202(a) and (b).)*

Subsections (a) and (b) refer to jurisdiction over the physical aspects of railroad grade crossings and their stationary warning devices. They have nothing to do with train operations and the use of locomotive mounted horns on trains approaching railroad grade crossings. Neither subsection permits the CPUC to forbid a railroad from sounding a locomotive mounted horn.

While the statute did grant limited authority to the CPUC with respect to horn use at grade crossings with the consent of affected railroads until 2003, that section is clearly defined and limited so as to preclude the CPUC from exercising jurisdiction in this proceeding in the year 2012:

(2) The Legislature finds and declares that for the communities of the state that are traversed by railroads, there is a growing need to mitigate train horn noise without compromising the safety of the public. Therefore, it is the intent of the Legislature that the commission may authorize the following pilot projects, after an application is filed and approved by the commission:

(A) To test the utility and safety of stationary, automated audible warning devices as an alternative to trains having to sound their horns as they approach highway-rail crossings in the communities of Roseville, Fremont, Newark, and Lathrop, and in any other location determined to be suitable by the commission.

(B) To authorize supplementary safety measures, as defined in Section 20153(a)(3) of Title 49 of the United States Code, for use on rail crossings.

No new pilot project may be authorized after January 1, 2003. The commission shall report to the Legislature by March 31, 2004, on the outcome of this pilot project.

(3) In light of the pending proposed ruling by the Federal Railroad Administration on the use of locomotive horns at all highway-rail crossings across the nation, it would be

in the best interest of the state for the commission to expedite the pilot projects authorized under paragraph (2) in order to contribute data to the federal rulemaking process regarding the possible inclusion of stationary, automated warning devices as a safety measure option to the proposed federal rule.

(*Cal. Pub. Util. Code* § 1202(c).)

Thus, the only statutory grant of authority to the CPUC regarding the use of locomotive horns was limited to authorizing pilot projects to test the use of stationary, automated warning devices at grade crossings, report the test results to the legislature, and to contribute data to the federal locomotive horn rulemaking process that was underway at the time. That limited authority clearly and unambiguously expired in 2003. It is now 2012 (nine years after the expiration of the sunset provision in section 1202), the federal locomotive horn rulemaking process has run its course, and the CPUC presumably contributed its stationary, automated warning device data to the federal rulemaking process as commanded by the legislature.

The proposed decision illegally expands the limited statutory grant of authority in subsection (2) by interpreting its supposed intent and ignoring its clear words. It adds CPUC discretion to establish a permanent “California quiet zone” in 2012 without the consent of operating railroads and contrary to the clear language of California’s locomotive horn use statute (section 7604) by CPUC agency fiat while at the same time omitting the express sunset provision from the statute. Clearly the proposed decision violates the judicial mandate set forth at Code of Civil Procedure section 1858 and the numerous cases construing it. (See Section II, *supra*.)

#### **IV. PUBLIC UTILITIES CODE SECTION 7604 DOES NOT GIVE THE COMMISSION AUTHORITY TO SILENCE THE USE OF LOCOMOTIVE MOUNTED HORNS AT PEDESTRIAN RAILROAD GRAD CROSSINGS**

The statutory scheme governing the use of locomotive mounted horns approaching railroad grade crossings could not be clearer. Pursuant to 49 CFR § 222.27, the Federal Railroad Administration (FRA) declined to require the use of locomotive horns on trains approaching pedestrian grade crossings. However, the FRA regulation provides that “where State law requires the sounding of a locomotive horn at pedestrian grade crossings, the locomotive horn shall be sounded in accordance with § 222.21 of this part.” Thus, according to FRA regulations, state law initially controls whether locomotive horn use is required at pedestrian crossings. However, once a

state decides to require locomotive horn use on trains approaching pedestrian grade crossings, 49 CFR § 222.21 controls the manner and sequence of their use.

Here, the California state legislature enacted a statute mandating the use of locomotive mounted horns on trains approaching pedestrian grade crossings. Specifically, *California Public Utilities Code* section 7604 provides as follows:

- (1) Except as provided in paragraph (3), a bell, siren, horn, whistle, or similar audible warning device shall be sounded at any public crossing in accordance with Section 222.21 of Title 49 of the Code of Federal Regulations.
- (2) Except as provided in paragraph (3), a bell, siren, horn, whistle, or similar audible warning device shall be sounded, consistent with paragraph (1), at all rail crossings not subject to the requirements of Subpart B (commencing with Section 222.21) of Part 222 of Title 49 of the Code of Federal Regulations.

(*Cal. Pub. Util. Code* § 7604(a)(1)-(2), emphasis added.)

Thus, the clear and unambiguous words used in the California legislature in section 7604 make it clear that the federal horn-blowing provisions set forth in 49 CFR § 222.21 apply to all rail crossings in California , including pedestrian crossings. In turn 49 CFR § 222.21 provides:

When must a locomotive horn be used? (a) Except as provided in this part, the locomotive horn on the lead locomotive of a train, lite locomotive consist, individual locomotive or lead cab car shall be sounded when such locomotive or lead cab car is approaching a public highway-rail grade crossing. Sounding of the locomotive horn with two long blasts, one short blast and one long blast shall be initiated at a location so as to be in accordance with paragraph (b) of this section and shall be repeated or prolonged until the locomotive occupies the crossing. This pattern may be varied as necessary where crossings are spaced closely together.

(49 CFR § 222.21, emphasis added.)

This clearly requires the use of a “locomotive horn.” Nothing in 49 CFR § 222.21, and consequently the California statute, permits adoption of a stationary wayside device in lieu of a “locomotive horn.” Indeed, the term “locomotive horn” is specifically defined in the federal regulations as “a locomotive air horn, steam whistle, or similar audible warning device [that produces a minimum sound level of 96 dB(A) and a maximum sound level of 110 dB(A) at 100 feet forward of the locomotive in its direction of travel] . . . mounted on a locomotive or control cab car.” (49 CFR § 222.9.) The California legislature used the same exact language as the federal definition of “locomotive horn” to define the horn it was talking about in section 7604 (“a locomotive air horn,

steam whistle, or similar audible warning device”), *i.e.*, a locomotive mounted warning device. Read singularly or together, there is no room for interpretation by administrative officials. Section 7604 clearly requires operating railroads to use a locomotive mounted audible warning device on all trains approaching all public, private, and pedestrian grade crossings in California. The proposed decision tortures the legislative intent and the use of the phrase “similar audible warning device” to mean wayside horns, which it clearly does not and cannot mean based on the FRA’s definition of “locomotive horn” and the California legislature’s use of the same definition and incorporation of the FRA’s regulation, which defines it as a “similar audible warning device [to a locomotive air horn or steam whistle] mounted on a locomotive or control cab car.” (49 CFR § 222.9.).

The proposed decision does not identify any exception that would enable the CPUC to ignore the clear mandate of the statute. Insofar as the statute is clear on its face, there is no room for any conflicting administrative interpretation. “Clear statutory language no more needs to be interpreted than pure water needs to be strained.” (*Holder v. Superior Court of San Diego County* (1969) 269 Cal App 2d 314, 317.)

**V. THE FRA SUBPART C QUIET ZONE EXCEPTIONS (INCLUDING WAYSIDE HORNS) TO THE SOUNDING OF LOCOMOTIVE MOUNTED WARNING DEVICES APPROACHING PEDESTRIAN RAILROAD GRADE CROSSINGS DO NOT APPLY HERE BECAUSE THE FRA DECLINED JURISDICTION OVER THE SAN CLEMENTE PEDESTRIAN GRADE CROSSINGS AND NO QUIET ZONE HAS BEEN OR CAN BE ESTABLISHED IN SAN CLEMENTE PURSUANT TO SUBPART C OF THE CODE OF FEDERAL REGULATIONS**

With respect to private and pedestrian grade crossings, *California Public Utilities Code* section 7604(a) provides:

- (2) Except as provided in paragraph (3), a bell, siren, horn, whistle, or similar audible warning device shall be sounded, consistent with paragraph (1), at all rail crossings not subject to the requirements of Subpart B (commencing with Section 222.21) of Part 222 of Title 49 of the Code of Federal Regulations.

(*Cal. Pub. Util. Code* § 7604(a)(2).)

Thus, the only state law exception to using the locomotive mounted horn for trains approaching pedestrian grade crossings is “except as provided in paragraph (3).” Paragraph (3) provides:

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- (3) A bell, siren, horn, whistle, or similar audible warning device shall not be sounded in those areas established as quiet zones pursuant to Subpart C (commencing with Section 222.33) of Part 222 of Title 49 of the Code of Federal Regulations.

*(Cal. Pub. Util. Code § 7604(a)(3).)*

Clearly, the San Clemente area has not been “established as [a] quiet zone[] pursuant to Subpart C (commencing with Section 222.33) of Part 222 of Title 49 of the Code of Federal Regulations.” As acknowledged in the proposed decision, the FRA declined to assert jurisdiction over the San Clemente pedestrian grade crossings because they were not located close enough to public vehicular grade crossings for the FRA to permit the establishment of an FRA quiet zone. Because there has been no quiet zone established pursuant to Subpart C of the federal regulation in San Clemente, there is no exception to section 7604(a)(2), and “a bell, siren, horn, whistle, or similar audible warning device shall be sounded, consistent with” the locomotive mounted audible warning device and horn pattern required by 49 CFR § 222.21. *(Cal. Pub. Util. Code § 7604(a)(2).)*

The Public Utilities Code does not grant the CPUC authority to alter or ignore the statute. Discussing an inapplicable FRA regulatory scheme may have its place in a state or federal legislative debate or proposal for a new law, but it has no place here in a proposed decision that purports to faithfully execute existing law by an ALJ.

## **VI. THE PROPOSED ORDER MISLABELS FINDINGS OF LAW AS FINDINGS OF FACT**

In its section captioned “Findings of Fact,” the proposed order lists the following findings:

2. The proposed AWS fits within the scope of the Commission's authority provided by Pub. Util. Code §§ 1202 and 7604.
3. The FRA recognized an exception to the sounding of train horns at railroad crossings.

Questions involving the applicability of statutes to given factual situations are questions of law that are not binding on any appellate court. (*Bank of America Nat'l Trust & Sav. Assoc. v. State Board of Equalization* (1962) 209 Cal App 2d 780, 793.) Thus, the proposed decision that the CPUC has jurisdiction under Public Utilities Code sections 1202 and 7604 to rule on the proposed

use of automated wayside horns and silencing of locomotive mounted warning devices in San Clemente is a finding of law, not fact, since it completely involves jurisdictional issues and the interpretation and application of state and federal statutes.

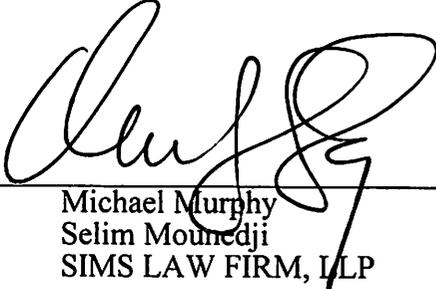
## VII. CONCLUSION

The California statutory language is clear. While the CPUC has exclusive jurisdiction over the physical requirements and designs of railroad grade crossings, its jurisdiction to address the use of locomotive horns for trains approaching those grade crossings was narrowly confined to the authorization of pilot test projects before 2003, with the consent of affected railroads, and the reporting of those pilot projects to the legislature. Because there is no ambiguity in the statutory language, the ALJ and the CPUC have no authority to resort to interpretation principles to omit the restrictive language and find an implied grant of jurisdiction where none was granted. Accordingly, the proposed decision is an abuse of discretion and it usurps legislative power.

Dated this 7<sup>th</sup> day of August, 2012, in Irvine, California.

Respectfully submitted,

By: \_\_\_\_\_



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