

**FILED**120
STATE OF CALIFORNIAEDMUND G. BROWN, JR., *Governor*07-18-12
11:49 AM**PUBLIC UTILITIES COMMISSION**505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

July 18, 2012

**Agenda ID #11468
Ratesetting**

TO PARTIES OF RECORD IN APPLICATION 11-08-004

This is the proposed decision of Administrative Law Judge (ALJ) Mason. It will not appear on the Commission's agenda sooner than 30 days from the date it is mailed. The Commission may act then, or it may postpone action until later.

When the Commission acts on the proposed decision, it may adopt all or part of it as written, amend or modify it, or set it aside and prepare its own decision. Only when the Commission acts does the decision become binding on the parties.

Parties to the proceeding may file comments on the proposed decision as provided in Article 14 of the Commission's Rules of Practice and Procedure (Rules), accessible on the Commission's website at www.cpuc.ca.gov. Pursuant to Rule 14.3, opening comments shall not exceed 15 pages.

Comments must be filed pursuant to Rule 1.13 either electronically or in hard copy. Comments should be served on parties to this proceeding in accordance with Rules 1.9 and 1.10. Electronic and hard copies of comments should be sent to ALJ Mason at rim@cpuc.ca.gov and the assigned Commissioner. The current service list for this proceeding is available on the Commission's website at www.cpuc.ca.gov.

/s/ KAREN V. CLOPTONKaren V. Clopton, Chief
Administrative Law Judge

KVC:avs

Attachment

Decision PROPOSED DECISION OF ALJ Mason (Mailed 7/18/2012)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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

Application 11-08-004
(Filed August 2, 2011)

DECISION REGARDING JURISDICTION

TABLE OF CONTENTS

Title	Page
1. Summary	2
2. Background.....	2
2.1. The Application.....	2
2.2. The Protest	4
2.3. The Federal Railroad Administration Recognized an Exception to the Sounding of Train Horns at Railroad Crossings.....	4
2.4. Briefing the Jurisdiction Question.....	5
3. Discussion	5
3.1. Rules for Statutory Construction.....	5
3.2. Commission’s Exclusive Power Over Public Railroad Crossings Includes the Power to Approve an AWS.....	7
3.2.1. Pub. Util. Code § 1202’s Grant of Exclusive Power	7
3.2.1.1. The Expiration of the Pilot Program Does Not Diminish the Commission’s Authority	8
3.2.2. Pub. Util. Code § 7604(a) Gives the Commission the Authority to Choose the Type of Warning Devices Locomotives Must Sound at Pedestrian-Grade Crossings	12
3.2.2.1. BNSF’s and Amtrak’s Interpretation of Pub. Util. Code § 7604 is Contrary to the Plain Language of the Statute and, Therefore, Violates Settled Rules of Statutory Construction	15
3.3. The FRA Already Opined to BNSF that FRA Regulations on Quiet Zones do not preempt State Law Governing the Sounding of Wayside Horns at Private and Pedestrian Crossings	17
3.4. BNSF’s and Amtrak’s Concern for Potential Criminal Liability Under Pub. Util. Code §§ 7604(b) and 7078 is Refuted by the Plain Language of the Statutes	18
3.5. California Constitution Article III, § 3.5, Does Not Deprive the Commission of Jurisdiction to Resolve San Clemente’s Application ...	20
4. Comments on Proposed Decision	22
5. Assignment of Proceeding	22
Findings of Fact.....	22
Conclusions of Law	22
ORDER.....	23

DECISION REGARDING JURISDICTION

1. Summary

Under federal regulations and California statutes discussed below, this decision finds the Commission has the jurisdictional authority to consider the City of San Clemente's Application (Application) for approval of the use of an Audible-Warning System, instead of train horns, at seven pedestrian-rail crossings. Accordingly, the Application will proceed to resolution and the City of San Clemente must demonstrate, in conformity with applicable state and federal law, that its proposed wayside-horn system provides sufficient warning to pedestrians near the track comparable to the warning provided by a locomotive horn as the train approaches the crossing.

2. Background

2.1. The Application

On August 2, 2011, the City of San Clemente (Applicant) filed the above-captioned Application seeking approval from the Commission to install an Audible-Warning System (AWS) as a Supplemental Safety Measure at each of seven San Clemente Beach Trail (Beach Trail) pedestrian crossings. The seven crossings which are the subject of this application are the Dije Court Crossing, the El Portal Crossing, the Corto Lane Crossing, the San Clemente Pier Crossing, the T Street Crossing, the Lost Winds Crossing, and the Calafia Crossing. The AWS is provided in addition to Commission Standard 9 automatic warning devices with an extra set of back lights with bells and flashing lights directed for pedestrian visibility. These warning devices also include Commission Standard No. 1-D pedestrian crossing signs in both English and Spanish. Downward-facing lighting fixtures illuminate the crossing and provide lighting for any pedestrian using the crossing. At the approach of a train, both the

crossing gate bell and the AWS will sound simultaneously. The Applicant has proposed fencing and other forms of channelization to guide pedestrians away from the tracks and toward the crossings. The crossings will be upgraded with improved surfaces and approaches (pedestrian landing areas and 8-foot wide concrete crossing panels attached to the railroad track with asphalt concrete approaches on each side of the track) and will incorporate swing gates that require pedestrians to look for oncoming trains before crossing the tracks.

The proposed AWS will be a permanently installed, stationary system that will provide an audible warning, in addition to existing visual warnings, to persons approaching a trail crossing. The audible warning will be focused toward Beach Trail users approaching the pedestrian trail crossing. In addition to these crossing improvements, the Applicant seeks an order from the Commission prohibiting train engineers from sounding the locomotive train horn except in circumstances where the locomotive engineer deems the sounding of the horn to be necessary.

The purpose of the AWS and the creation of a zone in the San Clemente Beach Trail where trains do not sound their horns (Quiet Zone) is to reduce the overall ambient noise level in the vicinity of the San Clemente Beach Trail and the City of San Clemente. The Applicant contends that the AWS and crossing improvements will provide warning to Beach Trail users of approaching trains comparable to that currently being provided by locomotive horns or whistles so that the safety of Beach Trail users and other pedestrians is assured.

The railroad tracks running adjacent to the Beach Trail are owned by the Orange County Transportation Authority. The BNSF Railway Company (BNSF) runs freight trains on this main line in San Clemente, and the Southern California

Regional Rail Authority (Metrolink) and the National Passenger Railroad Corporation (Amtrak) operate passenger service over the line.

2.2. The Protest

BNSF and Amtrak have protested the application, claiming that (1) California state statutes require railroads to use locomotive mounted horns in advance of all the Beach Trail's private and pedestrian railroad grade crossings; (2) the Commission has no jurisdiction to order railroads to stop using the locomotive mounted horns that California state statutes require; and (3) the Commission has no statutory authority to approve an AWS as a substitute for locomotive mounted horns.

2.3. The Federal Railroad Administration Recognized an Exception to the Sounding of Train Horns at Railroad Crossings

The FRA authorized the Commission to test the supplementary safety measures prescribed by the FRA in its "Quiet Zone" regulations passed under 49 U.S.C. § 20153(A)(3) for use at rail crossings. (See 49 C.F.R. §§ 222.1 *et seq.*) The FRA was developing Quiet Zone regulations which "provided standards for the creation and maintenance of quiet zones within which locomotive horns need not be sounded." (49 C.F.R. § 222.3.) At the same time, the Commission was considering legislation to create its own Quiet Zones under Pub. Util. Code § 1202. On January 13, 2000, the FRA published a Notice of Proposed Rulemaking that addressed the use of locomotive horns at public highway-rail crossings and, for the first time, provided an exception to the requirement that trains sound their locomotive horns before entering each public highway-rail crossing. (70 Fed. Reg. 21844, April 27, 2005.) The FRA established an exception to the sounding of train horns at railroad crossings in its interim final rule dated December 18, 2003:

[I]n circumstances in which ... safety measures fully compensate for the absence of the warning provided by the locomotive horn...Communities that qualify for this exception may create “quiet zones” within which locomotive horns would not be routinely sounded.

In so doing, the FRA expressed its intent to balance “the needs of railroads, States, and local communities” in facilitating the development of quiet zones.

(*Id.*)

2.4. Briefing the Jurisdiction Question

At the instruction of the assigned Administrative Law Judge (ALJ), the parties filed their opening and response briefs on the question of Commission jurisdiction on April 25, 2012 and May 9, 2012, respectively.

3. Discussion

3.1. Rules for Statutory Construction

In *California Manufacturers Ass’n. v. Public Utilities Commission* (1979) 24 Cal. 3d 836, 844, the California Supreme Court has set forth general rules governing statutory construction:

Where a statute is theoretically capable of more than one construction we choose that which most comports with the intent of the Legislature. [Citation.] Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. [Citation.] Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided. [Citation.] In the present instance both the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose. [Citation.]

(*See also Pacific Gas & Electric Co. v. Department of Water Resources* (2003) 112 Cal. App. 4th 477, 495 (2003).)

In deference to the California Supreme Court's pronouncements, in *Re GTE California Inc.*, this Commission has adopted the three-step approach to determine a statute's meaning:

The first step in statutory interpretation is to examine the actual language of the statute, giving the words their ordinary, everyday meaning. If the meaning is without ambiguity, doubt, or uncertainty, the language controls. (*See* D.97-03-067, mimeo., at 11, citing *IT Corp. v. Solano County Bd. of Supervisors*, 1 Cal. 4th 81, 98 (1991).) If the language is ambiguous or susceptible to more than one reasonable interpretation, the next step is to refer to the legislative history. (*Id.*) If legislative history fails to provide clear meaning, the final step is to apply reason, practicality, common sense, and extrinsic aids.¹

These standards were applied recently in D.12-05-035, wherein the Commission observed that when interpreting a statute, it must:

look to the statute's words and give them their usual and ordinary meaning. The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy.

...

Where more than one statutory construction is arguably possible, our policy has long been to favor the construction that leads to the more reasonable result. This policy derives largely from the presumption that the Legislature intends reasonable results consistent with the apparent purpose of the legislation. Thus, our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes'

¹ D.97-11-020. 76 CPUC 2d 412, at 414 (November 5, 1997).

general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.²

With these guidelines in mind, we address and construe the various federal and state statutes that the parties contend are dispositive of the jurisdictional dispute before the Commission.

3.2. Commission’s Exclusive Power Over Public Railroad Crossings Includes the Power to Approve an AWS

3.2.1. Pub. Util. Code § 1202’s Grant of Exclusive Power

Pursuant to Pub. Util. Code § 1202, the California Legislature exercised its plenary power under Article XII, § 5 of the California Constitution³ and conferred upon the Commission 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).

In 2001, the California Legislature declared in Pub. Util. Code § 1202(d)(2) the State’s policy with respect to train horn noise mitigation in California’s local

² D.12-05-035 (May 24, 2012), at 14, quoting from *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal. 4th 381, 387-388; see also *People v. Canty* (2004) 32 Cal. 4th 1266, 1276; and *Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735.

³ Article XII, Section 5 of the California Constitution provides, in part, that the “Legislature has plenary power...to confer additional authority and jurisdiction upon the commission[.]”

communities: “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” In its efforts to mitigate train horn noise, the Legislature enacted Pub. Util. Code § 1202(d)(2)(A) and authorized the Commission to establish pilot projects 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.

The Commission has expressly recognized its exclusive jurisdiction over public railroad crossings in light of the passage of Pub. Util. Code §§ 1201 and 1202. (See D.02-10-038 [October 24, 2002], at 3: “There can be no dispute that the Commission has exclusive jurisdiction over public rail crossings.”) Even before the passage of § 1202, California courts recognized the Commission’s broad jurisdictional scope with respect to public-railroad crossings. (See *Los Angeles Railway Corp. v. Los Angeles* (1940) 16 Cal. 2d 779, 785; *City of San Mateo v. Railroad Commission of California* (1937) 9 Cal. 2d 1, 5-6; and *City of Union City v. Southern Pacific Company* (1968) 261 Cal. App. 2d 277, 279.)

3.2.1.1. The Expiration of the Pilot Program Does Not Diminish the Commission’s Authority

While acknowledging that the “Legislature gave the Commission broad powers over the warning devices to be used at the physical locations of grade crossings themselves,”⁴ BNSF and Amtrak nevertheless contend that the “Legislature did not give the jurisdiction over the use of locomotive horns for

⁴ BNSF/Amtrak Opening Brief, at 6.

trains approaching those grade crossings.”⁵ BNSF and Amtrak assert that the Commission’s exclusive power over highway-rail crossings is limited by Pub. Util. Code § 1202(d)(2)(B) which provides:

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.

Consequently, BNSF and Amtrak conclude that even if they consented to the use of the AWS in lieu of the locomotive horn, the authority to use the AWS as a pilot program “expired by the express terms of the statute on January 1, 2003.” (BNSF/ Amtrak Protest/ Response, at 3; Opening Brief, at 8.)

We reject BNSF’s and Amtrak’s argument as it conflicts with California’s legislatively established policy that “there is a growing need to mitigate train horn noise without compromising the safety of the public.” (Pub. Util. Code § 202(d)(2).) The Legislature intended to mitigate locomotive horn noise and test Commission-approved Quiet Zones until such time as the Federal Railroad Administration (FRA) adopted federal regulations for the approval of these zones.⁶ Following the FRA’s adoption of those Quiet Zone regulations, the FRA opened the door to California’s creation of Quiet Zones at pedestrian at-grade

⁵ *Id.*

⁶ Since the FRA had initiated its Notice of Proposed Rulemaking at the end of 2000, the Legislature assumed the FRA regulations would be in place by January 1, 2003. The fact that the FRA’s Quiet Zone regulations were not in effect until May 27, 2005, created some problems for local communities and the Commission in establishing these areas where train horns would not be sounded except where the train engineer deemed it

Footnote continued on next page

crossings located outside the boundaries of the FRA-approved Quiet Zones 49 C.F.R. § 222.27 provides, in part:

This rule does not require the routine sounding of locomotive horns at pedestrian grade crossings. However, 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. Where State law requires the sounding of a locomotive audible warning device other than the locomotive horn at pedestrian grade crossings, that locomotive audible warning device shall be sounded in accordance with §§ 222.21(b) and (d) of this part.

Given the California Legislature's stated interest and policy to mitigate train horn noise by the creation of state-approved Quiet Zones prior to the adoption of federal regulations, we believe that the Legislature would mandate a Commission-authorized Quiet Zone here to mitigate train noise as permitted by those same federal regulations finally adopted in May of 2005. The federal regulations expressly authorize the Commission with the authority to establish Quiet Zones in these limited circumstances so long as those Quiet Zone protections are operated in a manner consistent with federal safety requirements set forth at 49 C.F.R. §§ 222.21(b) and (d).⁷ (*See* 49 C.F.R. § 222.27, *supra*.)

BNSF and Amtrak, however, contend that California law has precluded the adoption of Quiet Zones by the Commission, even in those instances in which it is permitted by the FRA regulations and is fully consistent with the safety requirements of FRA-established Quiet Zones under 49 C.F.R. § 222.1 *et seq.* They maintain that Pub. Util. Code § 1202(d)(2)(B) provides that no new

necessary. The final FRA Quiet Zone rule was issued April 27, 2005, and became effective 30 days thereafter.

⁷ 49 C.F.R. §§ 222.21(b) and (d) are quoted, *infra*, at footnote 15.

quiet zone pilot project may be authorized after January 1, 2003. Moreover, BNSF and Amtrak argue that even if the sunset provision did not exist, they never consented to the “proposed AWS and horn ban” which is required by Pub. Util. Code § 1202(d)(1).⁸ (BNSF/Amtrak Opening Brief, at 8.)

The limitation on pilot Quiet Zones, however, does not apply here. The Commission is not being asked to authorize a Quiet Zone pilot project separate and distinct from the FRA’s own Quiet Zone regulations in existence from 2000 through 2003. Rather, the Commission will follow the FRA’s final Quiet-Zone regulations, which permit California to impose Quiet Zones at the San Clemente pedestrian crossings, making the consent of the affected railroads unnecessary. Under the FRA Quiet-Zone regulations, these San Clemente pedestrian crossings do not fall within the FRA purview but, instead, fall entirely within the jurisdiction of the State of California. Federal Regulations (49 C.F.R. § 222.27) provide that if state law complies with FRA requirements for the operation of wayside horns, a state Quiet Zone for pedestrian crossings located outside of an FRA-created Quiet Zone may be established.

Finally, the expiration of the pilot program does not limit the Commission’s ongoing jurisdiction over rail crossings in this state or its ability to

⁸ Pub. Util. Code § 1202(d)(1) states the Commission has the exclusive power:

To authorize on an application-by-application basis and supervise the operation of pilot projects to evaluate proposed crossing warning devices, new technology, or other additional safety measures at designated crossings, with the consent of the local jurisdiction, the affected railroad, and other interested parties, including, but not limited to, represented railroad employees.

require AWS' consistent with the final federal rules. To construe the pilot program legislation as BNSF and Amtrak propose would create precisely the kind of jurisdictional gap that the legislation was intended to avoid. We further find that the Legislature's policy to mitigate train horn noise is a continuing policy, and that the Legislature intended the Commission to apply the experience gained from the "pilot program" in the Commission's ongoing efforts to mitigate train horn noise.

In sum, both state and federal policies designed to reduce train noise at pedestrian crossings are clear in their grant of authority to the Commission. BNSF's and Amtrak's interpretation of California law would ignore, and unnecessarily interfere with, those clear policies.

3.2.2. Pub. Util. Code § 7604(a) Gives the Commission the Authority to Choose the Type of Warning Devices Locomotives Must Sound at Pedestrian-Grade Crossings

The history of Pub. Util. Code § 7604 shows that the Legislature gave the Commission broad discretion in authorizing the type of warning devices at pedestrian-grade crossings. Prior to 2006, Pub. Util. Code § 7604(a) required:

A bell of at least 20 pounds weight or of equivalent sound-producing capability shall be placed on each locomotive engine, and shall be rung at a distance of at least 1,320 feet from the place where the railroad crosses any street, road, or highway...or a steam whistle, air siren, or an air whistle shall be attached[.]

While BNS and Amtrak contend that the prior version of Pub. Util. Code § 7604 already "contained an exception to the locomotive horn requirement when approaching a grade crossing equipped with an AWS,"⁹ the Legislature felt that

⁹ BNSF/Amtrak Opening Brief, at 5.

a change in Pub. Util. Code § 7604(a) was needed to make clear that the sounding of bell was one of several warning sound options. In the Legislative Counsel's Digest to Assembly Bill (AB) 1935 (Chapter 885, 2005-2006), the Counsel stated:

[Federal] regulations expressly preempt any state law, rule regulation, or order governing the sounding of locomotive horns at public highway-rail grade crossings, but are not intended to affect, nor do they preempt, any state law, rule, regulation, or order governing the sounding of locomotive horns at private highway rail grade crossings, as defined, or pedestrian crossings, as defined.

Counsel goes on to state that:

This bill would delete existing state law relative to the equipping and sound of locomotive bells and would instead require that one of several specified audible warning devices be sounded at any public crossing in accordance with the regulations adopted by the Secretary of Transportation, except in a quiet zone.

Accordingly, in 2006, Pub. Util. Code § 7604(a) was amended to read as follows:

- (a) (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.
- (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.
- (4) This section does not restrict the use of a bell, siren, horn,

whistle, or similar audible warning device during an emergency or other situation authorized in Section 222.23 of Title 49 of the Code of Federal Regulations.

- (b) Any railroad corporation violating this section shall be subject to a penalty of two thousand five hundred dollars (\$2,500) for every violation. The penalty may be recovered in an action prosecuted by the district attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with. (Bold and italics added.)

If anything, the amendment to Pub. Util. Code § 7604(a) actually broadened the Commission's authority to determine what audible warning devices to require. The Commission has exercised its authority on prior occasions, under both the prior and current versions of Pub. Util. Code § 7604, to approve changes at public crossings. (See D. 09-04-018 [April 17, 2012];¹⁰ D.05-02-032 [February 25, 2005];¹¹ D.04-08-030 [August 23, 2004];¹² and D.02-04-043 [April 24, 2002].)¹³ Under the rules of statutory construction, "when the Legislature enacts an amendment, we presume that this 'indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one.'" (*Garrett v. Young* (2003) 109 Cal. App. 4th 1393, 14504-1405, quoting *Froid v. Fox* (1982) 132 Cal. App. 3d 832, 837; see also *Davis v.*

¹⁰ Decision Granting Authority to City of Riverside to Construct a Grade-Separated Underpass for the Realigned Magnolia Avenue Cross Beneath Tracks owned by Union Pacific Railroad Company in the City of Riverside, County of Riverside, at 6.

¹¹ Opinion Adopting Settlement and Granting Applications in Part, at 17-18.

¹² Opinion, at 5.

¹³ Order Modifying Decision 00-12-015, at 3-6.

Harris (1998) 61 Cal.App.4th 507, 511.) The plain language of the statutory change vested the Commission with additional authority to approve the use of a variety of audible-warning devices.

3.2.2.1. BNSF's and Amtrak's Interpretation of Pub. Util. Code § 7604 is Contrary to the Plain Language of the Statute and, Therefore, Violates Settled Rules of Statutory Construction

BNSF and Amtrak contend that when “the State Legislature amended Section 7604 in the year 2006 to require compliance with 49 CFR 222.21, it removed the provision excepting locomotive horn use while approaching an AWS equipped grade crossing, ... thus, eliminating the AWS/horn use exception from section 7604.”¹⁴ Yet BNSF's and Amtrak's position runs afoul of the rule of statutory construction set forth, *supra*. The fact that the Legislature specifically added the “bell, siren, horn, whistle, or similar audible warning device” in subparts (1) through (4) of Pub. Util. Code § 7604(a) shows the Legislative intent to expand, rather than restrict, the Commission's authority.

BNSF and Amtrak also assert that Cal. Pub. Util. Code § 7604 requires the sounding of the locomotive horn at all grade crossings in California. They reason that Pub. Util. Code § 7604's incorporation of the requirements of 49 C.F.R. § 222.21 (*see* footnote 15 *infra*) expresses the Legislature's intent to apply § 222.21 standards to all grade crossings in California, whether public, private, or pedestrian. (BNSF/Amtrak Protest/Response, at 4; Opening Brief, at 2-4.) But BNSF's and Amtrak's argument is undermined by the language of the very federal rules and statutes upon which they rely. 49 C.F.R. § 222.27 permits an

¹⁴ BNSF/Amtrak Opening Brief, at 5.

exception to the sounding of locomotive horns at pedestrian crossings where those crossings are not within the boundaries of an FRA-established Quiet Zone:

... [W]here 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. Where State law requires the sounding of a locomotive audible warning device other than the locomotive horn at pedestrian grade crossings, that locomotive audible warning device shall be sounded in accordance with §§ 222.21(b) and (d) of this part.

Thus, 49 C.F.R. § 222.27 permits a state to impose a Quiet Zone at pedestrian crossings so long as that audible warning device “other than the locomotive horn” (e.g., an AWS) is sounded in accordance with 49 C.F.R. §§ 222.21(b) and (d).¹⁵ 49 C.F.R. § 222.21(a) provides that the locomotive horn

¹⁵ 49 C.F.R. § 222.21(b) provides that “a railroad, at its option, shall comply with this section or sound the locomotive horn in the manner required by State law, or in the absence of State law, in the manner required by railroad operating rules in effect immediately prior to June 24, 2005.” “The locomotive horn shall begin to be sounded at least 15 seconds, but no more than 20 seconds, before the locomotive enters the crossing.” Further, “[t]rains, locomotive consists and individual locomotives traveling at speeds in excess of 60 mph shall not begin sounding the horn more than one-quarter mile (1,320 feet) in advance of the nearest public highway-rail grade crossing, even if the advance warning provided by the locomotive horn will be less than 15 seconds in duration.”

§ 222.21(d) provides that “[t]rains, locomotive consists and individual locomotives that have stopped in close proximity to a public highway-rail grade crossing may approach the crossing and sound the locomotive horn for less than 15 seconds before the locomotive enters the highway-rail grade crossing, if the locomotive engineer is able to determine that the public highway-rail grade crossing is not obstructed and either: (1) The public highway-rail grade crossing is equipped with automatic flashing lights and gates and the gates are fully lowered; or (2) There are no conflicting highway movements approaching the public highway-rail grade crossing.”

Footnote continued on next page

shall be sounded “with two long blasts, one short blast and one long blast...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.”

3.3. The FRA Already Opined to BNSF that FRA Regulations on Quiet Zones do not preempt State Law Governing the Sounding of Wayside Horns at Private and Pedestrian Crossings

Finally, the FRA, through its counsel, has rejected BNSF’s position on preemption. The Assistant Chief Counsel for the FRA explained to BNSF in an April 21, 2010 letter, that the FRA regulations on Quiet Zones do not preempt State law governing the sounding of wayside horns at private and pedestrian crossings. When pedestrian crossings are located outside of the FRA Quiet Zone boundary, a State may impose its own Quiet Zone so long as the State’s requirement for sounding of its wayside horns is consistent with federal safety provisions for wayside horn devices:

Thus, when a locomotive horn at a private highway-rail grade crossing or pedestrian crossing outside a quiet zone is replaced by a wayside horn, except as provided in [sections] 222.25 and 222.27, Part 222 does not preempt any State law governing the sounding of the wayside horn at the crossing. (See FRA letter of April 21, 2010, from Mark Tessler of the FRA to Douglas Werner of BNSF, at 4 and attached to San Clemente’s Opening Brief.)

§ 222.21(e) provides that “[w]here State law requires the sounding of a locomotive audible warning device other than the locomotive horn at public highway-rail grade crossings, that locomotive audible warning device shall be sounded in accordance with paragraphs (b) and (d) of this section.”

49 C.F.R. § 222.25 exempts “private” highway-rail crossings from federal Quiet Zone regulations and permits states to mandate whether locomotive horns or wayside horns should be sounded at the crossing on approach of a train.

49 C.F.R. § 222.27 provides this same exemption for “pedestrian” crossings such as the pedestrian crossings in San Clemente.

In its letter, the FRA also notes that federal preemption of state wayside horn laws is limited to the requirement that the wayside horn must be sounded 15 seconds, but no more than 20 seconds, in advance of the train entering the crossing pursuant to Section 222.21(b) and (d). (*See* FRA letter of April 21, 2010, *supra*, at 3-4.) “Thus, locomotive audible warning devices other than a locomotive horn only have to be sounded in accordance with the time-based requirements set forth in §§ 222.21(b) and (d).” (*Id.*, at 4; *see* also 49 C.F.R. § 222.21(e).)

3.4. BNSF’s and Amtrak’s Concern for Potential Criminal Liability Under Pub. Util. Code §§ 7604(b) and 7078 is Refuted by the Plain Language of the Statutes

BNSF and Amtrak cite to the potential for criminal liability set forth in Pub. Util. Code §§ 7604 (b) and 7678 in support of their position that the Commission cannot grant applications that would inhibit a locomotive operative from sounding a train’s horn. Yet BNSF’s concern over criminal liability for locomotive operatives who do not sound a locomotive horn is misplaced given the plain language of the statutes and facts of this Application. Pub. Util. Code § 7604(b) provides:

- (b) Any railroad corporation violating this section shall be subject to a penalty of two thousand five hundred dollars (\$2,500) for every violation. The penalty may be recovered in an action prosecuted by the district attorney of the proper county, for the use of the state. The corporation is also liable for all damages sustained by any

person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with.

Pub. Util. Code § 7678 provides:

Except as provided in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 7604, every person in charge of a locomotive engine who, before crossing any traveled public way, omits to cause a bell to ring or steam whistle, air siren, or air whistle to sound at the distance of at least 1,320 feet from the crossing, and until the lead locomotive has passed through the crossing, is guilty of a misdemeanor.

By Pub. Util. Code § 7604(b)'s reference to "this section," we are required to review § 7604(a) and its four subparts to determine if there could be a violation. Since we have already determined that the statute allows the Commission to permit the implementation of an audible warning system other than a horn, the failure to sound a horn cannot, by itself, lead to a violation. Similarly, Pub. Util. Code § 7678 carves out an exception to potential criminal liability for those instances where the conductor is complying with either paragraph (1), (2), or (3) of Pub. Util. Code § 7604(a). Thus, if the conductor is acting in accordance with one of these paragraphs, there would not be grounds for potential criminal liability. Finally, the fact that Pub. Util. Code § 7604(a) incorporates the requirements of 49 C.F.R. § 222.21 would not lead to possible criminal liability in this case as 49 C.F.R. § 222.21 deals with locomotive mounted horns regarding public highway-grade crossings and not to private or pedestrian crossings which are the subject of the City of San Clemente's Application.

3.5. California Constitution Article III, § 3.5, Does Not Deprive the Commission of Jurisdiction to Resolve San Clemente's Application

The parties were also asked to address what impact, if any, California Constitution, Article III, § 3.5 has on the outcome or ability of the Commission to rule on the question of Commission jurisdiction. § 3.5 provides:

An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

- (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;

- (b) To declare a statute unconstitutional; and
- (c) To declare a statute unenforceable, or to refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination that the enforcement of such statute is prohibited by federal law or federal regulations.

In *Reese v. Kizer* (1988) 46 Cal. 3d 996, 1002, the California Supreme Court explained the reasoning behind the enactment of § 3.5 was to prevent the Commission from acting in a way that would thwart the will of the Legislature:

Article III, section 3.5, which was enacted by the voters in 1978, was placed on the ballot by a unanimous vote of the legislature in apparent response to this court's decision in *Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308 . . . in which the majority held that the Public Utilities Commission had the power to declare a state statute unconstitutional. [Citations omitted.] The purpose of the amendment was to prevent agencies from using their own interpretation of the Constitution or federal law to thwart the mandates of the Legislature.

(See also *Burlington Northern & Santa Fe Railway Company* (2003) 112 Cal. App. 4th 881, 887 [quoting ballot pamphlet for Proposition 5 which explained the purpose for Article III, § 5].)

The Commission does not believe that § 3.5 impacts the Commission's ability to rule on the question of the Commission's jurisdiction. The Commission is not being asked to declare a state statute unenforceable on the grounds it is unconstitutional. Moreover, as neither party has cited an appellate court decision holding that the enforcement of the applicable state statutes in question is prohibited by federal law or federal regulations, there is no constitutional impediment to resolving this jurisdictional dispute. Finally, if the Commission were to rule in the manner proposed by BNSF and Amtrak and refuse to enforce

Pub. Util. Code §§ 7604 and 1202, the Commission would be acting contrary to the expressed purpose behind Article III, § 3.5's enactment.

4. Comments on Proposed Decision

The proposed decision of Administrative Law Judge (ALJ) Mason in this matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure. Opening comments were filed by ___ on ____ and reply comments were filed on ____ by ____.

5. Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Robert Mason is the assigned ALJ in this proceeding.

Findings of Fact

1. On August 2, 2011, the City of San Clemente, California, filed an Application seeking approval from the Commission to install an AWS as a Supplemental Safety Measure at each of the following seven Beach Trail pedestrian crossings:

the Dije Court Crossing, the El Portal Crossing, the Corto Lane Crossing, the San Clemente Pier Crossing, the T Street Crossing, the Lost Winds Crossing, and the Calafia Crossing.

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.

Conclusions of Law

1. Federal regulations establishing Quiet Zones do not apply to these pedestrian at-grade crossings in San Clemente.

2. The Commission may exercise its exclusive jurisdiction over the pedestrian rail crossings that are the subject of this Application pursuant to Pub. Util. Code §§ 1202 and 7604.

3. California Constitution, Article III, § 3.5, does not deprive the Commission of jurisdiction to resolve the City of San Clemente's Application.

4. Pub. Util. Code §§'s 7604(b) and 7078 do not create the potential for criminal liability given the facts of the City of San Clemente's Application.

O R D E R

IT IS ORDERED that:

1. The Commission has jurisdiction to rule on the City of San Clemente's Application.

2. The assigned Administrative Law Jude is instructed to set a prehearing conference so that the parties can identify the remaining issues for the resolution and a scoping memo can be issued.

This order is effective today.

Dated _____, at San Francisco, California.