

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE ADOPTION)
OF FURTHER AMENDMENTS TO THE)
COMMISSION’S RULES REGARDING)
RAILROADS AND RAILROAD SAFETY)**

Case No. 11-00420-TR-RR

NOTICE OF PROPOSED RULEMAKING AND HEARING NOTICE

NOTICE IS HEREBY GIVEN that the New Mexico Public Regulation Commission ("NMPRC" or "Commission") proposes to amend its rules regarding railroads and railroad safety that are currently codified in the New Mexico Administrative Code ("NMAC") at 18.14.2 NMAC. This matter comes before the Commission upon the Petition for Amendment of 18.14.2 NMAC, filed on September 30, 2011 by BNSF Railway Company and Union Pacific Railroad Company; *whereupon*, having considered that Petition and the responses thereto, and being fully advised,

THE COMMISSION FINDS AND CONCLUDES:

1. The Commission is charged, among other things, with enforcing railroad safety as provided by NMSA 1978, § 63-7.1-1(A)(4), consistent with the Commission’s jurisdiction as provided in the New Mexico Constitution, Art. XI, § 2, and other applicable law.
2. On September 8, 2011, the Commission issued its *Final Order* in Case No. 09-00261-TR-RR, adopting a final rule that has since been duly published in the NEW MEXICO REGISTER and became effective on September 30, 2011.
3. The BNSF Railway Company and Union Pacific Railroad Company (“the Class I Railroads”) appealed the *Final Order* in Case No. 09-00261-TR-RR to the New Mexico Supreme Court. Subsequently, after discussion with representatives of the Commission’s Transportation Division Staff and counsel for the Commission, the Class I Railroads and the Commission filed a joint motion to stay the appeal until the conclusion of the parties’ efforts to resolve their differences administratively.
4. On September 30, 2011, in Case No. 11-00371-TR-RR, the Class I Railroads filed their Petition for Amendment of 18.14.2 NMAC (“Petition”). Pursuant to 1.2.2.35(A)(1)(d) NMAC, we take administrative notice of the entire record in Case No. 11-00371-TR-RR. As the result of the *Order Partially Granting Requested Interim Waivers and Variances* that we issued on November 3, 2011, the Railroads’ Petition for Amendment of 18.14.2 NMAC is now before us in this Docket. In their Petition, the Class I Railroads request that we adopt several amendments to the final rule we adopted on September 8, 2011 in Case No. 09-00261-TR-RR. In particular, the Railroads ask that we amend 18.14.2 NMAC by repealing subparts 18.14.2.11(B), (C), (D), and (E). They also ask that we repeal 18.14.2.13 NMAC, or, in the alternative, amend it to clarify the scope of "changes" [to lines and grade crossings] which must be reported annually.
5. The Class I Railroads also ask us to amend 18.14.2.9 NMAC by clarifying that the adoption of the clearances standards of the AREMA Clearances Manual will apply only to “prospective construction[;]” and they ask that we add a provision in 18.14.2.12[D] NMAC clarifying that release of [accident] reports will not waive what they assert to be a federal privilege from disclosure of these reports in discovery or admissibility at trial.
6. With regard to 18.14.2.9 NMAC, the Class I Railroads would have the rule explicitly state that clearance standards pertain to construction begun after January 1, 2012. Paragraph 41 of the September 8, 2011 Final Order in Case No. 09-00-261-TR-RR unambiguously states that the new clearance standards are to be applied prospectively only, but some clarification in the rule itself may be desirable. Therefore, the Commission’s Proposed Rule includes a clarification on this issue.
7. With regard to 18.14.2.11(B)-(D) NMAC, the Class I Railroads would completely revise the procedures and requirements for opening and closing of crossings, based on a claim that this Commission lacks jurisdiction to apply the existing final rule as adopted. The Class I Railroads argue that authority over the construction and closure of roads crossing railroad tracks, and therefore of road crossings, is exclusively vested in the government agency with authority over public roads, or with the owner of a private road; and that this Commission has no constitutional or statutory authority to order the construction or closure of roads, and therefore has no constitutional or statutory authority to order the construction or closure [of] road crossings. Based on that argument, the Railroads ask us to overhaul 18.14.2.11(B)-(D) NMAC by revising, not only procedures and requirements for opening and closing of crossings, but the entire approach we adopted in Case No. 09-00261-TR-RR, where we considered a similar argument but did not find it persuasive. Because we again find that the rule is

jurisdictional to this Commission and was lawfully adopted, we decline to adopt the Railroads' desired language for purposes of our Proposed Rule. (In support of their Petition, the Class I Railroads present several arguments, starting with the truism that actions of an administrative body that exceed its authority are void, and ending with the curious assertion that "The Commission's arguments in its Order attempting to establish its authority lack merit." Ptn., pp. 8, 11-12. Inasmuch as our Final Order does not constitute argument but, rather, findings, conclusions and orders, we find the last assertion to be misplaced within a petition for relief.)

8. With regard to 18.14.2.11(E) NMAC, the Class I Railroads ask that we withdraw the requirement for posting of USDOT mile post numbers and letters at each public crossing in New Mexico, especially in view of a pending Federal Railroad Administration rulemaking pertaining to the posting of milepost numbers and letters that they report is taking place before the federal railroad administration at this time, pursuant to 49 U.S.C. § 20152 (a)(5)(C). (Neither party has cited the docket number of the federal rulemaking, which would be helpful to the Commission.) The Railroads also argue that our rule is preempted by 49 U.S.C. § 20152, and that use of USDOT mile post numbers and letters is undesirable as a means of identifying road crossings. We need not address those arguments here; it suffices for practical purposes to note the reported pendency of a federal rulemaking concerning signage. Our Proposed Rule would delete the mile post requirement but retain the reference to USDOT identification overall.

9. With regard to 18.14.2.12(A)-(B) NMAC, the Class I Railroads would, apparently, delete the word "immediately" before the word "report" in reference to accident/incident reporting to various state agencies. (We do not find this request plainly set out in the Class I Railroads' waiver petition or in their rulemaking petition. It does, however, surface in the Commission's Transportation Division Staff's October 17, 2011 Response to Petitioners' Request for Interim Waiver of or Variance from 18.14.2.11, 18.14.2.12, and 18.14.2.13 NMAC and Petition for Waiver or Variance ("Response"), on the third (unnumbered) page thereof. We assume that the request came about in some informal discussion between the Class I Railroads and Staff. We have already deemed it appropriate to address a possible change of wording; *see Order*, 09/08/11, in Case No. 11-00371-TR-RR. In addition, Staff's Response states that it might not oppose replacing the word "immediately" in this rulemaking.) Our Proposed Rule replaces the word "immediately" with the word "promptly" in 18.14.2.12(A) but leaves the word "immediately" in place in 18.14.2.12(B), as reflecting an appropriate sequence for dealing with an accident/incident involving a railroad car carrying hazardous material. We do this notwithstanding our ruling, in the September 8, 2011 Order in Case No. 11-00371-TR-RR, that the Railroads' request for interim waiver or variance from both 18.14.2.12(A) and (B) NMAC should be granted. *See Order* at ¶10. This is because 18.14.2.12(B) deals, not with reporting to our Staff, but, rather, with reporting to the New Mexico State Police and to the New Mexico Environment Department – both agencies with direct emergency responsibilities in situations involving hazardous materials. In addition, we believe that reporting to local law enforcement and tribal police are basic requirements that should be part of our rule.

10. The Class I Railroads request that we add a provision to 18.14.2.12(C) NMAC clarifying that release of [accident] reports will not waive what they assert to be a federal privilege from disclosure of these reports in discovery or admissibility at trial. According to the Railroads, 49 U.S.C. § 20903 and 23 U.S.C. § 409 create a statutory privilege. While we are not as yet convinced that the asserted privilege would extend to the type of reporting that we require under 18.14.2.12 NMAC, our Proposed Rule adds the requested provision, at 18.14.2.12[D] NMAC.

11. With regard to 18.14.2.13 NMAC, in reference to our rule's requirement for annual filing of maps and profiles, the Class I Railroads would eliminate the requirement to report changes to lines and grade crossings in New Mexico since the previous filing. They argue that this information is available publicly through the National Highway-Rail Crossing Inventory, and that there are pending regulations to be promulgated under 29 U.S.C. § 20160 which appear likely to require railroads to maintain that inventory and to update any changes within six (6) months. Ptn. at 13. Our Proposed Rule adds an option to make these materials available electronically and would incorporate by reference the National Highway-Rail Crossing Inventory, provided that the Railroads and Staff agree on a complete citation for that inventory.

12. We find many of the Class I Railroad's requests for waiver or variance to be reasonable. A new rulemaking proceeding should be initiated in order to provide for possible further amendments to the Commission's Railroad Safety Rules.

IT IS THEREFORE ORDERED:

A. A new proceeding is hereby opened for the purposes of the Commission's consideration of further amendments to its Railroad Safety Rules as currently set forth at 18.14.2 NMAC. The Commission's Proposed Rule for comment is attached hereto as Exhibit 1.

B. A hearing shall be held before the Commission for the purpose of receiving oral comments on the Commission's Proposed Rule, at the following time and place:

Thursday, January 12, 2012, beginning at 1:30 P.M.

4th Floor Hearing Room

1120 Paseo de Peralta

Santa Fe, New Mexico 87501

C. Written comments on the Commission's Proposed Rule may be submitted until and through December 22, 2011. Written responses to the comments may be submitted until and through January 5, 2012. The record shall close on January 26, 2010.

D. This Order is effective immediately.

E. Copies of this Order shall be served via e-mail upon all persons listed on the attached Certificate Of Service (which includes all persons listed on the Certificate Of Service for the Final Order issued in Case No. 09-00261-TR-RR, as well as all persons who have since requested inclusion), and shall otherwise be served via regular mail. Any interested person may request addition to the official Certificate Of Service for this case, consistent with the timelines to be established in forthcoming procedural orders.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 8th day of November, 2011.

NEW MEXICO PUBLIC REGULATION COMMISSION

PATRICK H. LYONS, CHAIRMAN

THERESA BECENTI-AGUILAR, VICE CHAIR

JASON A. MARKS, COMMISSIONER

BEN L. HALL, COMMISSIONER