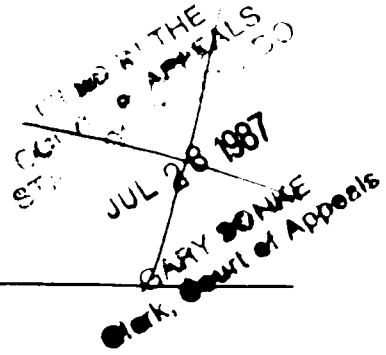
7-28-1987

Atchison, T. and S. F. R. Co. v. Public Utilities Com.

SUPREME COURT, STATE OF COLORADO

Case No. 87 SA 102



PETITIONER-APPELLANT'S OPENING BRIEF

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner-Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, THE CITY AND COUNTY OF DENVER, THE DENVER & RIO GRANDE WESTERN RAILROAD COMPANY, THE BURLINGTON NORTHERN RAILROAD COMPANY, THE CITY OF ARVADA, THE CITY OF COLORADO SPRINGS, STATE DEPARTMENT OF HIGHWAYS-STATE OF COLORADO, THE UNION PACIFIC RAILROAD and THE CITY OF WESTMINSTER,

Respondents-Appellees.

FOR APPELLATE REVIEW OF FINAL ORDER AND JUDGMENT OF FEBRUARY 17, 1987, OF THE DISTRICT COURT IN AND FOR THE CITY AND COUNTY OF DENVER, THE HONORABLE J. STEPHEN PHILLIPS, DISTRICT JUDGE, CIVIL ACTION NO. 84 CV 2787.

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THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY

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B. WHETHER THE PUBLIC UTILITIES COMMISSION ARBITRARILY ALLOCATED THE RAILROADS' SHARE OF PROJECT COSTS BETWEEN THE RAILROADS WITHOUT CONSIDERING BENEFITS AS REQUIRED BY APPLICABLE STATUTORY STANDARDS.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is before the Supreme Court on a direct appeal from a final judgment of the Denver District Court, affirming a decision of the Colorado Public Utilities Commission allocating the costs of building the new West Eighth Avenue viaduct between and among the City and County of Denver and the affected railroads.

B. COURSE OF THE PROCEEDINGS

On December 30, 1983, the City and County of Denver ("Denver") filed an application with the Public Utilities Commission ("PUC") for permission to tear down the old West Eighth Avenue viaduct and to construct a new viaduct, and for an allocation of the project costs. (Record page 660) On February 7, 1984, the PUC entered an Order approving the application and allocating costs between and among Denver and the affected railroads. (Record pages 1-18) On March 26, 1984, Appellant, The Atchison, Topeka and Santa Fe Railway Company ("Santa Fe"), filed a Petition For Review with the Denver District Court. (Record pages 19-23) The Santa Fe sought judicial review of the cost allocations. On February 17, 1987, the District Court entered its Order affirming the decision of the PUC. (Record pages 166-169) Subsequently, the Santa Fe filed its Notice of Intent To Seek Appellate Review and a Notice of Appeal. (Record pages 170-184) On motion, the District Court entered its Order approving a supersedeas bond and staying execution. (Record pages 186-190) The case is now pending on appeal before the Supreme Court.

C. STATEMENT OF THE FACTS

House Bill 1569 was signed into law on June 10, 1983.[1] House Bill 1569 amended Subparagraphs (b) through (e) of Subsection 3, §40-4-106, C.R.S. 1973 to read, in part, as follows:

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[1] A copy of House Bill 1569 is attached hereto as Appendix A.

(b) Prior to January 1 of each year the commission shall take applications for grade separation construction projects and shall hold hearings . . . to determine which projects shall be constructed and to allocate the expenses of construction between the railroad corporations affected and between the corporation and the state, county, municipality or public authority in interest. . . .

(c)(I) In the allocation of expenses for each grade separation construction project pursuant to paragraph (b) of this subsection (3) between the affected class I railroad corporations and the state, county, municipality or public authority in interest, the commission shall give equal weight to the benefits, if any, which accrue from the grade separation project and the responsibility for the need, if any, for such project.

(c)(II) In the allocation of the class I railroad corporations' share of expenses for a grade separation construction project pursuant to paragraphs (a) and (b) of this subsection (3), the commission shall consider the benefits, if any, which shall accrue between the class I railroad corporations affected.

Under House Bill 1569, the City and County of Denver, the Cities of Colorado Springs, Arvada and Westminster, and the Colorado Department of Highways, filed applications with the PUC for approval of the construction of certain railroad/highway grade separation projects and for the allocation of the costs of those projects. (Record pages 1 and 2) The application of Denver was

filed December 30, 1983. (Record pages 5, 660) It sought authority to remove and replace the West Eighth Avenue viaduct. (Record pages 5, 660) The viaduct spanned rail yards of The Denver & Rio Grande Western Railroad Company ("Rio Grande") on the east and a mainline track of Burlington Northern Railroad Company ("Burlington") and a mainline and spur track of the Santa Fe at the west end. (Record pages 5, 660-679) The PUC granted Santa Fe, Burlington and Rio Grande leave to intervene in the Denver proceeding. (Record pages 2, 681-683) All of the various applications were consolidated for hearings to commence January 18, 1984. (Tr 1/18, p 5, lines 1-14) On the first day of the hearings, the applications of the City of Colorado Springs and the Department of Highways were dismissed. (Tr 1/18, p 21, lines 3-19) Testimony was then taken separately on each of the three remaining applications.

In support of its application, Denver presented only the testimony of Mr. John Stamm on its direct case and Messrs. Ellerbrock and Minsas on rebuttal. (Tr 1/19, pp 24-105; Tr 1/20, pp 105-118) Mr. Stamm was the Director of Design and Construction Engineering. (Tr 1/19, p 24, lines 18-21) His testimony primarily dealt with questions of design, cost, history of the old viaduct and Denver's perceived needs for a new viaduct. He did not present any testimony concerning benefits to the railroads of a new viaduct. (Tr 1/19, pp 24-105)

Mr. Ellerbrock was Deputy Director of the Denver Traffic Engineering Division. (Tr 1/20, p 105, lines 22-24) He testified only concerning his opinion that an Eighth Avenue viaduct was necessary for the movement of traffic. He did not present any testimony concerning benefits to the railroads of a new viaduct. (Tr 1/20, pp 105-111) On cross-examination, he testified that the old viaduct had been closed November 18, 1983. (Tr 1/20, p 108, lines 5-7)

Mr. Minsas was Denver's last witness. He was Chief Structural Engineer for Denver. (Tr 1/20, p 111, lines 22-24) His testimony dealt only with cost questions. He presented no evidence relevant to questions of benefit. (Tr 1/20, pp. 111-119)

Upon conclusion of Denver's direct case, Santa Fe presented the testimony of Mr. C.L. Holman, Asst. General Manager of Engineering. (Tr 1/19, p 108, lines 1-11) Mr. Holman primarily testified concerning the predominance of the revenue operations of the Burlington under the viaduct, as opposed to the operations of Santa Fe. (Tr 1/19, pp 110-119) He also testified concerning the appropriate cost of a theoretical grade separation structure. (Tr 1/19, pp 119-130)

Finally, the PUC Staff presented the testimony of Mr. John Baier, Staff Transportation Engineer for the PUC. (Tr 1/20, p 15,

lines 10-19) Mr. Baier's testimony was presented at length in written form and on direct and cross-examination. The written testimony was accepted into evidence as Exhibit 17. (Tr 1/20, p 17, line 16, to p 19, line 4) He proposed a "base case" methodology to be used in allocating costs under House Bill 1569. (Ex 17, p 14; Record page 882) In his written testimony, he explained his underlying theory and assumptions as follows:

THEORY AND ASSUMPTIONS

> In order to analyze the separation projects and meet the requirements of the new law, I am presenting a new approach or methodology which is both logical and fair based upon the benefit and responsibility for need.
>
> First, in any grade separation project, there are two principle parties, the private interest and the public interest. The private interest consists of the railroad corporation or corporations that owns the right of way and tracks across which a roadway right of way, either exists or will exist. The public interest consists of the public authority, city, county or state, who owns the roadway right of way and the roadway which crosses or will be crossed by the railroad.
>
> Whenever new crossings are constructed, whether it be the case of a new rail line over an existing roadway, or a new roadway over an existing railroad, the alternative to construction of a separated crossing is the construction of a crossing at grade. In these cases analysis will compare separated verses at grade in determining benefit and responsibility. Similarly, reconstruction of an existing separation will compare separated verses the alternative at grade.
>
> A grade separation structure would not be required if either the railroad or the roadway

did not occupy the same right of way. Both public interest and private interest benefit from and contribute to the need for a grade separation.

The public benefits by the construction of a separation by the elimination of railroad-highway grade crossing accidents and the resultant loss and damage to property, death and injury to persons, delay and inconvenience to motorists as a result of crossing blockage, elimination of traffic disruption, elimination of potential hazardous materials, release, and eliminate delay to emergency service vehicles.

The railroad also benefits by the construction of the separation by the elimination of accidents and the resultant loss and damage to signals, trackage and equipment, damage to lading, delay to trains, derailments and release of hazardous materials, the reduction of tort liability as a result of accidents, and freedom of operation.

It is extremely difficult to measure and quantify these benefits. However, the benefits are shared equally.

It is recommended that the railroad and public share 50% each to separate the grades. However, this allocation should be made only for that portion of project which separates a reasonably adequate roadway and a reasonably adequate railroad. Therefore, further analysis is required.

(Ex 17, pp 14-16; Record pages 882-884)

In his written testimony, Mr. Baier then proceeded to elaborate on his "base case" methodology. Essentially, he proposed for each project the definition of a theoretical structure suitable to separate a reasonably adequate roadway from a reasonably adequate railroad. (Ex 17, pp 16-24; Record pages 884-892) Under this methodology, it is assumed that the

railroads, on the one hand, and the public, on the other, would share equally the benefits of a theoretical structure necessary to make an adequate separation of the grades. (Ex 17, p 16; Record page 884) It was his recommendation that the costs of the base case theoretical structure be assessed 50% to the railroads and 50% to the public. (Ex 17, p 16; Record page 884) To the extent that there would be components of a proposed project which represented either additions or deletions to the theoretical structure, the methodology then required a determination as to whether the addition or deletion would accrue to the benefit or detriment of either the public or the railroads and an appropriate adjustment would be made. (Ex 17, pp 16-24; Record pages 884-892) For example, the public entity would be charged with the cost of any component of a project which was essentially for the benefit of the public entity and not necessary for a reasonably adequate grade separation. (Ex 17, p 23; Record page 891)

In his written testimony, Mr. Baier applied the base case methodology to the West Eighth Avenue viaduct project. As a first step, he divided the viaduct into two segments. The longer portion was the easterly segment which crossed the rail yards of the Rio Grande. The shorter portion was the westerly segment which crossed the tracks of the Santa Fe and Burlington. With respect to the westerly segment, Mr. Baier determined that the base case costs for the theoretical structure were $2,288,013.00.

Of that amount, he recommended the assessment of 50%, or $1,144,007.00, to the Santa Fe and Burlington. He then noted that the Santa Fe and the Burlington each owned one mainline track under the westerly segment and therefore recommended that the railroads' assessment of $1,144,000.00 be divided equally between the Burlington and the Santa Fe so that each railroad would be assessed with $572,000.00. (Ex 17, p 27; Record page 895)

In its decision, the PUC made specific findings of fact concerning Denver's application which appear in Paragraphs 15 through 20 of the PUC findings. (Record pages 5-7)[2] Among other things, there are findings that the Burlington owns a southbound mainline track and the Santa Fe owns a northbound mainline track under the West Eighth Avenue viaduct; that the Santa Fe also owns a spur track; that these mainline tracks and spur are at the western edge of the viaduct, and that the Santa Fe mainline is located on Burlington property. There are also findings that the Burlington daily operates a total of 24 northbound and southbound trains under the viaduct; that the Burlington daily operates 8 helper engine consists and three switch engines under the viaduct; and that Santa Fe operates a total of four northbound and southbound trains under the viaduct on a daily basis. The PUC found that the average Santa Fe mainline traffic consists of 40-car general freight trains, and that "Burlington Northern traffic

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[2]A copy of the decision is attached hereto as Appendix B.

includes 20 daily coal trains averaging 110 cars in length." (Finding 19, Record page 6)

The PUC found that the old viaduct had deteriorated and had been closed in November of 1983 because of its unsafe condition. (Finding 17, Record page 6) The PUC found that:

> . . .The vehicular traffic that formerly used the West 8th Avenue viaduct has been diverted to other routes, including the West 6th Avenue viaduct. . . . No vehicular traffic currently crosses at West 8th Avenue at-grade or in the near vicinity, therefore, Applicant will not close any grade crossings.
>
> (Finding 20, Record page 6)

The PUC also found that ". . .no at-grade crossing is used in the vicinity of West 8th Avenue and none is proposed to be constructed." (Finding 35, Record page 12)

After making findings about each of the other pending applications, the PUC made findings concerning the requirements of House Bill 1569 and detailed findings describing the methodology proposed by Mr. Baier, along with his cost recommendations. (Findings 29-32, Record pages 8-10) Then, at Paragraphs 40 and 41, the PUC made the following additional findings:

> 40. House Bill 1569 requires that in allocating funds, the Commission must

consider relative benefits accruing to the affected railroads and public entity in interest, and the responsibility for need of the separation project. Staff's base case methodology starts with the assumption that since two parties, the public entity and railroad, create the need for the separation, it follows that both will benefit equally from the separation project. The methodology as proposed by Staff, however, is sufficiently flexible to enable adjustments to this assumption on a case-by-case basis. It is found herein that the affected railroads and public entities in the instant applications are equally responsible for the need of the proposed separations and will equally benefit from the construction of the respective grade separation projects.

41. House Bill 1569 further requires that where more than one railroad is affected by a separation project, the Commission must consider the benefits accruing between the railroads. It is found that in the separation projects involving the City and County of Denver, Burlington Northern and Santa Fe are affected railroads for a portion of the proposed viaduct. It is further found herein that the specific allocations proposed by Staff for the Burlington Northern and Santa Fe is just and reasonable. Both the Burlington Northern and Santa Fe own tracks and operate trains at the western portion of the proposed structure. Both railroads are equally responsible for and will equally benefit from the construction of the proposed viaduct.

(Record page 15)

In its Order, the PUC went on to direct that the allocation of costs for the West Eighth Avenue viaduct be in accordance with

Findings of Fact No. 36, thereby incorporating, without exception, the recommendations of Staff. (Order #8, Record page 17)

In its Petition For Review to the Denver District Court, Santa Fe alleged that the finding by the PUC that the public entity and the railroads are equally responsible for the need for the proposed separation and that they will equally benefit from the construction of a grade separation is improperly based on an assumption; and that the finding is not supported by the evidence and violates the requirements of Subsection (3)(c)(I), §40-4-106, C.R.S. 1973, as amended. (Record pages 20-22) Santa Fe also alleged that the PUC finding in Paragraph 41 that the Burlington and Santa Fe will equally benefit from the construction of the proposed viaduct is not in accordance with the evidence. (Record pages 21-22)

On review, the trial court concluded that the PUC had considered the Staff evaluation of benefits. Specifically, the trial court referred to Mr. Baier's explanation of his underlying theory and assumptions in which he recited certain general benefits to the public and to the railroads attributable to the construction of grade separation structures. (Record page 168) The District Court went on to hold:

> Whether the Court would have reached the same conclusion, that presumptively the benefits

> are equal between railroad and municipality, is not the question. The question is whether the PUC fulfilled its statutory obligation to consider benefits and whether its conclusion has support in the record. Here, the question must be answered yes. There is nothing to suggest that the conclusion of presumptively equal benefits to both entities is unreasonable. Accordingly, this Court has no authority to change the decision.
>
> Nor can it be said that the PUC abused its fact-finding discretion by apportioning the railroads' 50% each, since each had the right to use a mainline under the viaduct. It is not incumbent to apportion solely on the basis of temporary train traffic patterns, since amount of usage is subject to change.
>
> (Record pages 168-169)[3]

III. SUMMARY OF ARGUMENT

The applicable statute in this case required the PUC to give equal weight to the benefits and to the responsibility for the need in allocating grade separation costs between the public entity and the railroads. Subparagraph (c)(I) of Subsection 3, §40-4-106, C.R.S. 1973, as amended 1983. Santa Fe now concedes that there is sufficient evidence in the record to support the PUC finding that the railroads and Denver are equally responsible for the need for a viaduct. On the other hand, Santa Fe contends there was no evidence of benefit to the railroads and that it was improper for the PUC to assume that Denver and the railroads shared benefits equally.

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[3] A copy of the Order of the trial court is attached hereto as Appendix C.

The trial court characterized the PUC's ultimate finding as a presumptive conclusion that the railroads and Denver shared benefits on an equal basis. (Record page 168) Santa Fe agrees with this characterization. Santa Fe submits that the PUC finding was an incorrect, irregular application of the statutory standard and that it resulted in an unreasonable, arbitrary allocation of costs to the railroads. The statute did not authorize or direct a presumptive conclusion. There was no rational basis for the presumption. There was no evidence that the railroads would benefit from the reconstruction of the viaduct. In fact, the only evidence of benefit was that Denver would benefit from opening a new viaduct to handle the flow of traffic.

If the Court should disagree with Appellant and hold that it was proper for the PUC to make an allocation to the railroads based partly on assumed railroad benefit, then a 50/50 allocation of the railroads' share between Burlington and Santa Fe would be unreasonable and arbitrary. Under the Staff definition of railroad benefit, the Burlington would receive a disproportionate benefit from a grade separation as compared to the Santa Fe. It would be inconsistent with the statutory standards and an unconstitutional taking for Santa Fe to be assessed with 50% of the railroads' allocation.

IV. ARGUMENT

A. THE PUC IMPROPERLY APPLIED LEGISLATIVE STANDARDS IN ASSUMING EQUAL BENEFITS.

1. THE PUC'S CONCLUSION OF EQUAL BENEFITS IS BASED ON AN ASSUMPTION.

The PUC based its ultimate conclusion of equal benefits on an assumption that the public entity and the railroads benefit equally. This is evident from the findings in Section 40. (Record page 15) It is also evident from the fact that there are no other findings of fact to support the ultimate conclusion of equal benefit.

An analysis of Section 40 makes the PUC's intention clear. After referring to the requirements of the statute, the PUC explained that the Staff methodology starts with the assumption that the public entity and the railroads benefit equally. The PUC noted that the methodology is sufficiently flexible to accommodate adjustments to the underlying assumption. The PUC then made the ultimate conclusion that in all of the pending applications, the public entities and railroads share benefit and responsibility equally. (Finding 40, Record page 15) In its Order, the PUC went on to adopt Staff's cost recommendation in its entirety. (Order #8, Record page 17) On the strength of this, the railroads and Denver were ordered to split the base case costs of the West Eighth Avenue viaduct on a 50/50 basis. (Finding 36, Record page

13) It is clear that the PUC not only was adopting Staff's allocation recommendation, but that it was also adopting the methodology and underlying assumptions which gave rise to the recommendation. Staff assumed that benefits were shared equally in making its recommendation. The PUC adopted the recommendation without exception.

The intention of the PUC to rely on an assumption of equal benefits is further evidenced by the total absence of any findings to support the conclusion. There are no findings which either identify or quantify any benefits to the Santa Fe, or any of the other railroads, from the construction of the new West Eighth Avenue viaduct. The conclusion of equal benefits stands without any explanation or support from any other findings. This, standing alone, is grounds for reversal. Colorado Municipal League v. Public Utilities Commission, 687 P.2d 416, 426 (S.Ct. 1984).

2. THE PUC MISAPPLIED LEGISLATIVE STANDARDS

The statute provides that in allocating expenses for a grade separation projection, ". . .the commission shall give equal weight to the benefits, if any, which shall accrue from the grade separation project and the responsibility for the need, if any, for such project." (Emphasis added.) Subparagraph (c)(I) of Subsection 3, §40-4-106, C.R.S. 1973, as amended 1983. The

statutory requirement that the PUC give equal weight to benefits and responsibility is mandatory.

The only way in which the PUC could give equal weight to benefits and responsibility would be to start out by weighing them separately. It does not appear from the decision that the PUC weighed benefits. Rather, it appears clear that the PUC simply assumed equal benefits.

There is nothing in the wording of the statute to suggest a legislative intent that the PUC can indulge a presumption that the public entity and the railroads share benefits equally. If the legislature had intended a presumption that the public entity and railroads share benefits equally, it would have said so. Rather, the legislature directed the PUC to give equal weight to benefits and responsibility. This requires that these elements be weighed in the first place.

In this case, the PUC has misapplied the statute. If the PUC had formulated reasonable guidelines for weighing benefits, it might have been true to the meaning of the statute. Such a formulation would certainly have been within the legislative power of the PUC. However, in this case, the PUC went beyond its legislative power in assuming equal benefits. This is particularly true in view of the fact that there is no rational

basis for such an assumption in this case, as will be demonstrated in Part B of this section of the Argument.

Admittedly, the standards for judicial review of a PUC decision are tightly prescribed. Colorado Municipal League v. Public Utilities Commission, 687 P.2d 416 (S.Ct. 1984); AT&SF Railway Co. v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (1977). Nevertheless, it is clear that a decision of the PUC is subject to reversal when the PUC misreads the intention of the legislature and fails to implement correctly legislative standards. Morey v. The Public Utilities Commission, et. al., 196 Colo. 153, 582 P.2d 685 (1978). See also, Morey v. Public Utilities Commission, et. al., 629 P.2d 1061 (S.Ct. Colo. 1981). In the first Morey case, the Court noted at Page 155: ". . .that the Commission applied improper guidelines in its decision-making process . . . ." Specifically, the Court was referring to the PUC requirement that a motor carrier applicant prove substantial inadequacy of existing service as a pre-condition to the issuance of a new certificate of convenience and necessity. The Court pointed out that under the legislative doctrine of regulated competition, the controlling consideration is public need, and not inadequacy of existing service. The judgment of the trial court was reversed in part with instructions to remand the case to the PUC for reconsideration of its decision consonant with the views of the Supreme Court. Subsequently, the PUC did reconsider its decision. It again

denied the issuance of a certificate on the basis that the application was not consistent with the public need. This decision also ended up on appeal to the Supreme Court. In its decision in the second Morey case, the Supreme Court reiterated that "public interest" is the controlling consideration in an application for a motor carrier certificate. The Court also noted its recognition of the fact that the issuance of a motor carrier certificate is a legislative prerogative, and that it had therefore been unwilling to issue more detailed standards for the guidance of the PUC. The Court went on to say that "Nevertheless, it is within our power on appeal to ensure that the guidelines formulated and applied by the Commission are not unconstitutional, arbitrary, capricious, unreasonable or vague. . . ." p 1065

It is clear from the two Morey cases that the Supreme Court has the power to insure that the PUC properly implements legislative standards. It is this power which the Santa Fe asks the Court to invoke in this case.

B. THERE IS NO RATIONAL BASIS FOR AN ASSUMPTION THAT DENVER AND THE RAILROADS SHARE BENEFITS EQUALLY

There is no rational basis underlying the PUC's assumption of equal benefits in this case. The assumption is best understood by referring to Staff's own explanation of its theory and assumptions. In his written testimony, Mr. Baier explains the

logic which leads to the assumption of equal benefits. The logic essentially is as follows:

1. When railroads and highways intersect, the alternative to a grade separation is an at-grade crossing.

2. In determining relative benefit to a railroad company and a public entity from the construction of a grade separation project, the analysis should therefore consider the relative benefits to the railroad company and the public entity from the construction of a grade separation structure as compared to having an at-grade crossing.

3. There are some general benefits to the public from a grade separation structure, as opposed to an at-grade crossing, in terms of accident avoidance, elimination of delays to motorists and emergency vehicles and elimination of traffic disruption.

4. There are general benefits to a railroad company from the construction of a grade separation structure, as opposed to an at-grade crossing, in terms of accident avoidance and elimination of interference with railroad operations.

5. "It is extremely difficult to measure and quantify these benefits." (Ex 17, p 16; Record page 884)[4]

6. "However, the benefits are shared equally." (Ex 17, p 16; Record page 884)

Staff's assumption and the PUC's assumption of equal benefit rests on the foregoing analysis. The logic is flawed. The conclusion that benefits are shared equally is not supported by the premise that it is extremely difficult to measure or quantify these benefits. There is no rational support for the conclusion in Mr. Baier's logic or in any of the evidence presented in this case. The assumption that benefits are shared equally is arbitrary and unreasonable. It cannot stand as a substitute for the statutory requirement that the PUC weigh both benefit and responsibility.

The capriciousness of the assumption is aptly demonstrated when applied to the West Eighth Avenue project. According to the evidence, the original viaduct was constructed in 1936. (Tr 1/19, p 74, lines 1-5) The viaduct gradually deteriorated and was

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[4]In the past the PUC has had no difficulty in quantifying benefits to railroads from signalization of crossings. This has been done by weighing evidence; not employing assumptions. AT&SF Ry. Co. v. Public Utilities Commission, 190 Colo. 378, 547 P.2d 234 (1976); Union Pacific Railroad Co. v. Public Utilities Commission, 170 Colo. 514, 463 P.2d 294 (1969).

closed down as being unsafe in November, 1983. (Tr 1/19, p 27, lines 3-22; Tr 1/19, p 95, line 24, to p 96, line 3; Tr 1/20, p 108, lines 5-7) In December, 1983, after the original viaduct was closed down, Denver filed the instant application with the PUC for permission to tear down the old viaduct and reconstruct a new viaduct. (Record page 660) When the application was filed, and at the time of the hearing, there was no traffic on West Eighth Avenue which crossed the yards or facilities of any of the railroads at-grade, above-grade or below-grade. (Tr 1/19, p 95, lines 24-25; page 96, lines 1-12) There is no evidence that any of the traffic which had formerly used the West Eighth Avenue viaduct was then using at-grade crossings of railroad tracks and facilities at other locations. (Tr 1/19, p 96, lines 13-25; Tr 1/20, p 108, lines 9-15; Tr 1/20, p 54, lines 11-22) Furthermore, as the PUC noted at Page 12 of its decision, ". . .no at-grade crossing is used in the vicinity of West Eighth Avenue and none is proposed to be constructed." (Finding 35, Record page 12)

Given the foregoing facts, Staff's theory and analysis, which leads to its assumption of equal benefits, doesn't even fit the circumstances of the West Eighth Avenue project. Staff's analysis proceeds on the assumption that the alternative to a grade separation is an at-grade crossing. Staff, therefore, compares the relative benefits of a grade separation to an at-grade crossing and identifies certain general types of benefits to be realized by

railroads from the use of a grade separation structure as opposed to an at-grade crossing.

The railroad benefits identified by Staff don't apply to the West Eighth Avenue viaduct. As noted by the PUC, there was no consideration of an at-grade crossing as an alternative to the viaduct. Therefore, on the facts of this case, it can't be said that the construction of a new viaduct would eliminate accidents which might otherwise occur, that it would eliminate loss, damage or liabilities which might otherwise occur, or that it would eliminate interference with railroad operations which might otherwise occur.

There simply was no evidence, in any form, that the railroads, would receive any benefit from the construction of the West Eighth Avenue viaduct. In fact, on cross-examination, given the circumstances, Mr. Baier admitted that there was no benefit to the railroads. (Tr 1/20, p 60, line 17 to p 62, line 18; Tr 1/20, p 78, line 15 to p 79, line 2) The only evidence of benefit in this case is the benefit to Denver from building a new viaduct to handle the flow of motor vehicle traffic. (Tr 1/19, p 36, lines 5-8; Tr 1/19, p 71, line 21, to p 80, line 16; Tr 1/19, p 105, lines 1-5; Tr 1/20, p 62, line 19, to p 63, line 9; Tr 1/20, p 106, line 10, to p 107, line 20) The PUC's ultimate conclusion of equal benefit and responsibility has no support in the evidence,

and the decision of the District Court and the PUC should therefore be reversed. RAM Broadcasting v. Public Utilities Commission, 702 P.2d 746 (S.Ct. 1985); People's Natural Gas v. Public Utilities Commission, 698 P.2d 255 (S.Ct. 1985); AT&SF v. Public Utilities Commission, 194 Colo. 263, 572 P.2d 138 (1977). The allocation against the railroads results in an unconstitutional taking of their property in violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Section 25, Article II of the Constitution of the State of Colorado.

C. ALLOCATION TO RAILROADS SHOULD BE 25% OF BASE CASE COSTS

Santa Fe concedes that Denver and the railroads equally share responsibility for the viaduct. Santa Fe contends the evidence supports a conclusion that only Denver benefits. If Santa Fe is correct, the question is, how should the cost be allocated?

The statute requires the PUC to give equal weight to benefits and responsibility for need. If the railroads and Denver are each 50% responsible for the need, and if Denver receives 100% of the benefit from a new viaduct, then the railroads would have one-fourth of the total benefit and responsibility and should be allocated one-fourth of the cost of the base case structure.

D. IF THERE IS RAILROAD BENEFIT, A 50% ALLOCATION OF THE RAILROADS' SHARE TO SANTA FE IS UNREASONABLE, ARBITRARY AND INCONSISTENT WITH THE REQUIREMENTS OF THE STATUTE

As stated in the foregoing sections of this Argument, it is the contention of Santa Fe that, although the railroads may be partly responsible for the need, there is no evidence that they will benefit from the viaduct. If the Court agrees, the allocation to the railroads should not be based in whole or in part on benefit to the railroads. The allocation to the railroads should be based only on their share of responsibility. That allocation should be 25% of the base case costs. Under that circumstance, it is Santa Fe's position that a 50/50 allocation of the railroads' share between Santa Fe and Burlington would meet the statutory standard. This is on the basis that there is no evidence of benefit to either railroad. Therefore, with respect to benefits, the railroads are in identical positions and should share the railroads' allocation equally.

If, however, the Court should determine the PUC properly found that Denver and the railroads equally shared <u>both</u> responsibility and benefits and that the PUC properly allocated 50% of the base case costs to the railroads, then Santa Fe submits that a 50/50 allocation of the railroads' share between Santa Fe and Burlington would be arbitrary and inconsistent with the requirements of the statute.

The statute requires that, in allocating the railroads' share of expenses, the PUC ". . .shall consider the benefits, if any, which shall accrue between the Class I railroad corporations affected."

In Section 41 of its findings, the PUC found that both the Burlington and Santa Fe own tracks and operate trains under the viaduct. The PUC thereupon concluded that "Both railroads are equally responsible for and will equally benefit from the construction of the proposed viaduct." It appears that the conclusion of equal benefits is based solely on the finding that both railroads own tracks and operate trains under the viaduct. (Finding 41, Record page 15)

The only evidence of benefits to railroads from grade separations was the testimony of Mr. Baier, who identified benefits from a grade separation, as compared to an at-grade crossing. These benefits were:

1. Elimination of accidents and the resultant loss, damage and delay.
2. The reduction of tort liability.

3. Freedom of operation.

(Ex 17, p 18; Record page 883)

All of the benefits defined by Mr. Baier would have a proportional relationship to the level of operations. (Tr 1/20, p 80, line 16, to p 81, line 21) If these are the benefits which serve as the basis of an allocation between the railroads, it would be totally unreasonable to allocate the benefits on a 50/50 basis between Burlington and Santa Fe.[5] On the average, Burlington operates six times as many trains under the viaduct as Santa Fe. The vast majority of these are the long unit coal trains, as compared to the short, general freight trains operated by the Santa Fe. (TR 1/19, pp 109-114) Each railroad retains the revenue from its own operations, and each railroad pays expenses in proportion to its wheel count. (TR 1/19, pp 114-119) Any allocation between the railroads would have to give recognition to the preponderance of the operations by Burlington. There is no evidence of any prospective change in level of operations of the two railroads. The statute requires the PUC to consider benefits in making an allocation between the railroads. A 50% allocation to Santa Fe would be in disregard of that requirement. It would be unreasonable and arbitrary. It would represent a taking of the property

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[5]The PUC decision is internally inconsistent in defining railroad benefits so as to justify an allocation to the railroads and in ignoring those same benefits in making an allocation between the railroads. If the Court determines that the PUC properly found railroad benefit, the PUC decision should be reversed because of this inconsistency. People's Natural Gas v. Public Utilities Commission, 698 P.2d 255 (S.Ct. 1985).

of the Santa Fe in violation of its due process rights under the Fifth and Fourteenth Amendments of the United States Constitution and Section 25, Article II of the Colorado Constitution.

V. CONCLUSION

Santa Fe respectfully requests that the Order and decision of the trial court be reversed and that the case be remanded to the District Court for remand to the PUC with instructions that the Santa Fe be assessed with 50% of 25% of the base case costs which have been determined for the westerly segment of the West Eighth Avenue viaduct. Alternatively, if the Court sustains the PUC determination that the railroads' share of base case costs should be 50%, Santa Fe requests that the case be remanded with instructions to the PUC to consider levels of revenue operations under the viaduct in allocating the railroads' share between Santa Fe and Burlington.

Respectfully submitted this 28th day of July, 1987.

GRANT, McHENDRIE, HAINES AND CROUSE
Professional Corporation

By: _____
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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy of the foregoing PETITIONER-APPELLANT'S OPENING BRIEF in the U.S. mail, postage prepaid, this 28th day of July, 1987, addressed to the following:

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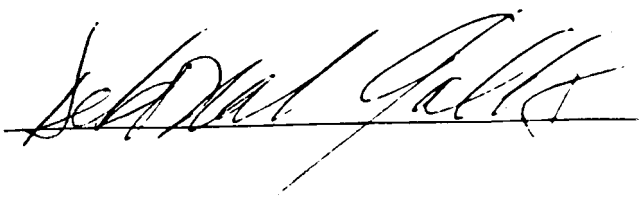

HOUSE BILL NO. 1569.

BY REPRESENTATIVES Wattenberg, McInnis, Shoemaker, Campbell, Underwood, Younglund, Armstrong, Bath, Bledsoe, Burkhardt, Fenlon, Heim, Herzog, Larson, Lee, Markert, Mielke, Minahan, Mutzebaugh, Neale, Owens, Paulson, and Robb;
also SENATORS Soash, Powers, Winkler, Hefley, Callihan, and Bishop.

PROVIDING FOR GRADE SEPARATION FUNDING TO BE DERIVED FROM RAILROAD CONSTRUCTION MONEYS AND MONEYS FROM OTHER AFFECTED ENTITIES AS ALLOCATED BY THE PUBLIC UTILITIES COMMISSION.

Be it enacted by the General Assembly of the State of Colorado:

SECTION 1. 40-4-106 (3), Colorado Revised Statutes 1973, is amended to read:

40-4-106. Rules for public safety - crossings - allocation of expenses. (3) (a) The commission also has power upon its own motion or upon complaint and after hearing, of which all the parties in interest including the owners of adjacent property shall have due notice, to order any crossing constructed at grade or at the same or different levels, to be relocated, altered, or abolished, according to plans and specifications to be approved and upon just and reasonable terms and conditions to be prescribed by the commission, and to prescribe the terms upon which the separation should be made and the proportion in which the expense of the alteration or abolition of the crossing or the separation of the grade should be divided between the railroad corporations affected or between the corporation and the state, county, municipality, or public authority in interest.

(b) PRIOR TO JANUARY 1 OF EACH YEAR THE COMMISSION SHALL TAKE APPLICATIONS FOR GRADE SEPARATION CONSTRUCTION PROJECTS

Capital letters indicate new material added to existing statutes; dashes through words indicate deletions from existing statutes and such material not part of act.

AND SHALL HOLD HEARINGS, OF WHICH ALL PARTIES IN INTEREST INCLUDING THE OWNERS OF AFFECTED PROPERTY LOCATED WITHIN A ONE MILE RADIUS SHALL HAVE DUE NOTICE, TO DETERMINE WHICH PROJECTS SHALL BE CONSTRUCTED AND TO ALLOCATE THE EXPENSES OF CONSTRUCTION BETWEEN THE RAILROAD CORPORATIONS AFFECTED AND BETWEEN THE CORPORATION AND THE STATE, COUNTY, MUNICIPALITY, OR PUBLIC AUTHORITY IN INTEREST. ONLY THOSE GRADE SEPARATION CONSTRUCTION PROJECTS WHICH MEET MINIMUM CRITERIA WARRANTING GRADE SEPARATIONS, AS ADOPTED BY THE PUBLIC UTILITIES COMMISSION GIVING CONSIDERATION TO THE STANDARDS UTILIZED BY THE COLORADO HIGHWAY COMMISSION, SHALL BE AUTHORIZED FOR CONSTRUCTION PRIOR TO MARCH 1 OF EACH YEAR PURSUANT TO THIS PARAGRAPH (b). IN ITS SELECTION THE COMMISSION SHALL CONSIDER TRAFFIC, SAFETY, AND GEOGRAPHIC DISTRIBUTION.

(c) (I) IN THE ALLOCATION OF EXPENSES FOR EACH GRADE SEPARATION CONSTRUCTION PROJECT PURSUANT TO PARAGRAPH (b) OF THIS SUBSECTION (3) BETWEEN THE AFFECTED CLASS I RAILROAD CORPORATIONS AND THE STATE, COUNTY, MUNICIPALITY, OR PUBLIC AUTHORITY IN INTEREST, THE COMMISSION SHALL GIVE EQUAL WEIGHT TO THE BENEFITS, IF ANY, WHICH ACCRUE FROM THE GRADE SEPARATION PROJECT AND THE RESPONSIBILITY FOR THE NEED, IF ANY, FOR SUCH PROJECT.

(II) IN THE ALLOCATION OF THE CLASS I RAILROAD CORPORATIONS' SHARE OF EXPENSES FOR A GRADE SEPARATION CONSTRUCTION PROJECT PURSUANT TO PARAGRAPHS (a) AND (b) OF THIS SUBSECTION (3), THE COMMISSION SHALL CONSIDER THE BENEFITS, IF ANY, WHICH SHALL ACCRUE BETWEEN THE CLASS I RAILROAD CORPORATIONS AFFECTED.

(III) THE COMMISSION SHALL ALLOCATE SUCH EXPENSES AMONG ALL AFFECTED CLASS I RAILROAD CORPORATIONS UP TO A TOTAL OF FIVE MILLION DOLLARS DURING THE TWELVE MONTHS BEGINNING JULY 1, 1983, AND UP TO FIVE MILLION DOLLARS PER YEAR FOR EACH SUCCEEDING YEAR. TOTAL ALLOCATIONS TO EACH CLASS I RAILROAD SHALL NOT EXCEED ONE MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS IN ANY ONE YEAR, OR SIX MILLION TWO HUNDRED FIFTY THOUSAND DOLLARS IN ANY FIVE-YEAR PERIOD. NOTHING IN THIS SUBPARAGRAPH (III) SHALL PRECLUDE ANY CLASS I RAILROAD CORPORATIONS FROM VOLUNTARILY CONTRIBUTING MORE THAN ITS ALLOTTED SHARE FOR GRADE SEPARATION CONSTRUCTION IN ONE YEAR; AND IN SUCH EVENT, ALL AMOUNTS CONTRIBUTED BY SUCH RAILROAD EXCEEDING ITS ALLOTTED SHARE IN ANY YEAR SHALL BE CREDITED TO AND SHALL SERVE TO REDUCE ANY ALLOCATION FOR GRADE SEPARATION CONSTRUCTION EXPENSES TO THAT RAILROAD IN SUBSEQUENT YEARS. NOTHING IN THIS SUBPARAGRAPH (III) SHALL BE CONSTRUED TO AUTHORIZE LESS THAN TWENTY-FIVE MILLION DOLLARS TO BE ASSESSED AGAINST ALL AFFECTED CLASS I RAILROAD CORPORATIONS IN ANY FIVE-YEAR PERIOD.

(d) THE COMMISSION SHALL NOT ORDER THE ABOLITION OF ANY

CROSSING FOR WHICH A GRADE SEPARATION IS DETERMINED TO BE NECESSARY UNTIL THIS SEPARATION IS CONSTRUCTED.

(e) THE STATE, COUNTY, MUNICIPALITY, OR PUBLIC AUTHORITY, AT ITS DISCRETION, MAY CHOOSE NOT TO PROCEED WITH A PROJECT.

(f) PARAGRAPHS (b), (c), (d), AND (e) OF THIS SUBSECTION (3) AND THIS PARAGRAPH (f) ARE REPEALED, EFFECTIVE JUNE 30, 1988.

SECTION 2. Effective date. This act shall take effect July 1, 1983.

SECTION 3. Safety clause. The general assembly hereby finds, determines, and declares that this act is necessary for the immediate preservation of the public peace, health, and safety.

Carl B. Bledsoe
SPEAKER OF THE HOUSE
OF REPRESENTATIVES

Ted L. Strickland
PRESIDENT OF
THE SENATE

Lorraine F. Lombardi
CHIEF CLERK OF THE HOUSE
OF REPRESENTATIVES

Marjorie L. Nielson
SECRETARY OF
THE SENATE

APPROVED 11:10 am June 10, 1983

Richard D. Lamm
GOVERNOR OF THE STATE OF COLORADO

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

* * *

IN THE MATTER OF THE APPLICATION OF THE CITY COUNCIL OF THE CITY OF ARVADA, COLORADO, FOR AUTHORITY TO CONSTRUCT A GRADE SEPARATION OF KIPLING STREET WITH THE BURLINGTON NORTHERN RAILROAD TRACKS.	APPLICATION NO. 36059 Arvada @ Kipling
IN THE MATTER OF THE APPLICATION OF THE CITY COUNCIL OF THE CITY OF COLORADO SPRINGS, COLORADO, FOR A RAILROAD-HIGHWAY GRADE SEPARATION PROJECT AT THE CROSSING OF THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY AT THE GARDEN OF THE GODS ROAD IN COLORADO SPRINGS, COLORADO.	APPLICATION NO. 36066 Colo Spgs @ G Gods
IN THE MATTER OF THE APPLICATION OF THE STATE DEPARTMENT OF HIGHWAYS, DIVISION OF HIGHWAYS - STATE OF COLORADO, FOR AUTHORITY TO CONSTRUCT A GRADE SEPARATION OF RELOCATED STATE HIGHWAY 385 AT UNION PACIFIC RAILROAD COMPANY MILEPOST 364.8, MORE OR LESS, IN JULESBURG, SEDGWICK COUNTY, COLORADO, AND TO CLOSE THE PRESENT AT-GRADE CROSSING OF STATE HIGHWAY 385 IN JULESBURG AT SUCH TIME AS THE PROPOSED GRADE SEPARATION IS OPEN TO TRAFFIC.	APPLICATION NO. 36070 CDOH in Julesburg
IN THE MATTER OF THE APPLICATION OF THE CITY AND COUNTY OF DENVER, COLORADO FOR AUTHORITY TO REMOVE AND REPLACE AND CONTINUE TO OPERATE AND MAINTAIN THE WEST 8TH AVENUE VIADUCT BETWEEN VALLEJO STREET AND MARIPOSA STREET, OVER PASSING RAILROAD TRACKS AND FACILITIES OF THE DENVER AND RIO GRANDE WESTERN RAILROAD, THE ATCHISON, TOPEKA, AND SANTA FE RAILWAY, AND THE COLORADO AND SOUTHERN RAILWAY COMPANIES TO BE SITUATED IN THE CITY AND COUNTY OF DENVER, COLORADO.	APPLICATION NO. 36071 Denver @ 8th
IN THE MATTER OF THE APPLICATION OF THE CITY OF WESTMINSTER, COLORADO FOR AUTHORITY TO CONSTRUCT A RAILROAD-HIGHWAY GRADE SEPARATION PROJECT AND FOR AN ALLOCATION OF THE COST OF THE PROJECT AT THE INTERSECTION OF WEST 92ND AVENUE AND THE RIGHT OF WAY AND TRACK OF THE BURLINGTON NORTHERN RAILROAD BETWEEN PIERCE STREET AND COLORADO STATE HIGHWAY 121 WITHIN JEFFERSON COUNTY, COLORADO.	APPLICATION NO. 36072 Westminster @ 92nd

INITIAL ORDER OF THE COMMISSION

February 7, 1984

Appearances: Jerry W. Goad, Assistant City Attorney, for Applicant, City of Arvada;
Jackson L. Smith, Assistant City Attorney for Applicant, City of Colorado Springs;
Donald Ostrander, Assistant Attorney General for Applicant, Colorado Department of Highways;
John L. Stoffel, Jr., Assistant City Attorney for Applicant, City and County of Denver;
Thomas V. Holland, City Attorney and
Victoria M. Bunsen, Assistant City Attorney for Applicant, City of Westminster;
John S. Walker, Jr., Esq., Denver, Colorado, for Intervenor, Denver and Rio Grande Western Railroad;
C. William Kraft, III, Esq. and
John L. Pilon, Esq., Denver, Colorado, for Intervenor, Burlington Northern Railroad Company;
Peter J. Crouse, Esq., Denver, Colorado for Intervenor, Atchison, Topeka and Santa Fe Railway Company;
William H. McEwan, Esq., Denver, Colorado for Intervenor, Union Pacific Railroad Company;
Steven H. Denman, First Assistant Attorney General, for the Staff of the Commission;
Bruce L. Waterhouse, Jr., Esq. and
J. Lawrence Hamil, Esq., Denver, Colorado, for Intervenor Craddock Development Corporation;
Frank M. Johnson, Jr., Julesburg, Colorado, pro se Intervenor in Application No. 36070.

STATEMENT OF THE CASE

BY THE COMMISSION:

The above-captioned applications for authority to construct grade separations were filed with this Commission prior to January 1, 1984, and notice was given of the filings and hearing dates as required by CRS, 40-4-105(3)(b) and Rules 4 and 5 of the Commission's Rules Governing Applications for Railroad-Highway Grade Separations (PUC Decision No. 83-1550, October 4, 1983).

Several protests and requests to intervene were received by the Commission. The intervening parties who appeared and participated at the hearing are noted in the Appearances above. No public witnesses participated at the hearing.

The five applications noted above were consolidated for hearing. Hearing of the matter was set for January 18, 1984 at 10:00 a.m. in Denver, Colorado. The dates of January 19, 20 and 23, 1984 were reserved on the Commission calendar for continued hearing. The applications were heard on January 18, 19, 20, 23 and 24, 1984 by Hearings Examiner William J. Fritzel. As a preliminary matter, Staff of the Commission moved to dismiss the application of the City of Colorado Springs, Application No. 36066. Staff contended that the Public Utilities Commission lacked jurisdiction to consider the application of the City of Colorado Springs since the same claim, i.e, the allocation of funds for the Garden of the

buds grade separation project, is currently pending judicial review. Staff presented oral and written argument on its motion. The City of Colorado Springs responded orally and in writing to Staff's motion to dismiss. Colorado Springs contended that the Commission had jurisdiction to consider its application since the issue, which is the subject of judicial review, differs from the application before this Commission. After considering the arguments of Staff and the City of Colorado Springs, the Examiner granted Staff's motion and dismissed the application of Colorado Springs, Application No. 36066, for the reason that the Commission lacked jurisdiction since a decision on judicial review will be res judicata on the claims asserted by the application in this case.

As a further preliminary matter, Applicant, Colorado Department of Highways, requested to withdraw its Application No. 36070. The request was granted and Application No. 36070 was dismissed.

During the course of the hearing on the remaining applications, testimony was received from witnesses and various exhibits were marked for identification. In Application No. 36059 (City of Arvada), Exhibits A through G and 5, 7 and 9 were marked for identification and admitted into evidence. In Application No. 36071 (City and County of Denver), Exhibits 1 and 2, 5 through 12, and 14 through 19 were admitted into evidence. Exhibit No. 13 was rejected. In Application No. 36072 (City of Westminster), Exhibits B, C, D, F, 2-A, 2-B, 2-C, 2-D, 2-E, 3 through 23, 25 and 26 were admitted into evidence. Exhibit No. 24 was withdrawn by Applicant, City of Westminster. At the conclusion of the application of the City and County of Denver, Intervenor Burlington Northern Railroad Company moved to dismiss Denver's application. Said motion was joined in by Intervenor Santa Fe. Burlington Northern, in its motion, contended that since no existing at-grade crossing exists at the proposed grade separation site, Denver's proposal does not meet the minimum criteria warranting grade separation which the Commission must consider. The motion was taken under advisement by the Examiner. Having considered the arguments of Burlington Northern and the City and County of Denver, Burlington Northern's motion to dismiss will be denied.

At the conclusion of the hearing, the matter was taken under advisement by the Examiner. The parties were allowed to file simultaneous statements of position if they so chose by January 27, 1984. Statements of position were filed by the City of Arvada, the City and County of Denver, the City of Westminster, the Atchison, Topeka and Santa Fe Railway Company, and Staff.

The City of Westminster, in its statement of position, requested leave to amend its application to request an allocation of funds from all Class I railroads operating in the State of Colorado. The motion will be denied.

As a result of the protracted hearings and submissions of evidence and argument, and the brief period of time remaining for decision as required by statute, the Commission finds that the due and timely execution of its functions requires that it omit the Examiner's recommended decision and that the Commission enter its own initial decision.

FINDINGS OF FACT AND CONCLUSIONS THEREON

Based upon all the evidence of record, the following facts are found and conclusions thereon are drawn:

A. THE APPLICATION OF THE CITY OF ARVADA

1. Applicant, City of Arvada, is a city located within the metropolitan Denver area.

2. Arvada filed Application No. 36059 on December 22, 1983 wherein it requests that the Commission grant it authority to construct a grade separation at Kipling Street wherein it intersects with the Burlington Northern Railroad tracks. The proposed grade separation is located within the corporate boundaries of the City of Arvada.

3. Intervenor Burlington Northern Railroad Company, a railroad common carrier, owns and utilizes the single main line track intersecting Kipling Street, a public roadway carrying motor vehicle traffic. The crossing at Kipling is now at-grade protected with automatic signals and gates. The proposed grade separation would be constructed at the location of the existing at-grade crossing.

4. Kipling Street is a public roadway carrying motor vehicle traffic in a north-south direction composed of three lanes in the vicinity of the crossing. The roadway on Kipling terminates approximately 100 feet north of the Burlington Northern Railroad tracks. Northbound vehicles using Kipling must turn right or left on Ridge Road, which parallels the railroad tracks. Vehicles traveling on Kipling at the vicinity of the crossing must negotiate two 90-degree turns in traveling the Kipling corridor. Thus, vehicles traveling northbound on Kipling must cross the tracks at grade level, turn 90 degrees to the east on Ridge Road, and then turn 90 degrees northbound on Independence Street.

5. The Burlington Northern Railroad tracks, having an east-west orientation, crosses Kipling Street at a 78 degree angle. There is a 3% grade approach to the tracks at the crossing for northbound traffic and a 5% grade approach for southbound traffic. Sight distance for northbound traffic is limited due to buildings to the east.

6. Kipling Street is an urban arterial. The current traffic volume at the crossing is 19,500 vehicles per day. The Denver Regional Counsel of Governments forecasts that by the year 2000, 44,000 vehicles per day are expected to use the crossing. The exposure factor, a figure based on the number of train movements per 24-hour day times the number of vehicles per 24-hour day is estimated to be 136,500 at the present time and 220,000 in the future. The posted speed limit for vehicular traffic on Kipling is 30 miles per hour.

7. Burlington Northern currently operates 5 freight trains per day at the Kipling Street crossing. During the summer months, 7 trains per day are operated. No increase in the volume of train traffic is anticipated in the immediate future. Three train movements occur during the peak traffic period. The minimum timetable train speed at the crossing is 20 miles per hour.

8. The vehicular traffic consists of private, commercial and emergency traffic. School buses destined for Ridge Home, located near the crossing, and other school buses use the crossing as well as emergency vehicles.

9. In the past four years, no train accidents have occurred at the present Kipling Street crossing, however, the Kipling corridor in the vicinity of the crossing has one of the highest accident rates in the City of Arvada. In 1980, 139 accidents with 27 injuries occurred; in

1981, 133 accidents with 34 injuries occurred; and in 1982, 102 accidents occurred on the Kipling corridor with 33 injuries and 1 fatality.

10. The City of Arvada has initiated a project to construct a four-lane parkway on Kipling from Interstate 70 on the south to Ralston Road on the north, a distance of 1.6 miles. As part of the project, Arvada proposes to construct, and therefore seeks authority from this Commission, a grade separation of Kipling and the Burlington Northern tracks at the location of the present at-grade crossing. Arvada proposes to construct a four-lane depressed roadway under the railroad tracks. The train traffic would be carried over Kipling Street via a bridge. Arvada also proposes to construct a bridge over Kipling in order carry Ridge Road traffic. Arvada estimates that the overall cost of the entire project is $16.8 million. $5.9 million has been spent or committed to date. Arvada estimates that the total cost of the grade separation will amount to a grand total of $7,023,000, which includes right-of-way acquisition (Exhibit No. 9, Application No. 36059). Staff disagrees with the cost estimates of Arvada and has adjusted the cost estimates which will be discussed later.

11. During the period of construction of the grade separation, Arvada proposes to divert traffic at-grade over the tracks in a "Y" pattern. A temporary track or "shoo-fly" would be constructed south of the present right-of-way with traffic crossing the track to the west and east (Exhibit E, Application No. 36059). Temporary signals will be placed at the crossing.

12. Applicant proposes to start construction of the grade separation in May or June of 1984 with the estimated completion target date in 1985. The estimated time for completion of the entire Kipling Street project is targeted for 1989.

13. Funding for the Kipling Street project is sought from a combination of funds from the Federal Government, City of Arvada, City of Wheatridge, and the Burlington Northern Railroad.

14. Applicant proposes and seeks authority herein to close the existing at-grade crossing at Kipling Street when the grade separation project is completed.

B. APPLICATION OF THE CITY AND COUNTY OF DENVER

15. Applicant, City and County of Denver, filed Application No. 36071 on December 30, 1983, requesting authority from this Commission to remove and to replace the West 8th Avenue viaduct located between Vallejo and Mariposa Streets located in the City of Denver over the railroad tracks and facilities of the Denver and Rio Grande Western Railroad, the Burlington Northern Railroad Company, and the Atchison, Topeka and Santa Fe Railway Company.

16. Intervenors, Atchison, Topeka and Santa Fe, Burlington Northern and Rio Grande, are railroad common carriers who own tracks and operate trains under the present West 8th Avenue viaduct. Burlington Northern owns the southbound main track and Santa Fe owns the northbound main line track. Santa Fe also owns a spur track. These main line tracks and spur are located at the western edge of the existing viaduct. The Santa Fe tracks are located on Burlington Northern property. D&RGW owns numerous switching tracks and other tracks located at their yard at the eastern part of the viaduct.

17. The existing West 8th Avenue viaduct was constructed in 1938 and was closed in November of 1983 due to the deteriorated and unsafe condition of said viaduct. Repair of the existing viaduct is not a viable alternative to new construction. Applicant proposes to replace the existing two-lane viaduct with a new two-lane viaduct which will be located at the site of the old viaduct. The alignment of the new viaduct will be the same as the existing one.

18. West 8th Avenue runs east to west, crossing over the tracks and yard facilities of Denver and Rio Grande Western Railroad and the main line tracks of the Burlington Northern and Santa Fe. The Burlington Northern and Santa Fe railroad tracks run in a north-south direction. Denver proposes to construct a viaduct with an eastern approach beginning at Mariposa Street, continuing in a gentle "S" curve over the tracks and yard, and continuing to its western approach at Vallejo Street. Applicant proposes to construct a steel box girder viaduct with 19 spans totaling 2,397 feet in length. With the addition of approaches, the total length of the viaduct will be 2,909 feet. The viaduct will accommodate two lanes of traffic. Complete plans and specifications for Applicant's viaduct are described in Exhibit No. 6 (Application No. 36071). The City of Denver estimates that the total cost of the project will be $7,359,775 (Exhibit No. 12, Application No. 36071). This cost estimate includes $762,500 for demolition of the existing viaduct and other expenses associated with the viaduct. Denver proposes to finance the viaduct by city bonds and railroad allocations. No federal funds are involved. Intervenor Santa Fe disputes the cost estimate of Applicant. Santa Fe prepared a plan for a theoretical viaduct structure (Exhibit No. 14, Application No. 36071). The theoretical structure is shorter in length than the structure proposed by Applicant, and said structure is less costly. Santa Fe estimates that the viaduct could be built for $1.1 million or $20 per square foot. This square foot cost estimate compares with Denver's estimate of $63.25 per square foot for the total project. Staff's proposed cost, which will be discussed later, amounts to $50.04 per square foot.

19. Applicant considers the West 8th Avenue viaduct to be an urban arterial street, however, it is found herein that West 8th Avenue is an urban collector. The average daily traffic projected for the completed West 8th Avenue viaduct ranges from 10,000 to 13,000 vehicles. 20,100 average daily vehicular traffic is projected for 1999. The rail volume at West 8th Avenue totals 48 train movements per day. There are 12 Burlington Northern trains operating northbound and 12 Burlington Northern trains operating southbound. In addition, Burlington Northern operates 8 helper engine consists and 3 switch engines. Two Santa Fe trains operate northbound and two Santa Fe trains operate southbound. The Santa Fe main line average traffic consists of 40-car general freight trains. Burlington Northern traffic includes 20 daily coal trains averaging 110 cars in length. The potential exposure factor at West 8th Avenue is at least 480,000.

20. The maximum train timetable speed at West 8th Avenue is 25 miles per hour. The proposed speed for vehicles using the new viaduct will be 35 miles per hour. The vehicular traffic that formerly used the West 8th Avenue viaduct has been diverted to other routes including the West 6th Avenue viaduct, which is located to the south of West 8th Avenue. No venicular traffic currently crosses at West 8th Avenue at-grade or in the near vicinity, therefore, Applicant will not close any grade crossings.

21. Applicant proposes to start construction of the West 8th Avenue project by April 15, 1984. The completion date is targeted for May 1, 1985.

C. APPLICATION OF THE CITY OF WESTMINSTER

22. Applicant, City of Westminster, a home-rule city located within the Denver metropolitan area, filed Application No. 36072 requesting authority from this Commission to construct a grade separation project at the intersection of West 92nd Avenue and the right-of-way of the Burlington Northern Railroad. Westminster also requests that part of the cost of the project be allocated to Burlington Northern.

23. Intervenor Burlington Northern Railroad Company owns and operates freight trains on the single main line track located at the proposed western extension of West 92nd Avenue.

24. Applicant proposes to extend West 92nd Avenue over the Burlington Northern tracks as part of an overall project to connect West 92nd Avenue as a four-lane arterial from Sheridan Boulevard on the east to Wadsworth Parkway on the west. No motor vehicles traveling on West 92nd Avenue now cross the Burlington Northern tracks at the proposed site of the project. Currently, West 92nd Avenue extends west to the Burlington Northern tracks, then it parallels the railroad tracks in a northwest direction terminating at old Wadsworth Boulevard. Westminster proposes to extend West 92nd Avenue west over the tracks via a grade separation bridge to Wadsworth Parkway (State Highway 121). West 92nd Avenue has been upgraded to four lanes in certain sections as it proceeds west from Sheridan Boulevard. The West 92nd Avenue bridge, which crosses the Denver-Boulder Turnpike, was recently completed. The West 92nd Avenue project, when completed, will provide the only direct east-west arterial connection between the eastern and western parts of the City of Westminster. There are plans involving other governmental agencies to extend West 92nd Avenue east of Sheridan Boulevard as an arterial to Colorado Boulevard. The extension of West 92nd Avenue to Colorado Boulevard appears on the Denver Regional Council of Governments (DRCOG) regional transportation plan.

25. There now exists three at-grade railroad crossings which permit vehicular traffic to travel to the various parts of the city. The at-grade crossings are located at West 88th Avenue, Pierce Street, and old Wadsworth Boulevard. The average daily traffic over West 88th Avenue in 1981 was 21,200; for Pierce Street, 2,000; and old Wadsworth Boulevard, 4,500. The 1981 combined exposure factor for the three at-grade crossings was 194,600. Average daily traffic on West 92nd Avenue was 1,150 in 1981. The current average daily traffic using the newly opened bridge crossing the Denver-Boulder Turnpike is 13,417. It is likely that upon completion of the proposed project, the combined exposure factor of the three existing at-grade crossings will be reduced since many vehicles using the existing crossing would use the direct route of West 92nd Avenue. None of the existing at-grade separations are scheduled to be closed, however, Westminster is currently planning a grade separation for Pierce Street in the future. The population of the City of Westminster is currently estimated to be 55,000 people, and it is expected to grow rapidly in the future. The completion of the West 92nd Avenue arterial will greatly facilitate the movement of traffic in the City. In addition, West 92nd Avenue runs adjacent to the northern boundary of the City Center, which is the geographical, commercial and governmental center of the city. The Westminster fire department, police and emergency medical services need quick access to all parts of the city. These emergency

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services must use existing at-grade crossings. The completion of the West 92nd Avenue arterial will greatly aid the emergency services in their response time.

26. Burlington Northern operates seven trains averaging 100 cars per day at the site of the proposed grade separation. The maximum timetable speed is 49 miles per hour.

27. As part of the overall project to upgrade West 92nd Avenue from Harlan to Wadsworth Parkway, Westminster proposes to construct a motor vehicle bridge over the Burlington Northern tracks. The proposed bridge (Exhibit B, Application No. 36072) will be constructed with prestressed concrete girders. The bridge will accommodate four lanes of traffic. The bridge will cross the tracks at a 39-degree angle. The clearance height from the top of the rail to the bridge is 23'6". Sufficient width will be allowed under the bridge for an additional set of tracks and service road. The railroad will not have to be diverted during construction.

28. Applicant estimates that the grade separation project will cost a total of $3,154,716, including the bridge, approaches and other construction related to the grade separation (Exhibit C, Application No. 36072). The bridge itself is estimated to cost $1,300,000. Of the total grade separation cost, Westminster proposes to provide $1,904,716 of the cost, and requests that the remainder of the costs be allocated to the Burlington Northern Railroad Company. The City proposes to finance its share of the grade separation cost by issuing sales tax revenue bonds. No federal funds are available for the project. Construction is proposed to begin on July 1, 1984 with completion scheduled for October 1, 1985.

D. ALLOCATION METHODOLOGIES

29. House Bill 1569 (1983 Colorado Session Laws, Chapter 453), effective July 1, 1983, which amends CRS, 40-4-106(3), requires this Commission in part to allocate the costs of grade separations between the affected Class I railroad corporation and the public authority in interest within definite guidelines. CRS, 40-4-106(3)(c)(I) (House Bill 1569) requires that "in the allocation of expenses for each grade separation construction project . . . between the affected Class I railroad corporations and the state, county, municipality, or public authority in interest, the Commission shall give equal weight to the benefits, if any, which accrue from the grade separation project and the responsibility for the need, if any, for such project." The statute also requires, in Section (c)(II) that in projects involving more than one Class I railroad, the benefits accruing between the affected Class I railroad corporations must be considered. Finally, in allocating the railroad share of cost, a ceiling is placed on the maximum amount that the Class I railroads can be assessed. Section III(c) requires that "the Commission shall allocate such expenses among all affected Class I railroad corporations up to a total of five million dollars during the twelve months beginning July 1, 1983 and up to five million dollars per year for each succeeding year. Total allocations to each Class I railroad shall not exceed one million two hundred fifty thousand dollars in any one year, or six million two hundred fifty thousand dollars in any five-year period." This section further provides that any Class I railroad can voluntarily contribute more than the above statutory ceilings.

30. Staff of the Commission, through John Baier, proposes a new methodology which addresses the requirements of House Bill 1569 in allocating a railroad share of the cost associated with grade separations.

Staff's allocation methodology starts with the assumption that since the public entity and railroad are equally responsible for the separation, both equally benefit and both are equally responsible for the need of the separation. Therefore, the public entity or railroad should each be assessed 50% of the cost of construction. However, since the equal assessment should relate only to the portion of an overall project which separates the roadway from the railroad tracks, a further analysis is necessary. Staff proposes that a base case be established which is a theoretical grade separation providing for a minimum facility (Exhibit No. 17, Application No. 36071). The base case is used to analyze actual grade separation projects by comparing the actual project to the theoretical base case. Staff proposes that a base case be established for grade separations relating to urban arterial, urban collector, rural arterial and rural collector, which are roadway classifications. Staff further proposes that railroad configurations be considered by providing a base case reflecting a single main railroad line track, double main line track, and yard/terminal facility. By utilizing a base case for all proposed projects, a consistent standard is maintained. The components of each actual grade separation is compared to the theoretical minimum facility base case and analyzed to determine if particular components of the actual project deviate from the minimum facility. Costs of the components of the actual project that deviate from the minimum facility are then allocated to the public entity or railroad on the basis of benefit and responsibility for need of the grade separation. Staff, in its analysis, further assumes that "affected railroad" as used in House Bill 1569 refers to railroads that own the right-of-way and/or tracks at the site of the proposed grade crossing.

31. Staff's minimum grade separation or base case, which is adequate for vehicular and railroad traffic, takes into account urban, rural and railroad function differences. The various base cases are used to compare an actual project. Staff's urban arterial base case allows four vehicular traffic lanes, each 12 feet wide, with a 6% roadway approach grade, an 11 foot median, and 1 pedestrian bikeway, 8 feet wide. The urban collector base case allows two 12-foot vehicular travel lanes with a 6% grade approach and 1 pedestrian bikeway, 8 feet wide. Staff's rural collector base case allows two 12-foot lanes with a 6% approach grade and two 5-foot shoulders. The rural arterial base case allows two 12-foot lanes with a 6% grade, two 8-foot shoulders, and one 8-foot pedestrian bikeway on one side. Staff's base case for railroad facilities are classified as single main line track, double main line tracks and railroad urban yard and terminal facilities. Staff's base case for single main line track locations provides space for two tracks at 15-foot centers. If the grade separation routes the railroad over a roadway, a train crew walkway is provided. If the railroad is routed under the roadway, a service road is provided parallel to the track. The base case for double main line tracks allows space for three tracks at 15-foot centers. Space for train maintenance is the same as in the base case above. Staff's base case for urban railroad yards and terminals allow for space for the railroad facilities under the roadway as they currently exist.

32. Since actual grade separation projects tend to be a part of a larger project, Staff proposes to analyze various components and assign costs to the railroad and public entity based upon benefits and responsibility for need for the separation using the base case as a touch stone. Grade separation projects typically will involve right-of-way, drainage, utility relocation, and other costs relating to venicular or railroad needs and desires. Staff proposes that additions to the base case as a result of the railroad's operation needs or physical layout be

assessed against the railroad and additions resulting from the public entities' needs be assessed against the public entity.

33. Applying the above-described base case methodology for allocating costs of the separation projects for the cities of Arvada, Denver, and Westminster, Staff makes the following recommendations:

a. Application of the City of Arvada

Staff's base case for the Arvada application relates to an urban arterial, single main line railroad. This base case allows four 12-foot vehicular traffic lanes, a 11-foot median, and one 8-foot pedestrian/bikeway, sufficient width for two railroad tracks at 15-foot centers, and a railroad service roadway. Only one railroad, the Burlington Northern, is affected by this grade separation. Staff, after comparing the plans and specifications of the City of Arvada, made adjustments to Arvada's cost estimates. Staff's adjustment to the estimate of the City of Arvada includes deletion of right-of-way costs, the vehicle overpass of Ridge Road, and Arvada's allowance for various contingency costs. Staff also, in computing its base case cost, reduced the length of the bridge by 14 feet. Staff's base case cost for the Arvada project is $1,888,978. Using this figure, Staff allocates 50% of the cost to the Burlington Northern, which amounts to $944,489. A credit for $222,363 applies to the Burlington Northern for a one track bridge, which leaves $722,126 allocated to the Burlington Northern. Rounding this figure to the nearest $1,000 amount to facilitate accounting, the Staff recommended allocation for the Burlington Northern is $722,000.

b. Application of the City and County of Denver

Staff used two base cases for the analysis of this project, since Denver's project involves a viaduct separating the Denver and Rio Grande Western rail yard and the double main line tracks of the Burlington Northern and Atchison, Topeka and Santa Fe. The base case for the railroad yard separates West 8th Avenue as an urban collector from the yards of the Rio Grande, an affected railroad. Staff's base case costs amount to $3,147,258 for this portion of the project. This cost is arrived at by adjustments to Denver's cost estimate by deleting costs associated with Navajo Street, adjustments to the costs of the viaduct structure and changing the viaduct approach grade to 6%. Since one railroad is affected by this portion of the project, Staff recommends that D&RGW be assessed 50% of the base cost, which amounts to $1,573,629 or $1,574,000 rounded to the nearest $1,000. The second base case used by Staff for Denver's project is the urban collector-double main line railroad base case, since this project also involves constructing a portion of the viaduct over the main line tracks of Burlington Northern and Santa Fe, the affected railroads for this portion of the project. After adjustment to Denver's cost estimates for this portion of

the viaduct, Staff's base case costs amount to $2,288,013. The joint Burlington Northern/Santa Fe allocation amounts to $1,144,000. Since each railroad owns one main line, 50% allocation of $1,144,000 amounts to $572,000 allocation for Burlington Northern and $572,000 allocation to Santa Fe.

c. Application of the City of Westminster

The base case used by Staff for this application is the urban arterial-single main line track. Burlington Northern is the affected railroad. Staff adjusted Westminster's estimated cost of $3,154,716 for the grade separation to a base case cost of $1,880,885. Staff's adjustments include reducing the width of the vehicle bridge by 30 feet and deleting costs relating to the removal of structures, access road, and the highline culvert. Burlington Northern's allocation at 50% is $940,443 or $940,000 round to the nearest $1,000.

34. Since House Bill 1569 places a ceiling of $1,250,000 on funds which can be allocated during the period of one year to an individual Class I affected railroad, and $5,000,000 for all affected Class I railroads in one year, it is necessary to prioritize projects for the purposes of railroad allocation of costs. For example, Staff's analysis in the instant case shows that for Burlington Northern, as an affected railroad in all three cases, its share for the Arvada project is $722,000; for the Denver project, $572,000; and for the Westminster project, $940,000, totaling $2,234,000. Since the total amount exceeds the statutory maximum ceiling for one railroad, the competing projects must be assigned priority for the purposes of railroad funding. House Bill 1569, Section (b), provides guidelines for the selection and prioritization of the projects wherein it states that "only those grade separation construction projects which meet minimum criteria warranting grade separations as adopted by the Public Utilities Commission giving consideration to the standards utilized by the Colorado Highway Commission, shall be authorized . . ." Pursuant to the above statutory mandate, the Commission adopted Rules Governing Applications for Railroad-Highway Grade Separations effective December 1, 1983 (Commission Decision No. C83-1550). These rules articulate standards for the selection of grade separations which are warranted and consequently assist in prioritizing projects for the purpose of allocation of costs. Rule No. 6 of the Rules require that the minimum actual or projected exposure factor shall exceed 75,000 at urban and 35,000 at rural localities, the roadway be a freeway arterial or collector with actual or projected traffic volume of 5,000 average daily traffic or greater for urban locations and 2,500 A.D.T. or greater for rural, and rail lines have an actual or projected rail traffic of four trains per day or greater. In addition, Rule No. 7 provides other factors that may be considered, such as the number of at-grade crossings to be closed, number and type of train movements, maximum train and vehicle speed, number and types of tracks, annual daily actual and projected traffic, type of vehicular traffic, angle of crossing, approach grades, sight distance, accident history and other factors. Finally, House Bill 1569, Section (b) mandates that this Commission consider safety, traffic, and geographical distribution.

35. Staff utilizes the above statutory and Commission rule standards in prioritizing the projects of Arvada, Denver and Westminster. Staff ranks the separation project of Arvada as number one, West-

minster as number two, and Denver is third in priority, which is found herein to be appropriate. There currently exists an at-grade crossing at the site of the proposed Arvada separation, which Arvada proposes to close. 19,500 vehicles per day currently use the crossing with a projected vehicle count of 44,000 per day by the year 2000. With 7 train movements per day at this crossing, the current exposure factor is 136,500. Since the potential for accidents is the greatest at this crossing among the competing applications herein, safety alone requires that the project be assigned a number one priority. Although Westminster's project is not located at an existing grade crossing, the proposed grade separation would greatly reduce the use of the three existing crossings at Pierce, 88th and old Wadsworth. In comparison to the above two projects, Denver's proposal ranks last in priority since no at-grade crossing is used in the vicinity of West 8th Avenue and none is proposed to be constructed.

36. Staff recommends the following railroad assessments for the projects herein (Exhibit No. 17, page 30, Application No. 36071):

A. Application No. 36059--Arvada--BN.

1. BN assessed $722,000 for project at Kipling Street with the condition that if construction is not started by December 1, 1984, money will be transferred to Westminster ($412,000) and to Denver ($310,000).

2. Railroad must agree to contribute more than 5% under federal funding regulations or assessment made at 5%.

*[Since Arvada plans to obtain federal funds for its project, the Federal-Aid Highway Program Manual (Exhibit No. 23, Application No. 36072) limits a railroad assessment to 5% of the project cost on projects which would eliminate an existing grade crossing. Although a railroad under this regulation can voluntarily contribute a greater amount than 5%, this requirement must be considered in allocating funds in order that the availability of federal funds will not be placed in jeopardy. Staff has provided for the 5% federal requirement by recommending that its base case assessment of $722,000 be implemented if Burlington Northern agrees to pay more than 5% and conversely if Burlington Northern does not agree to pay over the 5% maximum, the Burlington Northern, in the project of Arvada, should be assessed funds reflecting the 5% federal requirement.]

B. Application No. 36072--Westminster--BN.

BN assessed remainder of $1.25 million in the amount of $528,000 for the project at W. 92nd Avenue, with starting date condition of December 1, 1984, with money to be transferred to Denver up to the amount of $572,000. If BN does not agree to more than 5% amount in Application No. 36059, then full allocation of $940,000 to Westminster with balance of $310,000 to Denver.

C. Application No. 36071--Denver--W. 8th Avenue.

D&RGW assessed $1,250,000 maximum allowable for single year allocation. AT&SF assessed $572,000 in accordance with base case method. BN assessed 0 to maximum of $572,000 contingent upon funding of Arvada and Westminster projects.

Since it is unknown at this time whether Burlington Northern will voluntarily contribute more than the maximum federal 5%, and since House Bill 1569 allows an applicant to decline to proceed with its project after authorization by this Commission, these contingencies must be addressed in determining an alternate allocation. Staff has provided for these contingencies by recommending the following allocations by scenario to the Burlington Northern:

D. BN allocation by scenario

Scenario 1	Arvada @	$722,000
	Westminster @	$528,000
	Denver @	$ -0-
	TOTAL	$1,250,000
Scenario 2	Arvada @	$351,150
	Westminster @	$898,850
	Denver @	$ -0-
	TOTAL	$1,250,000
Scenario 3	Arvada @	$ -0-
	Westminster @	$940,000
	Denver @	$310,000
	TOTAL	$1,250,000
Scenario 4	Arvada @	$351,150
	Westminster @	$ -0-
	Denver @	$572,000
	SUBTOTAL	$923,150
	Reserved for Future Year	$326,850
	TOTAL	$1,250,000
Scenario 5	Arvada @	$722,000
	Westminster @	$ -0-
	Denver @	$528,000
	TOTAL	$1,250,000

37. An alternate cost allocation method was proposed by witness James O'Grady, who testified on behalf of the Cities of Arvada and Westminster. Mr. O'Grady's methodology determines the grade separation project cost, assigns priorities to the competing projects, and allocates cost to the railroads. In order to determine the eligible costs of a grade separation project, Mr. O'Grady relies upon the criteria found in the Federal Aid Highway Program Manual of 1975 (Exhibit 23, Application No. 36072), which is the federal method for cost allocation. The federal method allows certain cost components which are assessed to the railroad, such as preliminary engineering, right-of-way, and other construction costs which Staff method disallows. Competing projects under the O'Grady method are prioritized according to the Denver Regional Council of Governments (DRCOG) policy on urban systems allocation. DRCOG's policy considers safety, traffic, air quality, energy conservation, cost bene-

fits and geographical distribution. The railroad's share of eligible costs are assessed to individual railroads to be statutory maximum of $1.25 million per year including all five Class I railroads operating in Colorado up to a total of $5 million per year for all five railroads. Mr. O'Grady defines affected railroads as used in House Bill 1569 as railroads who own the right-of-way and/or tracks (directly affected) and railroads who use the railroad right-of-way and tracks (indirectly affected). Under this method, directly affected railroads are assessed their share of costs first, within the dollar limit set by House Bill 1569 and then indirectly affected railroads are assessed costs so as to guarantee that eligible grade separation projects are funded by the railroads up to $5 million per year. An example of the allocation of the O'Grady allocation method recommended by the City of Westminster for application in the instant three cases is provided by the City of Westminster in its statement of position as follows:

Project	Direct Allocation	Indirect Allocation	Total
Arvada	1,026,000		1,026,000
Westminster	224,000	1,026,000	1,250,000
Denver	2,500,000	224,000	2,724,000
TOTAL	3,750,000	1,250,000	5,000,000
Railroad			
BN	1,250,000	0	1,250,000
D&RGW	1,250,000	0	1,250,000
S. Fe.	1,250,000	0	1,250,000
UP	0	625,000	625,000
MoPac	0	625,000	625,000
TOTAL	3,750,000	1,250,000	5,000,000

38. CRS, 40-4-106(3)(b), as amended by House Bill 1569, requires that the Commission, after hearing, determine which proposed grade separation projects should be constructed. The statute requires that in making this determination, the Commission shall consider safety, traffic and geographic distribution. In addition, the projects must meet minimum criteria established by Commission Rule. The evidence of record establishes that the grade separation projects of Arvada, Denver and Westminster qualify on the basis of safety and traffic. Geographical distribution is not a factor in the instant applications since the proposed sites are located within the Denver metropolitan area. The record also reflects that the three projects qualify for approval by meeting the minimum criteria established by Rules 6 and 7 of this Commission's Rules Governing Applications for Railroad-Highway Grade Separations. It is found that the proposed grade separations of the Cities of Arvada, Denver and Westminster are necessary, in the public interest, and in compliance with the statutory and Commission criteria for approval. Intervenors Santa Fe and Burlington Northern argue that Denver's application does not meet the statutory and Commission criteria for railroad allocation since no crossing now exists at West 8th Avenue. This argument, if adopted, would require that in order to comply with the Commission's minimum criteria, any application for grade separation would have to show that a current at-grade crossing exists with vehicles crossing railroad tracks at grade. The Commission's Rules Governing Applications for Railroad-Highway Grade Separations are flexible in order to provide for separation projects that contemplate separations at sites that have no existing at-grade crossings. Rule 6(B) and 6(C) require a minimum actual .r projected exposure factor and daily traffic volume. Rule 6(F)

also specifically provides for consideration of other separation locations if unusual conditions or circumstances warrant such consideration.

39. House Bill 1569 requires that once a determination has been reached as to the projects to be constructed, the Commission shall allocate expenses of the projects to the affected Class I railroads and the public entity in interest, giving equal weight to the benefits which accrue from the separation project and the responsibility for need for the project. Since the term "affected railroad" is not defined in the Bill, it is necessary, for the purposes of allocation to the railroads, to interpret the term "affected" as used in House Bill 1569. The Applicants argue that an affected railroad is a railroad who owns the right-of-way and/or tracks at the site of the crossing or railroads who use the railroad facilities, however infrequent that use may occur. Staff, on the other hand, argues that affected railroad refers to railroads who own the right-of-way and/or tracks at the site of the proposed separation. In interpreting the term "affected railroads", it is necessary to consider the purpose of the statute in order to determine whether its terms have an understandable meaning. Earl and Sons Tire Center, Inc. v. City of Boulder, 559 P.2d 236, 192 Colo. 360 (1977). It is also necessary to determine legislative intent if possible and to effectuate said intent. U-M v. District Court in and for Larimer County, 631 P.2d, 165 (1981), Conrad v. City of Thornton, 553 P.2d 822 (1976). It is sufficiently clear from a reading of House Bill 1569 that the purpose of the Bill is to provide partial funding by railroad corporations for grade separation costs. The Bill requires allocations to public entities and railroads at specific grade separation sites. The Bill does not state that all Class I railroads operating in Colorado must participate in the allocation without regard to a nexus of a railroad to a specific site. The legislation is site specific. The allocation is to be divided among the interested public authority, vis-a-vis affected railroads relating to a specific site. Consequently, it is found herein that the term "affected railroads" as used in House Bill 1569 refers to those railroads who own the right-of-way and/or tracks at a specific grade separation site.

40. House Bill 1569 requires that in allocating funds, the Commission must consider relative benefits accruing to the affected railroads and public entity in interest, and the responsibility for need of the separation project. Staff's base case methodology starts with the assumption that since two parties, the public entity and railroad, create the need for the separation, it follows that both will benefit equally from the separation project. The methodology as proposed by Staff, however, is sufficiently flexible to enable adjustments to this assumption on a case-by-case basis. It is found herein that the affected railroads and public entities in the instant applications are equally responsible for the need of the proposed separations and will equally benefit from the construction of the respective grade separation projects.

41. House Bill 1569 further requires that where more than one railroad is affected by a separation project, the Commission must consider the benefits accruing between the railroads. It is found that in the separation projects involving the City and County of Denver, Burlington Northern and Santa Fe are affected railroads for a portion of the proposed viaduct. It is further found herein that the specific allocations proposed by Staff for the Burlington Northern and Santa Fe is just and reasonable. Both the Burlington Northern and Santa Fe own tracks and operate trains at the western portion of the proposed structure. Both railroads are equally responsible for and will equally benefit from the construction of the proposed viaduct.

42. Subsection (c)(III) of House Bill 1569 provides dollar amount ceilings for the allocation of costs assessed to affected Class I railroads. Total allocations to each Class I railroad is not to exceed $1,250,000 in any one year, or a maximum of $6,250,000 in any five-year period. The combined total ceiling for all affected railroads in any one year is $5,000,000, and up to $5,000,000 per year in each succeeding year. The provision found at the end of this subsection that states "nothing in this subparagraph (III) shall be construed to authorize less than $25,000,000 to be assessed against all affected Class I railroad corporations in any five-year period" raised much debate at the hearing. Although evidence of legislative intent was presented by the City of Westminster to the effect that the Legislature, by this subsection, intended to guarantee a $25,000,000 contribution of affected railroads to separate projects over a five-year period, this apparent guarantee must be read in context of the entire Bill. The $25,000,000 five-year provision refers only to allocation limits of subparagraph (III) wherein the Legislature appears to state that even though it has allowed individual affected railroad assessments up to yearly limit, the Legislature intended that total allocation to affected Class I railroads should amount to $25,000,000 over a five-year period. This provision that appears to guarantee $25 million over a five-year period must relate to the other provisions of the Bill that require railroad contributions to be assessed only to affected railroads at a specific site. In view of the fact that the record shows that approximately 74 potential railroad separation projects in Colorado are possible candidates for consideration over the five-year period, which is the life span of House Bill 1569, the legislative mandate of $25,000,000 should be achieved. The methodology proposed by Staff provides that any assessment which is not allocated up to $1.25 million per year per affected Class I railroad can be carried over into succeeding years up to a maximum of $25 million per five-year period. Such provision is found to be acceptable and in compliance with House Bill 1569. Staff's methodology and recommendation as described herein is found to be acceptable and in compliance with the provisions of House Bill 1569.

CONCLUSIONS

1. The Commission has jurisdiction over the parties and subject matter of this action.

2. The grade separations proposed to be constructed at the respective sites herein by the Cities of Arvada, Denver and Westminster are necessary and in the public interest.

3. The allocation of cost to the affected Class I railroad involving the grade separation projects of the Cities of Arvada, Denver and Westminster, should be allocated as recommended by Staff as contained in Findings of Fact No. 36 herein.

An appropriate Order will be entered.

O R D E R

THE COMMISSION ORDERS THAT:

1. Applications No. 36056, City of Colorado Springs, and No. 36070, Colorado Department of Highways, be, and hereby are, dismissed.

2. The motion of Burlington Northern Railroad Company to dismiss Application No. 36071, City and County of Denver, be, and hereby is, denied.

3. The motion of the City of Westminster to amend its application to include allocations from all Class I railroad corporations operating in Colorado be, and hereby is, denied.

4. Application Nos. 36059 (City of Arvada), 36071 (City and County of Denver), and 36072 (City of Westminster), be, and hereby are, granted.

5. The City of Arvada be, and hereby is, granted authority to commence construction in calendar year 1984 of a grade separation of Kipling Street with the Burlington Northern Railroad tracks in conformance with its plans as submitted in its Application No. 36059. The City of Arvada is further granted authority to erect temporary railroad signals at Kipling Street during the construction period of the grade separation.

6. The City and County of Denver be, and hereby is, granted authority to commence in calendar year 1984 removal of the existing West 8th Avenue viaduct and the replacement of said viaduct with a new viaduct and grade separation of West 8th Avenue with the railroad tracks and facilities of the Denver and Rio Grande Western Railroad, Atchison, Topeka and Santa Fe Railway, and Burlington Northern Railroad, in conformance with its plans submitted in Application No. 36071.

7. The City of Westminster, be, and hereby is, granted authority to commence construction in calendar year 1984 of a grade separation of West 92nd Avenue with the Burlington Northern track in conformance with its plan submitted in its Application No. 36072.

8. The allocation of costs assessed to the Burlington Northern Railroad, Denver and Rio Grande Western Railroad, and Atchison, Topeka and Santa Fe Railway for the grade separation projects of the City of Arvada, City and County of Denver, and City of Westminster, shall be in accordance with Findings of Fact No. 36 herein. In the event any of the above cities should elect not to proceed with its grade separation project, said cities shall notify the Commission and the affected railroads in writing within ten (10) days of its decision. In the event a city declines to construct its separation project, the allocations of railroad share of cost will follow the scenarios contained in Findings of Fact No. 36 herein.

9. The stipulation filed on January 13, 1984 by Applicant, City of Arvada, City and County of Denver, and the City of Westminster for the division of Burlington Northern's share of funds among the projects of the above cities be, and hereby is, approved. The Cities of Arvada, Denver and Westminster shall notify the Commission and Burlington Northern Railroad Company within ten (10) days of its decision to allocate the funds of Burlington Northern in accordance with said stipulation. In the event the above cities elect to proceed pursuant to said stipulation, the Burlington Northern's share of funds for one year shall be allocated as follows: $475,000 to the City of Arvada; $300,000 to the City and County of Denver; and $475,000 to the City of Westminster.

10. The Cities of Arvada, Denver and Westminster be, and hereby are, ordered to notify the Commission and the affected railroads in writing within ten (10) days of acceptance of construction contracts, and shall provide a copy of the accepted bid by item. The Cities shall further indicate adjustments to the cost to reflect a percentage difference between estimated and actual costs.

11. Burlington Northern Railroad, Denver and Rio Grande Western Railroad, and Atchison, Topeka and Santa Fe Railway be, and hereby are, ordered to deposit their respective allocated funds in the amounts authorized by this decision into construction escrow accounts within sixty (60) days of the final Commission decision to be disbursed by the Cities in interest.

12. The Cities of Arvada, Denver and Westminster shall notify the Commission of completion of their respective projects within ten (10) days of said completion.

13. The twenty (20) day time period provided for pursuant to CRS, 40-6-114(1) within which to file an application for rehearing, reargument, or reconsideration shall commence to run on the first day following the mailing or serving by the Commission of the decision herein.

This Order shall be effective thirty (30) days from the day and date hereof.

DONE IN OPEN MEETING the 7th day of February, 1984.

(S E A L)

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

EDYTHE S. MILLER

ANDRA SCHMIDT

Commissioners

COMMISSIONER DANIEL E. MUSE
RESIGNED EFFECTIVE JANUARY 31, 1984

ATTEST: A TRUE COPY

Harry A. Galligan, Jr.
Executive Secretary

jm:1559M

DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO

Civil Action No. 84 CV 2787

ORDER

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO, et al.,

Respondents.

In 1983 the Legislature passed H.B. 1569 [codified as C.R.S. 40-4-106(3)] which gave power to the Colorado Public Utilities Commission to assess owners of affected property part of the expenses for grade separation construction projects. One such request to have the P.U.C. assess expenses came from the City and County of Denver conjunctive with its project to rebuild the 8th Avenue Viaduct which for years had elevated foot and motor traffic over railway tracks below. The viaduct was closed in 1983 because its structural condition was dangerous.

The P.U.C. may allocate expenses up to $1,250,000 in any one-year period against any class I railroad corporation. C.R.S. 1973, 40-4-106(3)(c)(III). In making any allocation of expenses, by statute, the P.U.C. has to first determine the allocation as between the government authority in interest and the railroads collectively giving "equal weight to the benefits . . . which accrue from the grade separation project and the responsibility for the need . . . for such project." C.R.S. 1973, 45-4-106(c)(I).

After this allocation is decided, the P.U.C. then has to determine the respective shares to be paid by each of the class I railroad corporations considering the "benefits" that accrue to each one of the corporations affected. C.R.S. 1973, 40-4-106(c)(II).

In January of 1984, the P.U.C. held hearings on Denver's application as well as applications arising in Arvada, Colorado Springs, and Julesberg.

As to the Denver project, which is the subject of this case, the P.U.C. considered the viaduct in two segments, one covering the Rio Grande Railroad yards and the other, the west segment, covering the lines of Burlington Railroad as well as the lines of Atchison Topeka and Santa Fe. For this west segment the Commission determined that the base cost should be $2,288,000 to be split 50% by the municipality and 50% by the two railroads. As between the two railroads, it was further determined that each would bear 50% of the total railroads' share.

These determinations were reached in large part by utilizing an analytical approach suggested by the P.U.C. staff called the "base case" approach. As explained by the staff engineer (R. at pp. 560-562) the "base case" approach is as follows:

1. Since both the public and the railroads benefit for a grade differential crossing by facilitating the flow of traffic, minimizing damage to property, minimizing the risk of injury to persons, minimizing the risk of hazardous material release (all of which result eventually in financial savings) both the public and the affected railroads presumptively benefit equally.

2. However, this is true only for the basic minimum grade separation structure needed (which, of course, is different for urban and rural circumstances) and not for the entirety of the project being built.

The P.U.C. adopted this "base case" approach in its order of February 7, 1984. In applying this approach to the 8th Avenue Viaduct, the P.U.C. considered that only a segment of the viaduct was a crossing of the Santa Fe and Burlington lines. Thereafter, the P.U.C. determined that only the cost of a basic functional crossing, rather than that segment's projected total cost, could be apportioned. Having made these determinations, the apportionments described above were made.

The Santa Fe now challenges those findings arguing first that the assumption of equal benefits in the base case approach, is an arbitrary avoidance of the P.U.C.'s duty to analyze and determine the actual benefits, and, second, that the 50% allocation to each of the two railroads, Santa Fe and Burlington, for the one viaduct section crossing both of these

lies is incorrect because the evidence showed Burlington's lines were more frequently used.

This Court rejects both arguments.

As to factual questions, a reviewing court is limited to determining whether the P.U.C. has regularly pursued its authority, whether its decisions are just and reasonable, and whether the evidence supports its conclusions. C.R.S. 40-6-115. "The reviewing court may not substitute its judgment for that of the P.U.C. but must determine only if there is competent evidence in the record to support the P.U.C.'s decision." Ram Broadcasting of Colorado v. P.U.C., 702 P.2d 746, 750 (Colo. 1985). And, "[t]he evidence must be viewed in the light most favorable to the P.U.C.'s findings." Ram Broadcasting at 350. Further, ". . . the reviewing court, since it does not have the aid of a staff and the expertise of the P.U.C., should not undertake to duplicate the evaluation and judgment processes followed by the P.U.C. in arriving at its decision." Atchison, T. & S.F. Ry. Co. v. Public Utilities Commission, 572 P.2d 138, 141 (Colo. 1977).

The record here demonstrates that the P.U.C. considered the staff recommendation of evaluation of benefits which included analysis of "railroad-highway grade crossing accidents and the resulting loss and damages to property, death and injury to persons, delay and inconvenience to motorists as a result of crossing blockage, elimination of traffic disruption, elimination of traffic disruption, elimination of hazardous material release, and elimination of delay to emergency vehicles" as well as the "elimination . . . of loss and damages to signals, truckage and equipment, delay to trains, derailments . . . and the reduction of tort liability as a result of accidents." Record at 561.

Whether the Court would have reached the same conclusion, that presumptively the benefits are equal between railroad and municipality, is not the question. The question is whether the P.U.C. fulfilled its statutory obligation to consider benefits and whether its conclusion has support in the record. Here the question must be answered yes. There is nothing to suggest that the conclusion of presumptively equal benefits to both entities is unreasonable. Accordingly, this Court has no authority to change the decision.

Nor can it be said that the P.U.C. abused its fact-finding discretion by apportioning the railroads' 50% each since each had the right to use a main line under the viaduct. It is not

incumbent to apportion solely on the basis of temporary train traffic patterns since amount of usage is subject to change.

Having concluded that the P.U.C. properly considered those things required by statute, the Court also necessarily rejects the argument that the P.U.C.'s improper consideration constituted a taking in violation of constitutional due process.

The decision of the Commission is affirmed.

Dated this 17th day of February, 1987.

BY THE COURT:

J. Stephen Phillips
District Court Judge

cc: All counsel.