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VIA FACSIMILE AND U.S. MAIL

Ms. Carole J. Washburn
Executive Secretary
Washington Utilities and Transportation Commission
1300 E. Evergreen Park Dr. S.W.
P.O Box 47250
Olympia WA 98504-7250

BNSF and UP Comments on Proposed Railroad Operating Rules Relating to Point Protection (Docket No. TR-040151)

Dear Ms. Washburn:

The Burlington Northern and Santa Fe Railway Company ("BNSF") and Union Pacific Railroad Company ("UP") jointly submit these additional comments on the proposed Railroad Operating Rules Relating to Point Protection (Docket No. TR-040151) pursuant to the Notice of Opportunity to File Written Comments served October 15, 2004.[1]

The Notice states that the Commission seeks additional comments on the issue of its state statutory authority to adopt the proposed rules. These comments will first place the proposed rules in their proper context and then address the Commission's questions specifically.

I.
Background of the Proposed Rules and the Present Regulatory Scheme

Railroad presentations before the Commissioners and written comments have documented for the record that the proposed rules *(at Tab 1)* would have a broad and

[1] These comments supplement comments filed on behalf of BNSF and UP (and by the Association of American Railroads) in Dockets TR-040151 and TR-021465. The Railroads also made oral presentations and comments. The last written comments on rules proposed in this proceeding were dated August 11, 2004. All such comments and presentations are incorporated by reference into this submission.

unpredictable impact. The record contains extensive evidence and discussion documenting that the proposed rules would denigrate (not improve) railroad and public safety, they are preempted by federal law, and the Commission does not have state statutory authority to promulgate them. Attached at *Tab 2* is more detail on many (but not all) of these points, which are also decisive on the question of the Commission's jurisdiction under state law.

II.
Historical and Legal Context of the Commission's Jurisdiction.

The present regulatory scheme can be traced from the Washington Constitution to the railroad commission law passed in 1905. This was replaced by the public service law passed by the Legislature in 1911 (Chapter 117, Laws of 1911, known as the "Public Service Commission Act of 1911," now RCW Chapter 81. See *State ex rel. Allen v. PSC,* 111 Wash. 294, at 294, 190 P. 1012 (1920), for a brief early history of the Commission.

The 1911 statute almost immediately generated numerous Washington Supreme Court cases and one notable Attorney General Opinion on the extent and scope of the railroad regulatory scheme in Washington. Thereafter, most jurisdictional issues were only rarely visited by the Washington Supreme Court, so most authorities are decades old, but still the law. The basic framework is as follows.

The WUTC is a creation of the Legislature. Previous incarnations were called the "Railroad Commission," "Public Service Commission," and the "Department of Public Service." The basic authority and powers were tweaked from time to time, but remained basically the same as the 1911 law for decades. In *State ex rel. Northeast Transport Co. v. Abel,* 10 Wn 2d 349, 355, 116 P 2d 522 (1941), *supra.,* the Washington Supreme Court stated the basic jurisdictional rule governing the WUTC:

> "Since the department of public service *(now the WUTC)* is a creature of statute, exercising a limited jurisdiction, *nothing is presumed in favor of its jurisdiction.* Similarly, *there is no presumption in favor of its exercise of power.* Its jurisdiction to enter orders *must appear in the record.*" (Comment and Emphasis added)

Other cases holding the same thing include *Jewell v. WUTC,* 90 Wn 2d 775, 585 P 2d 1167 (1975), *State ex rel. PUD No. 1 of Okanagan Co. v. Dept. of Public Service,* 21 Wn 2d 201, 150 P 2d 709 (1944), *North Bend Stage Lines v. Schaaf,* 199 Wash 62, 92 P 2d 702 (1939), and *State ex rel. Northeast Transportation Co. v. Schaaf,* 198 Wash. 52, 86 P 2d 1112 (1930), among others.

This restrictive interpretation is not limited to the WUTC, but is typical of the courts' view of other state agencies. See, for example, *State ex rel. Puget Sound Navigation Co. v. WDOT,* 33 Wn 2d 448, 206 P 2d 456 (1949). Not only must jurisdiction and authority to exercise power be conclusively demonstrated, but must also *appear in the record.* As

the Railroads have noted, this record supports no such rulemaking *(Comments of BNSF/UP of June 11 and August 11, 2004)*, either factually or legally. Worth noting is that, while courts defer to Commission fact-finding expertise, they do not defer to the Commission the determination as to WUTC's jurisdiction. *US West Comm. Inc. v. WUTC,* 134 Wn 2d 48, 949 P 2d 1321 (1997).

While the Commission's basic jurisdiction and power were settled early, the Legislature has made numerous tweaks and changes in specific statutory delegations of authority as the federal law changed. For instance, in 1961 the Legislature added or rewrote a number of specific provisions in RCW Chapter 81 dealing with railroad regulation, granting new powers and responsibilities while taking back others. *Laws 1961, ch. 14.* Later, more changes were made, some effective as late as July 1 of this year, for various reasons. Examples are contained in *Laws 1980, ch. 104,* and *Laws 2003, ch. 53.* Entire programs of regulatory authority, such as those over railroad rates, were removed as times and federal laws changed. *Laws 1991, ch. 49.* These last changes were made to *comply with changes in federal law* regarding railroad regulation, recognizing that the traditional role of state commissions in railroad regulation is *shrinking* with federal policy, not *expanding.*

Thus, while addressing such minute issues as seeing eye dog transportation, the Legislature has not seen fit to grant WUTC the power to regulate railroad operating rules, point protection, remote control, or other items these proposed rules would govern, as will be analyzed below.

III.
Answers to Questions by the Commission

With the general rules and background in mind, let us now examine the specific questions posed by the Commission. The questions will be in *italics* and the answers will be in normal type. The entire request for comments is attached at *Tab 4.*

1) Do the statutes identified in the CR-102 form filed with the Code Reviser, i.e., RCW 80.01.040 and RCW 81.04.160, provide statutory authority for the Commission to adopt the proposed rule?

No. The Commission cited two statutes giving it authority to adopt the proposed rules. RCW 80.01.040, the first authority cited in the CR-102, is a global, general delegation of authority. It provides in subsection (1) that WUTC will "(e)xercise all the powers and perform all the duties prescribed therefore by this title and by Title 81 RCW, or by any other law." By its own terms, this general delegation relies on *other* statutes for implementation and by itself confers no authority.

Subsection (2), similarly, states that WUTC will "(r)egulate in the public interest, *as provided by the public service laws,* the rates, services, facilities, and practices of all persons engaging in the transportation by whatever means of persons or property..." (Emphasis added) The public service laws are codified in Title 81 RCW. Here again, no independent, unfettered power is delegated. The WUTC must still find a statute

specifically empowering it to regulate the subject matter included in the proposed rules -- railroad operating rules.

RCW 81.04.160 is the second statute cited in the CR-102. It contains a careful, limited listing of specific subject matter that is subject to WUTC regulation. Matters such as placing bulletins about train arrivals and departures at stations, the times stations will be left open, and the like are listed, followed by a general phrase, "and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title." Nowhere does the title "treat" regulation of railroad operating rules, point protection, or remote control operations, which are the subject of the proposed rules.

The proposed rules are intended to be penal, both civilly and criminally. It is intended that the Commission will "enforce" them either directly or through orders. (CR-102, "Reasons supporting proposal"). RCW 81.04.390 provides that violation by persons of an order of the Commission is a gross misdemeanor. Gross misdemeanors carry a maximum sentence of one year imprisonment and a $5,000 fine. *RCW 9.92.020.* Public service companies in violation may be fined up to $1,000 per offense, with each day counting as a separate offense.[2] *RCW 81.04.380.* Mandamus actions are also available to the Commission to enforce orders. *RCW 81.53.200.* In the case of penal statutes and rules such as these, the standard on review is one of strict construction, specific authority, and clear and enforceable language, all of which is missing in the proposed rules.

2) Do other statutes in Title 81 RCW provide statutory authority for the Commission to adopt the proposed rule, e.g., RCW 81.44.065, RCW 81.53.030, or RCW 81.104.120(3)?

a) What about RCW 81.44.065, relating to the devolution of powers and duties relative to safety of railroads?

Answer: No. RCW 81.44.065 (formerly RCW 43.53.055) provides as follows:

> The utilities and transportation commission shall exercise all powers and duties in relation to the inspection of tracks, bridges, structures, equipment, apparatus, and appliances of railroads with respect to the safety of employees and the public and the administration and enforcement of all laws providing for the protection of the public and employees of railroads which prior to April 1, 1955 were vested in and required to be performed by the director of labor and industries.

L&I was never delegated any power to adopt or enforce regulations pertaining to railroad operating rules. L&I is the state's mini-OSHA agency (OSHA is called "WISHA" in this state). RCW 81.44.065 merely transferred

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[2] Every common carrier is a public service company. *RCW 81.04.010.*

L&I's limited railroad-related WISHA powers to WUTC, many of which are, of course, now preempted by federal law. Attached at *Tab 5* is an Attorney General's Opinion dated November 5, 1973, construing this statute. It cautions that such WISHA powers are still subject to federal law.

b) What about the language in RCW 81.53.030 (Petition for crossing) that states that the "commission may provide in the order authorizing a grade crossing, at or any subsequent time, that the railroad company shall install and maintain ... flagmen ... or other devices or means to secure the safety of the public and its employees"?

Answer: This statute, enacted by Laws 1961, ch. 14, is by its terms limited to *hearings* in which authority for a new *crossing* has been *petitioned for* and an *order* is being written, or modified, concerning that particular *crossing*. While the *crossing* may be of a highway or another railroad, nothing in this statute authorizes such an order for *private* crossings, nor does it authorize any *rulemaking* or regulation of operating rules. The statute does not even grant authority to decide if there will be a crossing of another railroad, but only what kind will be established. *State v. Public Service Com'n,* 114 Wash. 301, 194 P. 982 (1918).

c) What about RCW 81.104.120(3), which provides that "The utilities and transportation commission shall maintain safety responsibility for passenger rail service operating on freight lines"?

Answer: RCW Chapter 81.104 focuses on high capacity transportation systems under the primary jurisdiction of the Department of Transportation. WUTC conducts various facility safety inspection programs. RCW 81.104.120(3) provides only that "safety responsibility" will be split between WUTC and local agencies, depending on whether the tracks involved carry freight as well as passengers. This is among several other housekeeping chores RCW 81.104 contains, such as budgeting details, funding, etc. The clause conveys no independent or new safety or rulemaking authority.

3) RCW 81.04.160 identifies several examples of appropriate subjects for commission rulemaking, including the regulation of railroads in the interest of the "comfort and convenience" of the consumers of railroad services (e.g., the bulletining of trains, terms and conditions contained in contracts for the shipment of property, and the time station offices will be kept open). The examples are followed by the phrase "and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title." Does this language authorize the Commission to adopt rules for the safety of the general public as opposed to "comfort and convenience" of the customers of railroads?

Answer: No. Jurisdiction and power will not be "presumed." *State ex rel. Northeast Transport Co. v. Abel,* 10 Wn 2d 349, 355, 116 P 2d 522 (1941), *supra.* The language of the statute speaks for itself and is limited to the rail *passengers,* not the general public. This is abundantly clear in the authorities analyzed in answers to later questions. The Commission's power has always been construed literally and restrictively by the courts and the Legislature has been very sparing in granting such authority. When it does, it is clear and unmistakable, not requiring a "stretch" of the language or context. *Abel, supra.*

4) RCW 81.28.240 authorizes the Commission to "determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule. What significance should the Commission attribute to the phrase "in respect to the transportation of persons and property by such common carrier"? Please consider the definitions of the terms "transportation of persons" and "transportation of property" in RCW 81.04.010.

Answer: RCW 81.28.240 is an *intrastate* ratemaking statute now totally preempted by federal law. The statute just before it, RCW 81.28.230, is titled "Commission to fix just, reasonable, and compensatory rates." The reference in -.240 to "after such hearing" refers to the ratemaking hearing in -.230. The subject matter bears no resemblance to the proposed rules and grants no authority for them, nor does the statute grant authority to regulate the safety of the general public.

These statutes did not allow the Commission to regulate interstate commerce even before the newer federal acts (beginning with the Staggers Act in the 1980's) deregulated railroad ratemaking. *Camas Prairie R. Co. v. Dept. of Public Works,* 125 Wash. 653, 217 P. 33 (1923).

The phrase *"in respect to the transportation of persons and property by such common carrier"* limited the statute's effect to the people and goods being transported (things like rates and fares, discriminatory pricing, etc.). The phrase "transportation of persons" is defined at RCW 81.04.010 to "include any *service* in connection with the receiving, carriage, and delivery *of the person transported and his baggage* and all facilities used, or necessary to be used in connection with the safety, comfort, and convenience *of the person transported."* (Emphasis added) The phrase "transportation of property," as defined by the same statute, "includes any service in connection with the receiving, delivery, elevation, transfer in transit, ventilation, refrigeration, icing, storage, and handling *of the property transported."* (Emphasis added) Again, none of this bears any resemblance to the proposed rules. RCW 81.28.240 grants no authority to regulate the safety of the general public.

5) If your answer to question 4 is that the Commission's authority under the 1911 public service law does extend to the safety of the general public, does this mean that local governments in Washington are precluded from adopting ordinances applicable to railroads that are for the safety of the general public? See, e.g., Kennewick Municipal

Code Sec. 11.30.070... Wouldn't the Seattle Electric Company case and the 1916 Attorney General Opinion mean that such local ordinances would be preempted by the 1911 public service law?

Answer: The Railroads' answer is that the 1911 public service law (RCW 81.28.240) does *not* extend to authorizing regulations for health and safety of the general public, so the question does not require an answer. However, we wish to comment on the case *Seattle Electric Co. v. Seattle,* 78 Wash. 203, 138 P. 892 (1914) and the later Attorney General Opinion of 1916 (copy attached at *Tab 6*).

In *Seattle Electric,* the City sought to regulate the operation of electric street cars by ordinance. The object was to prevent overcrowding by requiring that a schedule be filed with the City. The Court struck the ordinance down on the ground that the "public service commission law" (Laws 1911, ch. 117, now RCW Chapt. 81) is a general law and the City"s right to exercise the police power ceases when the state acts upon the same subject matter. *Seattle Electric, supra., 78 Wash. 203, 208.* "Acting" took place, not with regulation, but the effective date of the statute. *Id.* The Washington Supreme Court quoted with approval the following passage from *Northern Pacific R. Co. v. State of Washington,* 222 U.S. 370:

> "...It is elementary, and such is the doctrine announced by the cases to which the court below referred, that the right of a state to apply its police power for the purpose of regulating interstate commerce, in a case like this, *exists only from the silence of congress on the subject or manifests its purpose to call into play its exclusive power.* This being the conceded premise *upon which alone* the state law could have been made applicable, it results that as the enactment by congress of the law in question was an assertion of its power, by the fact alone of such manifestation *that subject was at once removed from the sphere of the operation of the authority of the state..."* (Emphasis added)

Although the word 'preemption" appears nowhere in the opinion, this is what this early statement is defining. It includes the even later idea of "negative preemption" argued by the Railroads in this rulemaking. See *Comments of June 11, 2004, at 11.*

The Washington Supreme Court was the "court below" that was reversed by the U.S. Supreme Court in *Northern Pacific, supra.* Conforming to the U.S. Supreme Court's interpretation, the Washington Court went on to rule in *Seattle Electric* that *enactment* of the state law nullified at least portions of the City ordinance. *Seattle Electric, supra., 78 Wash. 203, 210.* No action by the PSC was necessary first. By quoting with approval the Supreme Court case, the Washington Court was also ruling that the state law is nullified the instant a federal law subsuming it is enacted.

This is what we now call "preemption." It is what the Railroads have been saying about the effect of the enactment of the Federal Rail Safety Act and the Interstate Commerce Commission Termination Act on state regulation of the subject matter of these proposed

rules. Although more modern cases can be found, none is more eloquent or easier to understand than *Seattle Electric.*

Justice Parker's concurring opinion in *Seattle Electric* expressed his concern that the majority's opinion may be construed too broadly to prohibit *all* exercise by the City of its police power when the public service law is involved. This problem was addressed by the Attorney General two years later.

The Attorney General's Opinion of May 16, 1916, is instructive. Here, the City of Spokane asked Attorney General Tanner for his opinion as to the validity of a Spokane ordinance. Mr. Tanner replied that, as soon as the public service law was enacted, the City lost its jurisdiction over rates, schedules, and rules relative to the overcrowding of cars. However, because the public service commission's jurisdiction was (and is) limited to the transportation of persons and property, the City could regulate matters relating "to the prohibiting of such acts of the utility as may be detrimental to the peace, health, safety or general welfare of the community." *AG Op. at 296.* He is saying here that the PSC (now WUTC) has no authority for rules affecting the general public, but the City does because the public service law does not cover safety of the general public. Of course, the later FRSA and ICCTA federal acts were not yet enacted. For a case holding basically the same as the AG's Opinion and *Seattle Electric,* see *Puget Sound Traction, L. & P. Co. v. PSC,* 100 Wash. 329, 170 P 1014 (1918).

These opinions are views of the basic law governing the WUTC contemporaneous with its enactment and based on case from both the federal and state supreme courts. No clearer view could be obtained as to the lack of authority and jurisdiction of this Commission to adopt the proposed rules.

6) What significance should we attribute, in RCW 81.28.230, to the words "after such hearing" and "such common carrier"?

Answer: We believe -.240 was meant here since -.230 does not contain these words, but -.240 does. This question was addressed in answer to question 4. We should not attach any significance to this preempted ratemaking statute.

7) What significance, if any, should the Commission ascribe to the fact that RCW 81.28.230 states "This section does not apply to railroad companies, which shall be regulated in this regard by chapter 81.34 RCW and rules adopted thereunder."

Answer: RCW 81.28 was a ratemaking statute that is now totally preempted. Its core, RCW 81.34, was repealed. *Laws 1991, ch. 49.* If anything, the significance of RCW 81.28.230 is that it demonstrates that there is no statutory authority for the proposed rules.

IV.
Conclusions

1. The Commission is preempted by federal law and the federal Constitution from adopting and enforcing the proposed rules.

2. The Commission is without state statutory authority to adopt or enforce the proposed rules.

3. The proposed rules are vague and would be unenforceable if adopted.

4. The rulemaking procedure continues to suffer from numerous failures to follow the Administrative Procedure Act.

5. The record does not support the adoption of the proposed rules.

6. The proposed rules are bad public policy in that they would introduce confusion and uncertainty into railroad operations, denigrating the safety of railroad workers, passengers, freight, equipment, facilities, and the general public.

The Railroads request that the Commission find and order that it does not have authority or jurisdiction to adopt the proposed rules, that it chooses not to adopt them, that this rulemaking docket is closed, and that no hearing is necessary on December 10, 2004.

The Railroads reserve the right to raise these and all other legal and procedural objections arising under the Constitution, federal law, the Administrative Procedure Act, other state law, the record, and sound policy, as may be appropriate on judicial review of these proceedings.

Very truly yours,

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TAB 1

NEW SECTION

WAC 480-62-218 Point protection. (1) The following definitions apply to this section:

"Shove" means to back up or push cars with a locomotive rather than pulling them.

"Drop" and "kick" mean to release cars from a train or locomotive and allow them to coast or roll free.

(2) When cars or engines are shoved, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. This requirement does not apply when it is reasonably certain, through the use of technology or other means, that neither people nor equipment are in the way and that switches are properly lined. Cars or engines must not be shoved to block other tracks until it is safe to do so.

(3) When railroad cars are shoved, kicked or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Movements over the crossing may only be made on the crew member's signal.

(4) The warning required in subsection (3) of this section is not required when crossing gates are in the fully lowered position, or it is clearly seen that no traffic is approaching or stopped at the crossing.

(5) Movements performed under remote-control operations are to be considered "shoving" movements, regardless of the direction or position of the remote-control locomotive, except when the primary remote-control operator is riding the leading locomotive.

(6) When a remote-control zone has been activated in accordance with a railroad's own rules, the railroad may relieve the remote-control operator of the requirements of this rule. However, the railroad must provide point protection in accordance with subsections (2) and (3) of this section at road crossings at grade or where a car or engine that is being moved could block mainline tracks except:

(a) When it is reasonably certain, through the use of technology or other means, that neither people nor equipment are in the way and switches are properly lined.

(b) When crossing gates are in the fully lowered position, or it is clearly seen that no traffic is approaching or stopped at the crossing.

(7) The requirements of this section apply to a railroad

unless and until it has filed with the Federal Railroad Administration, pursuant to 49 CFR Sec. 217, operating rules that materially modify the requirements of Sections 6.5 and 6.32.1 of the General Code of Operating Rules (Fourth Ed., effective April 2, 2000).

TAB 2

Overview of the Proposed Rules
Discussed in Previous Comments & Presentations

1. **The proposed rules would unduly burden interstate commerce.**

   - The rules would rewrite critical railroad operating rules in a unique manner. They do not match existing rules anywhere the Railroads operate.

   - The rules encompass a multitude of different operations and circumstances involving interstate commerce, some as yet unforeseeable and many probably unintended. *Chart, Tab 3.*

   - This combination of uniqueness, imprecision and breadth of scope would place an undue burden on interstate commerce in violation of the Commerce Clause.

2. **The proposed rules are preempted by federal law.**

   - The rules would affect rail safety in areas already covered by federal regulations and/or policy and would apply state-wide without reference to any essentially local safety hazard or other federal tests. *Tab 1.* Thus, they are preempted by the Federal Rail Safety Act of 1970 ("FRSA"). See *49 USC Sec. 20103(a).*

   - The rules would purport to regulate railroad operations, facilities, rules and practices that are within the exclusive jurisdiction of the Surface Transportation Board under the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). See *49 USC Sec. 10501* and *City of Seattle v. Burlington Northern R. Co.*, 145 Wn 2d 661, 41 P 3d 1169 (2002).

   - New rules training and enforcement standards would be required if the rules are adopted and enforced, but have not been addressed. *Railroad Comments of June 11 and August 11, 2004.* FRSA preempts states from requiring such training (vested exclusively in the FRA). *Comments of June 11, 2004, at 10; Union Pacific R.R. Co. v. CPUC,* (CA-9, 2003) 346 F.3d 851.

   - The rules are ambiguous, using words and phrases in ways different than the industry [(i.e., "shove," "drop," "kick," "in the way," "materially modify," and others at *Tab 1.* These differences will induce confusion, denegrate safety, and burden interstate commerce, as well as intensify the requirement for extensive new training programs in violation of the Supremacy Clause.

   - The rules purport to govern remote control operations. *Tab 1, (5), (6).* The Commission is without authority, under state and federal law, to promulgate such rules. *Railroad Comments of June 11, 2004.*

   - The Railroads have also demonstrated that the proposed rules would also be different than the federal regulatory scheme, illustrated by the letter of FRA Administrator Rutter attached to *Railroad Comments of June 11, 2004.*

   - The rules purport to govern switching. *Id., (1), (2).* States have no jurisdiction to regulate switching. *Interstate Commerce Commission Termination Act of 1995, 49 USC Sec. 10501.*

   - Washington law has always recognized the doctrine of preemption, both early as will be discussed, and lately as in *City of Seattle v. Burlington Northern RR. Co.*, 145 Wn 2d

661, 41 P 3d 1169 (2002) (the ICCTA and FRSA express an "unambiguous intent to regulate railroad operations as a matter of federal law").[1]

- Rules such as these would be a void "patch work regulatory scheme" with "extraterritorial effect," *Union Pacific R.R. Co. v. CPUC*, (CA-9, 2003), 346 F 3d 851, at 871 (), and states may not exert a "direct burden on interstate commerce." *State v. Northern Express Co.*, 80 Wash. 309, 141 P. 757 (1914), *appeal dismissed* 241 U.S. 686 (1916).

3. **The proposed rules would be unenforceable under state law.**

- The Commission has entered no findings of fact for the record to support adoption of these rules. *CR-102.* The rules would be void under Washington law. *State ex rel. Northeast Transport Co. v. Abel,* 10 Wn 2d 349, 355, 116 P 2d 522 (1941).

- Promulgating these rules would be found to be arbitrary and capricious under these circumstances.[2]

- There have been significant procedural lapses in this rulemaking that show a "disregard for the material rights" of the Railroads. *Railroad Comments of June 11 and August 11, 2004.* The rules would be void under Washington law. *Northern Pacific Ry. Co. v. WUTC*, 68 Wn 2d 915, 416 P 2d 337 (1966).

- The cost of implementation of these rules by Washington railroads has not been calculated. *CR-102.* Because the rules would apply to all Washington railroads, and some are small businesses, failure to inquire into costs violates the Washington Administrative Procedures Act. *Railroad Comments of August 11, 2004, at 4, 5.*

- The new rules are intended to be enforceable civilly and criminally. *CR-102, "Reasons supporting proposal."* Penal rules and statutes require a high standard of clarity and unquestioned jurisdiction. *Comments of August 11, 2004.* These rules, with their vague and imprecise language, would be unenforceable (void for vagueness).

- The rules purport to govern crossings, whether public or private. *Id., (3), (4), (6).* The Commission has no jurisdiction over private crossings. *RCW Chapter 81.53.*

- The proposed rules would tie their applicability to an arbitrary year 2000 standard, producing strange results. BNSF may be subject to these rules while UP may not be due to differences in the existing rules they use. *Tab 1, (7).*

- This quirk would also create even more uncertainty in the field among railroad workers. The rules could apply one day, but not the next, and may apply on one railroad, but not the other. They may apply while the same train is on another railroad, and not apply when it is on its home railroad (UP running on BNSF, for example).

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1 This case is dispositive of this entire discussion. The proposed rules include regulation of switching. The case stresses that state regulation is to be treated the same as local regulation from an FRSA preemption standpoint, in that both are preempted. 145 Wn 2d 661, 671.

2 Agency action is arbitrary and capricious if it is willful and unreasoning and taken without regard to the attending facts or circumstances. US West Comm., Inc. v. WUTC, 134 Wn 2d 48, 69, 949 P. 2d 1321 (1997); RCW 34.04.130(6)(f). Acting without statutory authority also violates RCW 34 04.130(6)(b).

- This is not only impossible to perform safely, but the results are arbitrary and capricious and raise issues of Denial of Equal Protection.

- The Railroads have brought to the Commission's attention numerous procedural irregularities in both this Docket (TR-040151) and its strange sibling (TR-021465). *Railroad Comments of June 11 and August 11, 2004.* Washington law strongly disfavors actions that are arbitrary and capricious or, in older parlance, are in "disregard of the material rights of the parties." *Northern Pacific Ry. Co. v. WUTC,* 68 Wn 2d 915, 416 P 2d 337 (1966).

- The proposed rules constitute a new regulatory program that the Administrative Procedure Act terms a "significant legislative rule." *RCW 34.05.328(5)(c)(iii); Railroad Comments of August 11, 2004.*

- The Legislature has provided special protections and procedures for adoption of significant legislative rules by state agencies. *RCW 34.05.328.* These protections were summarily dismissed in the CR-102 and should have been voluntarily adopted by the Commission if they are not mandatory. *Id.*

- The record is devoid of evidence of any valid problem needing correction. Insofar as is known to the Railroads, it also contains no evidence such rules would *correct any problem* if it existed. As noted, this lack of record is itself fatal to the proposed rules. *Abel, supra.*

TAB 3

COMPARISON OF POINT PROTECTION RULES

WUTC	GCOR	BNSF	UPRR
(1) The following definitions apply to this section: "Shove" means to back up or push cars with a locomotive rather than pulling them "Drop" and " kick" mean to release cars from a train or locomotive and allow them to coast or roll free.	No parallel rule	No parallel rule	No parallel rule
(2) When cars or engines are shoved, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. This requirement does not apply when it is reasonably certain, through the use of technology or other means, that neither people nor equipment are in the way and that switches are properly lined. Cars or engines must not be shoved to block other tracks until it is safe to do so.	**6.5 Handling Cars Ahead of Engine 4th edition** When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains • Maximum speed for snow service 5th edition same as UP, BNSF will adopt.	**6.5 Handling Cars Ahead of Engine** When cars or engines are shoved and conditions require, a crew member must take an easily seen position on the leading car or engine, or be ahead of the movement, to provide protection. Cars or engines must not be shoved until the engineer knows who is protecting the point of the movement and how protection will be provided. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains. • Maximum timetable speed for snow service unless a higher speed is authorized by the employee in charge. Note: When plowing snow and all employees are on the equipment, one common authority may be used by both maintenance of way employees and the train crew. * * *	**6.5 Handling Cars Ahead of Engine (effective 4/1/04)** When cars or engines are shoved and conditions require, a crew member must provide protection for the movement. Cars or engines must not be shoved to block other tracks until it is safe to do so. When cars are shoved on a main track or controlled siding in the direction authorized, movement must not exceed: • 20 MPH for freight trains • 30 MPH for passenger trains • Maximum speed for snow service * * *

WUTC	GCOR	BNSF	UPRR
(3) When railroad cars are shoved, kicked or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Movements over the crossing may only be made on the crew member's signal. (4) The warning required in subsection (3) of this section is not required when crossing gates are in the fully lowered position, or it is clearly seen that no traffic is approaching or stopped at the crossing	**6.32.1 Cars Shoved, Kicked or Dropped** When cars are shoved, kicked, or dropped over road crossings at grade, a crew member must be on the ground at the crossing to warn traffic until the crossing is occupied. Make any movement over the crossing only on the crew member's signal. Such warning is not required when: • Crossing gates are in the fully lowered position. or • It is clearly seen that no traffic is approaching or stopped at the crossing.	Same as GCOR.	Same as GCOR except that a different rule applies when remote control moves are made over a gated crossing equipped with cameras: **35.1.6 Road Crossing Equipped with Cameras (effective 3/4/04)** When movements are made over a road crossing equipped with cameras, unless the RCO is on the engine or a crew member is at the crossing to provide warning, the RCO must: • Be in position to observe the crossing and roadway approaches in the monitor to assure that automatic crossing warning devices activate as designed when the RCL approaches and remain activated until the crossing is occupied by engine or cars; • Make sure movement over crossing does not exceed 4 MPH until crossing is occupied.
(5) Movements performed under remote control operation are to be considered "shoving" movements, regardless of the direction or position of the remote control locomotive, except when the primary remote control operator is riding the leading locomotive.	**No parallel rule in 4th edition. 5th edition 6.5.1 Remote Control Movements** Remote control movements are considered "shoving" movements, except when the remote control operator controlling the movement is riding the leading engine in the direction of movement. Before initiating movement, the remote control operator or a crew member must be in position to visually observe the	SSI 23(A)e Except when the primary Remote Control Operator is riding the leading locomotive, remote control movements are to be considered "shoving" movements, regardless of direction or position of remote control locomotive.	**35.1.4 Shoving Movement (effective 6/7/02)** Except when the primary RCO is riding the leading locomotive, remote control movements are to be considered "shoving" movements, regardless of direction or position of remote control locomotive.

WUTC	GCOR	BNSF	UPRR
	direction the equipment moves. Relief of Providing Protection The remote control operator is relieved from the requirement to stop within half the range of vision for movements with engine on leading end when: 1.The remote control zone has been activated. 2.Switches/derails are known to be properly lined. 3.Track(s) within the zone are known to be clear of other trains, engines, railroad cars and men or equipment fouling track. This process must be repeated each time the remote control zone is activated.		
(6) When a remote-control zone has been activated in accordance with a railroad's own rules, the railroad may relieve the remote-control operator of the requirements of this rule. However, the railroad must provide point protection in accordance with subsections (2) and (3) of this section at road crossings at grade or where a car or engine that is being moved could block mainline tracks except: (a) When it is reasonably certain through the use of technology or other means, that neither people nor equipment are in the way and switches are properly lined. (b) When crossing gates are in the fully lowered position, or it is clearly seen that no traffic is	**No parallel rule in 4th edition.** **5th edition 6.7** **Remote Control Zone** A. Entering Remote Control Zone • Before entering a remote control zone, all employees that are not part of the remote control crew must determine whether the zone is activated. Employees may receive this information from the remote control operator, other authorized employee or special instructions. • When the remote control zone is activated, track(s) within the zone must not be fouled with equipment, occupied or switches operated until the remote control zone has been deactivated or permission is granted by the remote control operator to enter the remote control zone.	SSI 23(F)b. When a Remote Control Zone is activated, the Remote Control Operators are relieved of point protection for pullout movements (locomotive on leading end) only. Rule 6.28 requirement to stop within half the range of vision is waived. After Remote Control Zone is activated, Remote Control Operator must ascertain that switches/derails are properly lined and track(s) within zone are clear of trains, engines, railroad cars and men or equipment fouling track before initial pullout movement. This process must be repeated each time the Remote Control Zone is activated.	**35.6.2 Activated Remote Control Zone** **(8/4/04)** When a remote control zone is activated, the RCO must ascertain that switches/derails are properly lined and track(s) within the zone are clear of trains, engines, cars and men or equipment fouling track. The RCO is then relieved of point protection and the requirement to stop in one half the range of vision for pull out movements with locomotive on the leading end only. Point protection is required under the following conditions: * Remote Control Zone is not equipped with pull back and stop protection (PSP) or track is not protected by a derail lined in the derailing position. * PSP equipment is inoperative. RCO must test equipment as contained in the

WUTC	GCOR	BNSF	UPRR
approaching or stopped at the crossing.	B. Transfer of an Active Remote Control Zone • An active remote control zone may be transferred to other remote control operators. • A job briefing must be conducted each time the zone is transferred between remote control operators and, if applicable, other authorized employee. C. Deactivating Remote Control Zone When the remote control operator ends the tour of duty, the remote control zone must be deactivated except the remote control zone may remain active if: • Transferred. • Special instructions specify the hours the remote control zone is active.		instructions for the operation of the equipment. or * RCO manually overrides the PSP equipment.
(7) The requirements of this section apply to a railroad unless and until it has filed with the Federal Railroad Administration, pursuant to 49 C.F.R. Sec. 217, operating rules that materially modify the requirements of Sections 6.5 and 6.32.1 of the General Code of Operating Rules (Fourth Ed., Effective April 2, 2000).	49 C.F.R. Sec. 217	49 C.F.R. Sec. 217	49 C.F.R. Sec. 217

TAB 4

[Service Date October 15, 2004]

October 15, 2004

NOTICE OF OPPORTUNITY TO FILE WRITTEN COMMENTS
(By November 19, 2004)

NOTICE OF CONTINUATION OF ADOPTION HEARING
(Set for Friday, December 10, 2004)

RE: Railroad Rulemaking to Consider Possible Point Protection Rule, WAC 480-62-218; Docket No. TR-040151

TO INTERESTED PERSONS:

On July 21, 2004, the Washington Utilities and Transportation Commission filed a Notice of Proposed Rulemaking (CR-102) in this docket with the Code Reviser. The CR-102, as filed with the Code Reviser, is available for inspection on the Commission's web site at: http://www.wutc.wa.gov/040151.

On August 11, 2004, the Commission received joint comments from the Burlington Northern and Santa Fe Railroad Company and Union Pacific Railroad Company in opposition to the proposed rule. The Commission also received comments from the Brotherhood of Locomotive Engineers and the King County Labor Council in support of the proposed rule.

In addition to addressing other matters such as preemption by federal law and general objections to the proposed rule, the railroads' August 11, 2004, comments raise the question of whether the Commission's stated bases of statutory authority in the CR-102 form filed with the Code Reviser, RCW 80.01.040 and RCW 81.04.160, authorize adoption of this rule. Based on these comments, the Commission continues the adoption hearing scheduled for October 13, 2004, until December 10, 2004, and seeks additional comments from interested persons on the issue of the Commission's state statutory authority before proceeding to adoption of the proposed rule.

ADOPTION HEARING

The Commission reschedules the adoption hearing to its regularly scheduled open meeting, **Friday, December 10, 2004, beginning at 9:30 a.m., in the Commission's Main Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.**

The Commission filed a CR-102, Notice of Proposed Rulemaking, with the Code Reviser on July 21, 2004, published as WSR# 04-15-140. The Commission filed a continuance of WSR# 04-15-140 on August 11, 2004, reflecting October 13, 2004, for the adoption hearing and date of intended adoption. The continuance of WSR# 04-15-140 was published as WSR# 04-17-057. The Commission filed a continuation of WSR# 04-17-057 on October 15, 2004, reflecting December 10, 2004, for the adoption hearing and date of intended adoption. This continuation of WSR# 04-17-057 will be published as WSR# 04-21-037. In all other respects the CR-102 remains unchanged.

WRITTEN COMMENTS

The Commission requests comments from interested persons that will assist the Commission in determining whether it has adequate state statutory authority to adopt the proposed rule. In particular, the Commission seeks responses to the following questions regarding the various potential sources of authority:

1) Do the statutes identified in the CR-102 form filed with the Code Reviser, *i.e.*, RCW 80.01.040 and RCW 81.04.160, provide statutory authority for the Commission to adopt the proposed rule?

2) Do other statutes in Title 81 RCW provide statutory authority for the Commission to adopt the proposed rule, *e.g.*, RCW 81.44.065, RCW 81.53.030, or RCW 81.104.120(3)?

a) What about RCW 81.44.065, relating to the devolution of powers and duties relative to safety of railroads?

b) What about the language in RCW 81.53.030 (Petition for crossing) that states that the "commission may provide in the order authorizing a grade crossing, or at any subsequent time, that the railroad company shall install and maintain . . . flagmen . . . or other devices or means to secure the safety of the public and its employees"?

c) What about RCW 81.104.120(3), which provides that "The utilities and transportation commission shall maintain safety responsibility for passenger rail service operating on freight rail lines"?

3) RCW 81.04.160 identifies several examples of appropriate subjects for commission rulemaking, including the regulation of railroads in the interest of the "comfort and convenience" of the consumers of railroad services (*e.g.*, the bulletining of trains, terms and conditions contained in contracts for the shipment of property, and the time station offices will be kept open). The examples are followed by the phrase "and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title." Does this language authorize the Commission to adopt rules for the safety of the general public as opposed to "comfort and convenience" of the customers of railroads?

4) RCW 81.28.240 authorizes the Commission to "determine the just, reasonable, *safe*, adequate, sufficient and proper *rules, regulations, practices*, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule." What significance should the Commission attribute to the phrase "in respect to the transportation of persons and property by such common carrier"? Please consider the definitions of the terms "transportation of persons" and "transportation of property" in RCW 81.04.010.

Please consider, also, the Attorney General Opinion dated May 3, 1916 (five years after enactment of the statute now codified at RCW 81.28.240) to the then Public Service Commission. (Available on the Commission's website at http://www.wutc.wa.gov/040151.) Please also consider the opinion in *Seattle Electric Company v. Seattle 78 Wash. 203, 214 (1914) (Parker, J. concurring)*. Do these authorities require that the Commission's rulemaking authority under this statute is limited to prescribing rules for the safety of the passengers or shippers using the services of the regulated common carrier as opposed to the safety of motorists or the general public?

5) If your answer to question 4 is that the Commission's authority under the 1911 public service law does extend to the safety of the general public, does this mean that local governments in Washington are precluded from adopting ordinances applicable to railroads that are for the safety of the general public? *See, e.g., Kennewick Municipal Code § 11.80.070* (http://www.ci.kennewick.wa.us/city%20clerk/kmc/11-80.pdf). Wouldn't the

Seattle Electric Company case and the 1916 Attorney General Opinion mean that such local ordinances would be preempted by the 1911 public service law?

6. What significance should we attribute, in RCW 81.28.230, to the words "after *such* hearing" and "*such* common carrier"?

7. What significance, if any, should the Commission ascribe to the fact that RCW 81.28.230 states "This section does not apply to railroad companies, which shall be regulated in this regard by chapter 81.34 RCW and rules adopted thereunder."

The Commission requests that comments be provided in electronic format to enhance public access, for ease of providing comments, to reduce the need for paper copies, and to facilitate quotations from the comments. Comments may be submitted by electronic mail to the Commission's Records Center at <records@wutc.wa.gov>. Please include:

- The docket number of this proceeding (TR-040151)
- The commenting party's name
- The title and date of the comment or comments

An alternative method for submitting comments may be by mailing/delivering an electronic copy on a 3 ½ inch, IBM-formatted, high-density disk, in .pdf Adobe Acrobat format or in Word 97 or later. Include all of the information requested above. The Commission will post on the Commission's web site all comments that are provided in electronic format. The web site is located at <http://www.wutc.wa.gov/040151>.

If you are unable to file your comments electronically or to submit them on a disk, the Commission will always accept a paper document. Questions may be addressed to Mike Rowswell at (360) 664-1265 or e-mail at <mrowswel@wutc.wa.gov >.

Your participation is welcomed via written comments. Information about the schedule and other aspects of the rulemaking, including comments, will be posted on the Commission's web site as it becomes available. If you wish to receive further information on this rulemaking you may (1) call the Commission's Records Center at (360) 664-1234, (2) e-mail the Commission at <records@wutc.wa.gov>, or (3) mail written comments to the address below. When contacting the Commission, please refer to Docket No. TR-040151 to ensure that you are placed on the appropriate service list. The Commission's mailing address is:

Executive Secretary
Washington Utilities and Transportation Commission
1300 South Evergreen Park Drive S.W.
P.O. Box 47250
Olympia, Washington 98504-7250

Sincerely,

CAROLE J. WASHBURN
Executive Secretary

TAB 5

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON

[NO NUMBER IN ORIGINAL]

1973 Wash. AG LEXIS 244; 1973 Ltr. Op. Atty Gen. Wash. No. 102

November 5, 1973

CORE TERMS: railroad, department of labor, railroad industry, work place, transportation, paramount, supplied, administrative agency, interagency, inspection, vested, duties

SYLLABUS:
[*1]

OFFICES AND OFFICERS -- STATE -- LABOR AND INDUSTRIES -- RAILROADS -- WASHINGTON INDUSTRIAL SAFETY HEALTH ACT.

The Washington Industrial Safety Health Act, chapter 80, Laws of 1973, is applicable to employment in work places operated by the railroad industry.

REQUESTBY:

Honorable Charles D. Kilbury
State Representative, 16th District
P.O. Box 2482
Pasco, Washington 99302

QUESTION:
By letter previously acknowledged you have requested an opinion of this office on a question which we paraphrase as follows:

Is the Washington Industrial Safety Health Act, chapter 80, Laws of 1973, applicable to employment in work places operated by the railroad industry?

We answer this question in the affirmative for the reasons set forth in our analysis.

OPINIONBY:
SLADE GORTON, Attorney General; DAVID W. ROBINSON, Assistant Attorney General

OPINION:
ANALYSIS

The Washington Industrial Safety Health Act of 1973, chapter 80, Laws of 1973 (hereinafter referred to as "WISHA") is an act requiring the director of the department of labor and industries to adopt and enforce regulations governing health and safety in employment in our state. Section 3 of this act provides, in part:

> "This chapter shall apply with respect to employment performed **[*2]** in any work place within the state. . . ." (Emphasis supplied.)

The term "work place" is broadly defined in § 2 (7) to include:

> ". . . any plant, yard, premises, room, or other place where an employee or employees are

employed for the performance of labor or service . . ." (Emphasis supplied.)

Prior to 1955, the adoption and enforcement of safety regulations for the railroad industry were included among the responsibilities of the director of the department of labor and industries. Accord, § 80, chapter 7, Laws of 1921. In that year, however, the legislature [[Orig. Op. Page 2]] removed these responsibilities from that department and transferred them to the utilities and transportation commission. See, § 1, chapter 173, Laws of 1955, and § 1, chapter 165, Laws of 1955, now codified as RCW 43.22.050 and **RCW 81.44.065**. These statutes, neither of which was expressly amended or repealed by WISHA, read respectively as follows:

RCW 43.22.050:

> "The director of labor and industries, through the division of safety, shall:
>
> "(1) Exercise all the powers and perform all the duties prescribed by law . . . in relation to the administration and enforcement of all laws and safety standards **[*3]** providing for protection of employees . . . Provided, however, This section shall not apply to railroads;
>
> ". . ."

RCW 81.44.065:

> "The utilities and transportation commission shall exercise all powers and duties in relation to the inspection of tracks, bridges, structures, equipment, apparatus, and appliances of railroads with respect to the safety of employees and the public and the administration and enforcement of all laws providing for the protection of the public and employees of railroads which prior to April 1, 1955 were vested in and required to be performed by the director of labor and industries."

Section 27 of WISHA, however, now provides, in pertinent part, that the department of labor and industries

> ". . . shall be the sole and paramount administrative agency responsible for the administration of the provisions of this chapter, and any other agency of the state or any municipal corporation or political subdivision of the state having administrative authority over the inspection, survey, investigation, or any regulatory or enforcement authority of safety and health standards related to the health and safety [[Orig. Op. Page 3]] of employees in any work place **[*4]** subject to this chapter, shall be required, notwithstanding any statute to the contrary, to exercise such authority as provided in this chapter and subject to interagency agreement or agreements with the department made under the authority of the interlocal cooperation act (chapter 39.34 RCW) relative to the procedures to be followed in the enforcement of this chapter: . . ." (Emphasis supplied.)

In direct answer to your question, we find nothing in WISHA which, either expressly or by implication, can be said to exclude a "work place" as defined in § 2 (7), supra, from the coverage of this act merely because it is operated by a railroad company or other component of the railroad industry. Accordingly, we answer the question you have asked in the affirmative - with the understanding, of course, that the state's jurisdiction over railroads under WISHA is subject to the same limits imposed by the paramount federal authority over interstate commerce as applied in the past under **RCW 81.44.065**, supra. See, 45 USCA § 434; and State v. Chicago, M. St. P. & P.R.R. Co., 79 Wn.2d 288, 484 P.2d 1146 (1971), appeal **[*5]** denied, 404 U.S. 804 (1971).

In addition we note that by virtue of § 27, supra, such powers as were heretofore vested in the utilities and transportation commission with regard to railroad employee safety are now to be exercised in accordance with WISHA as the governing statute, together with any rules and regulations promulgated thereunder and any interagency agreements entered into pursuant thereto - with the department of labor and industries being the ". . . sole and paramount administrative agency responsible for the administration of . . ." its provisions.

We trust the foregoing will be of some assistance to you.

TAB 6

STATE OF WASHINGTON

REPORT

OF THE

ATTORNEY GENERAL

W. V. TANNER
Attorney General

1915-1916

OLYMPIA:
FRANK M. LAMBORN, PUBLIC PRINTER
1917

from contagious disease, and that you have the power to make reasonable rules to that end. It is our understanding that the Wasserman blood test is a test for a contagious blood disease. If as a matter of fact the test is an established scientific method of ascertaining the presence of a contagious blood disease and is not harmful to the person to whom it is applied, we are of the opinion that you may legally adopt a regulation for the government of the schools requiring pupils therein to submit to such test at reasonable times.

Yours respectfully,
HOWARD WATERMAN,
Assistant Attorney General.

OLYMPIA, WN., May 8, 1916.

Public Service Commission, Olympia, Wn.

GENTLEMEN: You have submitted to us the following inquiry submitted to you by Dr. J. B. Anderson, health officer of the city of Spokane:

"Would you kindly indicate to me whether you consider cities of the first class have a right to regulate sanitary conditions of street cars in the method and manner of cleanliness; that is whether we are able to force them to scrub their cars out if necessary, and in the matter of ventilation, whether we can force them to open up their windows and give the people fresh air, or whether it is necessary for your commission to rule on these important problems."

Accompanying the letter is a copy of an ordinance of the city of Spokane, two sections of which are as follows:

"Section 88. No person shall expectorate on the floor of any street railway car or other public conveyance, or public building, or on any sidewalk in the city of Spokane.

"Section 89. Every closed street railway passenger car operated in Spokane shall be properly ventilated while in operation and shall be properly aired at the end of each round trip. It shall also be cleaned at the end of each day's run and disinfected at least once each week in such manner as the health officer may direct or approve. The dry sweeping or dusting of any street car while it is on any street is strictly prohibited. The president of the board of health, the health officer, or any of his deputies may order any street railway passenger car operated

in violation of any provision of this section to the car barns, and the company shall immediately comply with the said order. All street cars shall be adequately heated in cold weather."

By the provisions of the constitution cities and towns are authorized to make and enforce local police, sanitary and other regulations, section 11 of article XI being as follows:

"Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws."

By the provisions of section 10, article XI, a city of the class to which Spokane belongs may "frame a charter for its own government consistent with and subject to the constitution and laws of this state."

Section 9 of chapter 117, of the Laws of 1911, being the public service commission law of this state, provides:

"Every common carrier shall construct, furnish, maintain and provide safe, adequate and sufficient service facilities, trackage, sidings, railroad connections, industrial and commercial spurs and equipment to enable it to promptly, expeditiously, safely and properly receive, transport and deliver all persons or property offered to or received by it for transportation, and to promote the safety, health, comfort and convenience of its patrons, employees and the public.

"All rules and regulations issued by any common carrier affecting or pertaining to the transportation of persons or property shall be just and reasonable."

Section 53 of chapter 117, *supra*, provides:

"Whenever the commission shall find, after such hearing, that the rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier in respect to the transportation of persons or property are unjust, unreasonable, unsafe, improper, inadequate or insufficient, the commission shall determine the just, reasonable, safe, adequate, sufficient and proper rules, regulations, practices, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule as hereinafter provided."

By the provisions of said chapter 117, street railroads and street railroad companies are included within the term "common carrier." It will be observed that in the above quotations the provisions of the law are directed to the "rules and regulations

* * * pertaining to the transportation of persons or property" or "rules, regulations, practices, equipment, appliances, facilities or service of any such common carrier *in respect to the transportation of persons or property.*".

In the case of *State ex rel. Webster v. Superior Court*, 67 Wash. 37, it was held that the public service commission had exclusive jurisdiction to deal with the rates of a public utility within the corporate limits of the city of Seattle.

In the case of *Seattle Electric Co. v. Seattle*, 78 Wash. 203, it was held that the public service commission had exclusive jurisdiction concerning the operation of street cars in accordance with schedules, and to prescribe rules relative to the prevention of overcrowding of cars, and that since the enactment of the public service commission law the city had no jurisdiction over such matters.

It will be observed that both of these cases refer to rates or rules and regulations in respect to the transportation of persons, and it is apparent therefore that insofar as any regulations relate to the transportation of persons or property, such regulations are exclusively within the jurisdiction of the public service commission.

Insofar as the regulation relates to the prohibiting of such acts of the utility as may be detrimental to the peace, health, safety or general welfare of the community the utility may be subjected to the police power of the city in the same manner as any other corporation or person. It may be prohibited from maintaining any public nuisance irrespective of the jurisdiction of the commission.

The determination of the question of whether or not the regulation is one in respect to the "transportation of persons or property," as distinguished from that which may be in the interest of public peace, health, safety or general welfare, is not free from difficulty.

It is our opinion that the mere incidental affecting of the transportation is not sufficient of itself to remove the utility from the jurisdiction of the municipal authorities. For instance,

we have no doubt that until the state acts by general law the municipality may regulate the speed of cars within the corporate limits, such regulation being for the safety of the traffic on the streets, as well as for the safety of the passengers. The city may prevent the operation on the streets of cars in a condition calculated to injuriously affect the health, safety or welfare of the inhabitants of the city, as for example, cars loaded with explosives or carrying property which gives off offensive odors.

Considering the ordinance in question, we are of the opinion that the provisions prohibiting expectorating on the floor of cars and prohibiting dry sweeping or dusting of any car while it is on any street, are valid in the exercise of the police power of the city. The provisions relative to ventilation and cleaning may not be as free from doubt and may depend on the establishing of facts, concerning which we have not sufficient information to enable us to express a positive opinion.

If it can be established as a fact that a poorly ventilated car, or a car not cleaned as provided in the ordinance, is a nuisance or is detrimental to the general health of the community, as distinguished from the convenience of the passengers, the city may properly prevent the use of such a car within the city limits. This last statement is applicable to a car which has not been fumigated.

For the reason that we doubt if the necessary facts can be established to meet the conditions referred to in the preceding paragraph, we are of the opinion that with the exception of the prohibitions against expectorating and dry sweeping or dusting, the attempted regulations are "in respect to the transportation of persons," and therefore exclusively within the jurisdiction of the public service commission.

In our opinion the question concerning adequate heating of cars in cold weather is one entirely within the jurisdiction of the public service commission and the city may not regulate in this respect.

Yours respectfully,

SCOTT Z. HENDERSON,
Assistant Attorney General.