[Service Date January 21, 2005]

BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of Proposed Rule	)	DOCKET NO. TR-040151
	)	
WAC 480-62-218	)	GENERAL ORDER NO. R-517
	)	
Relating to Point Protection for	)	ORDER DIRECTING
Railroad Operations.	)	WITHDRAWAL OF
	)	RULEMAKING PROPOSAL
. . . .	)	

SYNOPSIS: *After reviewing its legal authority over point-protection practices, the Commission withdraws the proposed rule and terminates the rulemaking.*

1 **NATURE OF RULEMAKING:** The Commission initiated this rulemaking proceeding to consider the need for rules addressing protection at the leading end of train movements, otherwise referred to as point protection. The Washington Utilities and Transportation Commission takes this action under Notice WSR #04-15-140, filed with the Code Reviser on July 21, 2004.

2 **PROCEDURAL HISTORY:** The Commission initiated this rulemaking as a result of information presented during stakeholder workshops during the Commission's rulemaking in Docket No. TR-021465 addressing remote control operations. It became apparent from those workshops that the need to provide adequate protection of the leading end of the train is a general safety concern common to traditional switching operations and remote control operations alike.

3 The Commission therefore sought information at its January 28, 2004, open meeting about whether to pursue point protection rules in the remote control rulemaking docket (Docket No. TR-021465) or to consider a general point protection rule in a separate rulemaking. The Commission decided to address point protection issues generally in a separate rulemaking and directed that a Notice of Proposed Rulemaking (CR-102) be filed with the Code Reviser in Docket No. TR-021465 on remote control notice requirements and definitions

only, and that a Preproposal Statement of Inquiry (CR-101) be filed with the Code Reviser in Docket No. TR-040151 on the general issue of point protection.

4 On February 18, 2004, the Commission filed a Preproposal Statement of Inquiry (CR-101) in this rulemaking docket with the Code Reviser (WSR # 04-05-103). On February 20, 2004, the Commission mailed a Notice of Opportunity to File Written Comments to all persons on the interested persons list in Docket No. TR-021465 requesting comments by March 19, 2004, on the draft rule language set out in the notice. The notice stated that workshops were not scheduled in the proceeding because the workshops in Docket No. TR-021465 provided sufficient background information on the general issue of point protection.

5 On March 19, 2004, the Commission received comments from Cherie Rodgers, a member of the Spokane City Council, Mark K. Ricci, President of the Washington State Legislative Board of the Brotherhood of Locomotive Engineers and Trainmen (WSLB-BLET), and representatives of Burlington Northern and Santa Fe Railway Company (BNSF) and the Union Pacific Railroad Company (UP). Ms. Rodgers and Dr. Ricci submitted general comments supporting the draft rules, while the railroads submitted detailed comments opposing the rulemaking and the draft rules.

6 At the Commission's May 12, 2004, open meeting, the Commission considered whether to file a Notice of Proposed Rulemaking (CR-102) with the Code Reviser. Based on stakeholder comments at the open meeting and written materials prepared by BNSF and UP comparing the draft rule language with the language of the railroads' internal operating rules, the Commission sought additional information before proceeding to the proposed rule phase of the rulemaking process. By a notice dated May 21, 2004, the Commission sought responses by June 11, 2004, to a number of questions. The questions sought clarification of the railroads' respective operating rules and terms used in the railroads' rules. On June 11 and July 14, 2004, the Commission received

comments from Dr. Ricci on behalf of the WSLB-BLET. On June 14, 2004, the Commission received comments from UP and BNSF.

7 On July 21, 2004, the Commission filed a Notice of Proposed Rulemaking (CR-102) in this docket with the Code Reviser (WSR # 04-15-140). On July 23, 2004, the Commission issued a notice to stakeholders informing them of an opportunity to submit written comments by August 11, 2004, as well as to attend an adoption hearing scheduled for September 29, 2004, and to make oral comments concerning adoption of a proposed rule.

8 On August 11, 2004, the Commission received joint comments from BNSF and UP in opposition to the proposed rule. The Commission also received comments from the WSLB-BLET and the King County Labor Council in support of the proposed rule. The railroads' August 11, 2004, comments addressed matters such as preemption by federal law and general objections to the proposed rule, which the railroad had already raised in prior comment. The railroads also raised new questions about whether the statutes listed on the CR-102 form, RCW 80.01.040 and RCW 81.04.160, authorize adoption of the proposed rule.

9 In order to accommodate a scheduling conflict, the Commission continued the date of the intended adoption hearing from September 29, 2004, to October 13, 2004, by filing a continuance of WSR # 04-15-140, published at WSR # 04-17-057. At the Commission's October 13, 2004, open meeting, the Commission notified interested persons that the adoption hearing would be continued until December 10, 2004, to allow for additional comments from stakeholders.

10 The Commission issued a notice to stakeholders on October 15, 2004, in response to the railroads' comments, continuing the adoption hearing until December 10, 2004, and seeking written comments concerning Commission's statutory authority to adopt the proposed rule. The Commission sought comments by November 19, 2004. The notice to stakeholders posed a number of specific

questions about the Commission's statutory authority concerning railroads. The Commission also filed a continuance of WSR # 04-17-057 with the Code Reviser, published at WSR # 04-21-037.[1]

11 On November 19, 2004, BNSF and UP responded jointly with a memorandum from their attorneys. The WSLB-BLET responded with a fifteen-page letter from Dr. Mark Ricci.

12 The Commission has since continued the date of the intended adoption to January 26, 2005, to allow additional time to review stakeholder responses concerning the question of statutory authority. On December 1, 2004, the Commission filed with the Code Reviser a continuance of WSR # 04-23-053, published as WSR # 04-24-087, and issued a notice to stakeholders informing them of the continuance of the adoption hearing.

MEMORANDUM

13 **BNSF and UP's Comments Regarding Statutory Authority.** UP and BNSF assert that the Commission is a creature of statute, exercising limited jurisdiction, and that nothing is presumed in favor of its jurisdiction. The railroads state that the legislature has made various changes in the Commission's statutory authority to regulate railroad companies over the years, with some as recent as 2004. Many of the statutory changes have been in recognition of the expansion of federal authority regarding railroad regulation. The railroads assert that although the legislature has addressed some very specific topics related to railroad transportation, it has not authorized the Commission to regulate railroad operating rules, point protection, or remote control operations.

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[1] On November 12, 2004, the Commission filed a continuance of WSR # 04-21-037 with the Code Reviser, published as WSR # 04-23-053, reflecting a change in time of the hearing scheduled for December 10, 2004. The Commission issued a notice to stakeholders on November 16, 2004, advising them of the change in time.

14 The railroads state that RCW 80.01.040 contains only general delegation language that relies on other statutes for implementation and by itself confers no authority on the Commission. Although RCW 81.04.160 lists specific subject matter that is subject to Commission regulation (such as placing bulletins about the arrival and departure of trains at stations), neither it, nor the rest of Title 81 addresses regulation of railroad operating rules, point protection, or remote control operations. The railroads assert that this lack of specificity is important because statutes allowing penalties are strictly construed.

15 RCW 81.44.065 confers on the Commission the power to exercise the powers and duties regarding railroads that prior to 1955 were required to be performed by the director of labor and industries. The railroads state that the Department of Labor and Industries was never delegated any power to adopt or enforce regulations pertaining to railroad operating rules. They also cite a 1973 Attorney General Opinion, 1973 AGO No. 102, stating that, as a result of the adoption of the Washington Industrial Safety and Health Act of 1973 (WISHA), those powers the Commission had in regard to railroad employee safety are to be exercised in accordance with WISHA as the governing statute and with the Department of Labor and Industries as the "sole and paramount administrative agency" responsible for WISHA's administration.

16 RCW 81.53.030 states that the commission may provide in an order establishing a grade crossing, or at a subsequent time, that the railroad company shall maintain flagmen. The railroads state this authority is limited to hearings in which a party has petitioned for a new crossing, or to a modification of an order granting a new crossing.

17 RCW 81.104.120(3) states that the commission "shall maintain safety responsibility for passenger rail service operating on freight lines." The railroads state that chapter 81.104 RCW deals with public high capacity transportation

systems, and that this section deals only with the division of existing safety responsibility between the Commission and local safety agencies depending on whether the tracks carry freight as well as passengers.

18 RCW 81.28.240 authorizes the Commission to make orders or rules concerning, among other things, safe practices to be observed by common carriers "in the transportation of persons and property by such common carrier." The railroads state that RCW 81.28.240 is an intrastate ratemaking statute now totally preempted by federal law and that, even before it was preempted, it did not authorize regulation of interstate service, or regulation for the safety of the general public as distinguished from the people and goods being transported.

19 The railroads also state that (1) the proposed rule is preempted by federal law, (2) that it would be unenforceable due to vagueness, (3) that the Commission failed to follow the Administrative Procedure Act, (4) that the record does not support adoption of the rule, and (5) that the proposed rule would be "bad public policy," introducing confusion and uncertainty into railroad operations.

20 **WSLB-BLET Comments Regarding Statutory Authority.** The WSLB-BLET argues that the Commission has general authority to adopt rules for the protection of passenger, property, employee, and public safety. In response to the railroads' contention that Commission lacks authority to regulate "railroad operating rules, point protection, remote control operations, or anything even close," the union states in its November 19 comments that "inasmuch as the technology of remote control operations could not have been envisioned in the writing of these codes in the 1980's, 1960's, 1940's even to the early 1900's, it is not significant that those railroad terms were not used in the construction of the WUTC's authority."

21 The union states that RCW 80.01.040 and RCW 81.04.160 mandate that the Commission regulate the "services" of railway companies and notes that RCW 81.04.010 states that "the term service is used in this title in its broadest and most inclusive sense." The union suggests that it is a "service" to provide protection at railroad crossings; that it is a service to employees and passengers to provide rules that avoid collisions between freight and passenger trains; and that it is a service to shippers to provide rules that ensure shipments are made without damage to lading from collision.

22 The union notes a number of statutory provisions establishing Commission jurisdiction over rail transportation matters. The union asserts that RCW 81.28.240 authorizes the Commission to determine, among other things, safe practices to be used in the transportation of persons and property, and that RCW 81.44.010 authorizes the Commission, after hearing, to direct "repairs, improvements, changes or additions" to "tracks, switches, terminals, terminal facilities, stations, motive power or any other property, apparatus, equipment, facilities, or device for use by any common carrier in, or in connection with the transportation of persons and property …" The union also notes authority under the following statutes:

- RCW 81.44.065, regarding the authority that was, prior to 1955, vested in the director of labor and industries;
- RCW 81.48.015 which requires local governments to give notice to the Commission when enacting a whistle ban ordinance;
- Chapter 81.53 RCW which provides authority to hear petitions with respect to conditions at grade crossings;
- RCW 81.53.271, which contains a legislative policy statement in connection with the recent expansion of the uses of grade crossing protective fund monies; and finally,
- RCW 81.104.120(3), concerning the high capacity transportation system, which contains a statement that the Commission "shall maintain safety responsibility for passenger rail service operating on freight rail lines."

23 In reference to the Commission's authority under RCW 81.44.065 to "exercise all powers and duties in relation to the inspection of tracks, bridges, structures, equipment, apparatus, and appliances of railroads" that prior to 1955 were the responsibility of the director of labor and industries, the union argues that one meaning of the word "apparatus" is "the means by which a system functions." The union urges that the railroads' general code of operating rules, or GCOR, is by that definition, the "apparatus" of railroad operations and that the Commission therefore has authority over railroad operating rules.

24 In reference to the language in RCW 81.04.160 authorizing the Commission to adopt such "rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title" the union suggests that point protection is necessary for the comfort and convenience of employees, passengers, and the general public.

25 In summary, the union argues "Legal technicalities and nuance aside, the citizens of Washington State as far back as 1911 have relied on the commission and its precursors to address passenger, property, employee and public safety with respect to railroad operations in Washington State. … What the Revised Code of Washington does not provide for is a nuanced, hair splitting option to address passenger, property, employee and public safety from railroad operations. … Succinctly, the WUTC is being asked by hundreds of thousands of Washington citizens to impose a regulation on railroads that will provide for employee, property, passenger, and public safety."

26 **Discussion and Decision.** This proposed rule would require, consistent with the railroads' own operating rules, that railroads protect the leading end of train movements. The rule would protect employees that might be present on the tracks ahead of the movement, vehicles using road crossings, shipper property, the trains being moved, and trains on connected tracks.

27 An agency possesses only those powers conferred by statute.[2] Thus, the Commission may only adopt rules on topics over which it has statutory authority. We must identify, therefore, specific language in the Commission's governing statutes conferring authority to make rules on the subject of point protection. After identifying such language, it is necessary to consider whether that authority has been superseded by any of the numerous federal laws pertaining to railroads that have been enacted in the ninety-plus years since many of the Commission's railroad statutes were enacted.

28 The broadest statements of Commission regulatory authority over railroads are those enacted in the 1911 Public Service Laws. Although the legislature enacted additional prescriptive legislation concerning railroads over the following decades, those statutes usually involve specifically delineated enforcement or adjudicative roles for the Commission on discrete topics.

29 In addition, the trend of recent decades has been for Congress to preempt much of state economic, labor, and safety regulation of railroads. For example, Congress has enacted the Railway Revitalization and Regulatory Reform Act, the Staggers Rail Act of 1980, the Car Service Act, the Locomotive Boiler Inspection Act, the Federal Railroad Safety Appliance Act, the Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, the Hours of Service Act, and the Railway Labor Act, to name but a few. Some of these laws give additional powers to federal regulatory authorities in regulating railroads and some specifically deregulated railroad operations. Others are intended to address specific labor and safety issues. This is not to say that there are no gaps in the federal preemption overlay, where the Commission's authority with respect to railroads remains effective. Some subject areas, such as clearances and

[2] *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 536-37 (1998); *See also Cole v. WUTC*, 79 Wn.2d 302, 306 (1971) ("An administrative agency must be strictly limited in its operations to those powers granted by the legislature.")

at-grade highway crossings, have remained unquestioned areas of state jurisdiction.

30 As the railroads have noted in their comments, the Federal Railroad Administration (FRA) continues to review and consider issues involving point protection in its audit of remote control locomotive operations. While the FRA's efforts may not be as swift as the union would prefer, the FRA has recognized and is working to address the issue. The FRA's efforts concerning point protection have not been adopted in rule and do not constitute preemption of state efforts to regulate the issue, although state rules concerning point protection may implicate other areas of federal regulation. As no other state has asserted authority to adopt rules concerning point protection, we must examine carefully whether the Commission has state authority to adopt the proposed rule and whether it falls within a gap in the federal regulatory scheme.

31 Although there is some language from the 1911 laws that, at least superficially, appears to provide a basis for adopting the proposed rule, we conclude, based on our analysis of the scope of our statutes and of the preemptive effect of federal law, that we lack clear authority to adopt a rule of the scope and effect of the proposed rule. Further, what narrow authority we may have is so limited that a rule within that narrow scope is inadvisable. We provide our analysis of each potentially authorizing statute, starting with the broadest statements of Commission authority regarding railroads and then moving to the more specific.

32 The very broadest statement of the Commission's regulatory authority over railroads is set forth in RCW 80.01.040(2), which states that the Commission shall "[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 within this state for compensation; including … railway companies." As our supreme court in *Cole v. WUTC* observed, "although RCW 80.01.040(3) [the counterpart of subsection (2)

applicable to utility companies] demands regulation in the public interest, that mandate is qualified by the following clause 'as provided by the public service laws …'."[3] In *WITA v. TRACER*, the court held that the Commission lacked jurisdiction to establish a community calling fund because no statute in Title 80 RCW authorized the Commission to do so, despite the Commission's authority to regulate telecommunications companies on a number of subjects and despite the general language in RCW 80.01.040(3).[4] Thus, the Commission's authority to adopt rules or issue orders on a particular subject cannot rest on RCW 80.01.040(2) or (3) alone—the Commission must have specific authority elsewhere in the public service laws to act.

33 We therefore turn to more specific provisions within Title 81 RCW. As mentioned above, the legislature's next broad statement of the Commission's authority over railroads came from the 1911 Public Service Law. Although the 1911 law gave the Commission considerable discretion within its scope, the law contains certain restrictions of scope that must be kept in mind before turning to language of the specific statutes.

34 The first general limitation on the scope of the 1911 law is that it gave the Commission regulatory authority only over those railroads that offered their services to the public for hire, *i.e.*, "common carriers."[5] Thus, the law did not extend regulation to private carriers such as logging and industrial railroads.[6]

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[3] 79 Wn.2d at 306.
[4] 75 Wn. App. 356, 368-69 (1994).
[5] The Commission's authority extended to "public service companies"—at term that is defined to include various utilities and "common carriers." "Common carrier," in turn, is defined as those entities providing transportation "for public use . . . for hire." RCW 81.04.010.
[6] The legislature subsequently gave the Commission authority to inspect and prescribe conditions at industrial grade crossings. *See* chs. 81.53 and 81.54 RCW.

35 Second, the 1911 law did not apply to interstate services.[7] Under the Interstate Commerce Act of 1887 and the Mann-Elkins Act of 1910, the Interstate Commerce Commission held exclusive authority over interstate railroad services.[8]

36 Third, the statutory scheme of the 1911 law does not provide the Commission with plenary authority over all aspects of the railroad industry: The 1911 law defined certain discrete subject areas to be addressed either by the adoption of rules and regulations or by orders directed to particular companies, after a hearing.[9] Generally, the 1911 law was concerned with protecting passengers and shippers against the problems ascribed to monopoly power, *e.g.*, unjust or discriminatory rates,[10] and poor or insufficient service,[11] but it also provided the Commission with authority to order repairs or reconstruction of railroad facilities for the safety of the public and the railroads' employees,[12] and authority

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[7] *See, however,* RCW 81.28.250 (authorizing the Commission to investigate "interstate rates, fares, charges, classifications, or rules or practices in relation thereto" and to make petition to the interstate commerce commission for relief).

[8] *Id.*; *see also Gibbons v. Ogden*, 22 U.S. 1 (1824)(established that the Constitution defines federal power to regulate Commerce between states and no part of such power can be exercised by a state); http://hbswk.hbs.edu/item.jhtml?id=2951&t=bizhistory.

[9] By contrast, RCW 81.80.130, a 1935 statute with several subsequent amendments, authorizes the Commission to fix rates for motor freight common carriers and to "regulate the accounts, service, and safety of operations thereof; require the filing of reports and other data thereby; and supervise and regulate all 'common carriers' in all other matters affecting their relationship with competing carriers of every kind and the shipping and general public." There is no similar broad statement in the statutes authorizing the commission to regulate the "safety and operations" of railroads for the benefit of the general public.

[10] *See e.g.,* RCW 81.28.180 (rate discrimination prohibited), RCW 81.28.190 (unreasonable preferences prohibited), RCW 81.28.200 (prohibiting charging more for a short than a long haul), RCW 81.28.210 (prohibiting rebating).

[11] *See, e.g.,* RCW 81.28.240 (authorizing commission to order improved facilities and service), RCW 81.44.010 (authorizing commission to order additional tracks, switches, terminals, terminal facilities, stations, motive power, etc. to promote the security and convenience of the public or employees).

[12] RCW 81.44.020.

to promulgate standards for certain identified safety appliances such as brakes and handrails.[13]

37 To the extent that the 1911 statutes purport to regulate interstate railroad transportation services, they are preempted by the Interstate Commerce Commission Termination Act (ICCTA) of 1995.[14] Even prior to the ICCTA, economic regulation by states of *intrastate* rail transportation had been preempted by the Staggers Act Rail of 1980, although the states were allowed to continue regulating intrastate rail transportation in instances of "market dominance" consistent with standards established by the Interstate Commerce Commission.[15]

38 We cite one of the statutes in the 1911 Public Service Law, RCW 81.04.160, in our Notice of Proposed Rulemaking (CR-102) as a basis for this rulemaking. The statute provides, in relevant part:

> The commission is hereby authorized and empowered to adopt, promulgate and issue rules and regulations covering the bulletining of trains, showing the time of arrival and departure of all trains; the conditions to be contained in and become a part of contracts for transportation of persons and property, and any and all services concerning the same, or connected therewith; the time that station rooms and offices shall be kept open; rules governing demurrage and reciprocal demurrage, and to provide reasonable penalties to expedite the prompt movement of freight and release of cars, the limits of express delivered in cities and towns, and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title.

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[13] RCW 81.44.040, RCW 81.44.050.
[14] 49 U.S.C. § 20106.
[15] *See* Paul Stephen Dempsey, *The Deregulation of Intrastate Transportation: The Texas Debate*, 39 Baylor L. Rev. 1, 3 (1987).

39 The railroads persuasively argue that this statute does not authorize the Commission to adopt the proposed rule. All of the examples set out in the statute as appropriate subjects for rulemaking relate to services railroads provide in the interest of the "comfort and convenience" of passengers and shippers, *e.g.*, the bulletining of trains, conditions contained in contracts for transportation, and the time station offices will be kept open. Although the examples are followed by the catchall phrase "and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title," this language does not provide authority for a point protection rule to protect the comfort and convenience of passengers and shippers, or the general public. Under the canons of statutory construction, courts construe general words that follow the enumeration of particular classes of things in a statute as applying only to things of the same general class as those enumerated. For example, in a statute granting the Department of Conservation the authority to sell "gravel, sand, earth or other material" from state-owned land, the term "other material" cannot include commercial timber harvested on state parkland because timber is not in the same general category as gravel, sand, and earth. [16] Point protection of trains is not in the same category of railroad operations and services as providing train bulletins, conditions in transportation contracts or schedules for station offices.

40 In addition, the statute does not support an inference that the legislature also meant to authorize rules pertaining to the general safety of employees and non-customers, as the statute is limited to addressing the comfort and convenience of users of transportation services. Thus, RCW 81.04.160 does not provide authority for the Commission to adopt the proposed rule.

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[16] *See Muckelshoot Indian Tribe v. Department of Ecology*, 112 Wn. App. 712, 725-26 (2002*); Malo v. Alaska Trawl Fisheries, Inc.,* 92 Wn. App. 927, 930 (1998). The drafters of the 1911 Public Service Law would have been aware of this rule. *See In re Hoss' Estate*, 59 Wash. 360 (1910) (holding that where general words in a statute follow specific words, designating special things, the general words are, as a rule, limited to cases of the same general nature as those which are specified).

41 On its face, another possible alternative source of authority is RCW 81.28.240. That statute 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 or property by such common carrier, and fix the same by its order or rule.

42 This language, also adopted in 1911, was originally part of a statute that gave the commission authority to fix the rates and services of common carrier railroads.[17] As a result of a general recodification of statutes in 1961, the portion quoted above was split off from the portion that addressed rates. The rates portion now appears in RCW 81.28.230, which allows the Commission to order rates "after a hearing had upon its own motion or upon complaint." Thus, the words "after such hearing" in RCW 81.28.240 refer back to the rate hearing described in language now codified at RCW 81.28.230.

43 In a further twist, the legislature expressly exempted railroad companies from the application of RCW 81.28.230 in 1984, when it adopted a new chapter to allow for regulation of intrastate rail transportation, in accordance with the rules of the ICC, as required by the Stagger's Rail Act of 1980.[18] This new chapter was repealed in 1991.[19]

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[17] 1911 Laws ch. 117, Sec. 53.
[18] "This section does not apply to railroad companies, which shall be regulated in this regard by *chapter 81.34 RCW and rules adopted thereunder."
[19] "***Reviser's note:** Chapter 81.34 RCW was repealed by 1991 c 49 § 1." Chapter 81.34 RCW was enacted in 1984 to enable to the Commission to continue to regulate intrastate railroad services in a manner consistent with the federal Interstate Commerce Act. Much of Title 81 RCW was

44 The railroads argue that the common carrier rate and service statutes (RCW 81.28.230 and 240) are most faithfully read together, *in pari materia*.[20] Following this rule of statutory construction, the railroads assert that the legislature intended to exempt railroad companies from the application of both statutes. The principle of reading statutes *in pari materia* is intended to allow statutes that relate to one another to be construed as a unified, harmonious scheme.[21] Another rule of statutory construction, however, instructs that exceptions in statutes are, as a general rule, to be strictly construed and allowed to extend only so far as the language warrants.[22] The legislature exempted railroad companies only from the application of RCW 81.28.230, which concerns rates, in order to address the issue of federal preemption of state economic regulation of railroad companies. We find that RCW 81.80.240 remains applicable to railroad companies as the legislature would have explicitly exempted railroad companies from the application of RCW 81.28.240 had the legislature intended to so.[23]

45 Aside from this dispute over statutory construction, there is a second problem with relying on this statute to establish operating practices with broad protection for employees and the general public, as well as shipper property. This statute, RCW 81.28.240, authorizes the Commission to prescribe "safe . . . practices," but only contemplates safety in respect to "the transportation of persons or property by such common carrier." A reasonable interpretation of the statute is that the

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amended at that time to remove or exempt railroads from the application of general common carrier economic regulatory statutes, including RCW 81.28.230. 1984 Laws ch. 143. The statutory language enacted as part of the same section in 1911 Laws ch. 117 § 53 had been recodified into what is now sections 81.28.230 and 240 in 1961 as part of the general recodification of statutes that occurred that year.

[20] *See, e.g., Sane Transit v. Sound Transit*, 151 Wn.2d 60, 94 (2004) ("Fundamental to statutory construction is that we construe statutes which relate to the same subject matter in pari materia, or in other words, as if they were one statute.")

[21] *See State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974).

[22] *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977).

[23] *See State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

Commission may consider whether the common carrier's practices are safe with respect to the service that it provides to its own shippers and passengers—not whether the carrier's operations pose a danger to employees or the general public.[24]

46 While the proposed rule would have the effect, in some instances, of protecting shipper property, we think an honest assessment of the proposed rule would have to grant that shipper property is a secondary focus of the rule. The primary focus is people—employees, passengers, and the road traveling public. Because we do not have authority under this statute to protect these people, we think it inappropriate to try to hang our jurisdictional hat on the hook of a concern for shipper property—especially given our lack of authority over non-common carrier railroad operations and possible federal preemption of regulation of interstate services.[25]

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[24] RCW 81.28.240 *(emphasis added)*. This distinction is borne out by a number of considerations and authorities including: the definition of the terms "transportation of persons" and "transportation of property" in RCW 81.04.010 (both are focused on the service provided to the customer); the fact that the statute is prescribing a program of "common carrier" regulation of "for hire" transportation services and not general police power regulation; and, most clearly, by an Attorney General Opinion published not long after the statute was adopted. *See* AGO 1915-1916 at 294, (May 3, 1916). The opinion explains that the public service law does not extend to regulation that "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" as opposed to "regulations that relate to the transportation of persons and property." *Id.* at 296. Although Attorney General opinions are not controlling, the courts give them considerable weight: an AGO constitutes notice to the legislature of the department's interpretation of the law, and greater weight attaches to that interpretation when the legislature acquiesces in it. *Holbrook, Inc. v. Clark County*, 112 Wn. App. 354, 361 (2002).

[25] *See* paragraphs 37, 47 and 49.

47 As with all of the 1911 laws, this statute was always applicable only to *for-hire*[26] *intrastate* transportation services.[27] Because point protection is as much a problem of interstate operations and private carriers (logging and industrial railroads) as it is of intrastate common carriers, there is a significant mismatch between the narrower scope of the statute and the broader scope of the problem to be addressed by the point protection rule. While a rule covering only intrastate operations might be defensible under this analysis, it would have a drastically limited effect. Combined with the other arguments casting doubt on the validity of the proposed rule, we think this statute is too slim a reed to support adoption of such a rule.

48 Fourth, the statute requires the Commission to act through an adjudicative hearing in which it makes specific factual findings that a particular carrier's existing rules or practices are unsafe, rather than addressing rules and practices that apply to all railroad companies, *i.e.*, a rulemaking. This rulemaking proposal has been based on the railroads' own operating rules, including the General Code of Operating Rules. We have not found these rules to be unsafe. In fact, we have relied on them as an appropriate basis for the proposed state rule. While we have heard from interested parties in this rulemaking during the open meeting process and through written comment, and have gathered certain information concerning the railroad's operating rules and general safety of railroad point protection practices, we have not yet conducted the kind of company-by-company adjudication that would allow us to make the required finding, in particular as to actual operating practices. If we were to proceed on the narrow authority provided under this statute, we would need to hold a fact-finding hearing to address the factual questions presented.

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[26] The definition of common carrier at RCW 81.04.010 is limited to those who offer services "for hire." This definition excludes logging and industrial railroads. The Commission's authority over logging and industrial railroads is apparently limited to hearing petitions concerning conditions at grade crossings under chapters 81.53 and 81.54 RCW.
[27] 1911 Laws ch. 117 § 53.

49 Finally, as discussed above, the regulation of rail transportation of persons and property, as a service, is preempted by federal law. Under the ICCTA, Congress granted exclusive jurisdiction to the Surface Transportation Board over "transportation by rail carriers, and the remedies provided in this part with respect to . . . rules (including car service, interchange, and other operating rules), *practices,* routes, services, and *switching* [emphasis added]."[28] Our state Supreme Court and Ninth Circuit Court of Appeals have interpreted ICCTA preemption very broadly.[29] While it is often said that the ICCTA focuses on "economic" regulation[30] and is not a "safety" regulatory scheme like the Federal Railroad Safety Act (FRSA),[31] RCW 81.28.040 was itself enacted as part of a statute that authorized the Commission to fix the rates and services of individual companies in a hearing process as two sides of the coin of economic regulation.

50 In short, we have too many reservations about RCW 81.28.240 as an appropriate source of authority for the proposed rule.

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[28] 49 U.S.C. § 10501.

[29] *City of Seattle v. Burlington Northern Railroad Company*, 145 Wash.2d 661 (2002)(city ordinance prohibiting switching movements across arterial street during peak traffic hours was preempted by the ICCTA because it regulated switching). *City of Auburn v. U.S.,* 154 F.3d 1025, 1029 (9th Cir. 1998) (Upholding an STB decision finding preemption of local environmental permitting standards for the reopening of an existing railroad line through the city of Auburn, Washington). The Ninth Circuit specifically concluded that "[a]ll the [ICCTA preemption] cases … find a broad reading of Congress' preemption intent, not a narrow one," and "there is nothing in the case law that supports Auburn's argument that, through the ICCTA, Congress only intended preemption of economic regulation of railroads."

[30] The original House Report demonstrates that the ICCTA focused on economic regulation and was "[i]ntended to standardize all economic regulation (and deregulation) of rail transportation under Federal law, without the optional delegation of administrative authority to State agencies to enforce the Federal standards, as provided in the relevant provisions of the Staggers Rail Act." H.R.Rep. No. 104-311, 1995 U.S.C.C.A.N. 793, 807.

[31] Where a state "safety" regulation is at issue, there is authority that the more permissive state preemption clause of the FRSA applies and the ICCTA preemption clause does not. *Tyrrell v. Norfolk Southern Railway Co.*, 248 F.3d 517, 523 (6th Cir. 2001).

51 A third statute from the 1911 law is also worthy of some attention. RCW 81.44.020, states:

> If upon investigation the commission shall find that the equipment or appliances in connection therewith, or the apparatus, tracks, bridges or other structures of any common carrier are defective, and that the operation thereof is dangerous to the employees of such common carrier or to the public, it shall immediately give notice to the superintendent or other officer of such common carrier of the repairs or reconstruction necessary to place the same in a safe condition …

52 Although this statute clearly directs the Commission to consider danger to railroad employees and the general public[32] that may result from railroad operations, it limits the Commission to ordering "repairs or reconstruction" of defects in the equipment or facilities and does not extend to prescribing particular operating practices. It therefore does not provide authority for the proposed rule, which would prescribe practices, not equipment or facilities.

53 A few other statutes also come close, but ultimately do not provide the Commission authority to adopt the proposed rule. The Commission has authority, by order, to require railroad companies to maintain some means of securing "the safety of the public and its employees" at grade crossings, including, where appropriate, the maintenance of "flagmen" at such crossings. [33] However, this authority extends only to crossings established after 1913[34] that are

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[32] Public safety is also the paramount consideration when a petition is made to the Commission to specify the method or manner of grade crossing, or to decide the type of signals or warning devices to be installed at a grade crossing under chapter 81.53 RCW.

[33] RCW 81.53.030. "The commission may provide in the order authorizing a grade crossing, or at any subsequent time, that the railroad company shall install and maintain proper signals, warnings, flagmen, interlocking devices, or other devices or means to secure the safety of the public and its employees."

[34] "In respect to existing railroad grade crossings over highways the construction of which grade crossings was accomplished other than under a commission order authorizing it, the commission

outside the limits of first class cities.[35] Moreover, the authority to require the maintenance of flagmen at certain crossings is particularized to the facts at individual crossings and does not provide a basis for adopting rules to be observed in switching operations generally.

54 While it might be possible to write a rule that arguably can wriggle through some very narrow jurisdictional passageways—*e.g.*, a rule that applies only to intrastate services, based only on concern for shipper property—we think such a rule would be of very limited effect, and could well be struck down as interfering with much broader federal authority. After closely examining the Commission's statutes governing railroad companies, as well as the federal regulatory scheme, we conclude that the Commission does not have clear authority to adopt rules governing the point protection practices of railroad companies in Washington State.

55 In addition, this is not a situation where there are no rules or practices governing point protection. While not enforceable by the Commission, railroad companies have adopted operating practices and rules for point protection, and the FRA will likely address point protection as a safety issue in the future. Without clear state authority and considering the question of federal preemption, we find it more appropriate and defensible to focus our efforts in regulating those areas of railroad company safety and operations over which the Commission has clear authority, than to focus our efforts in likely litigation over a proposed rule with an effect far more narrow than the scope of the problem to be addressed. For these reasons, we direct the Secretary to withdraw the proposed rule from consideration.

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may in any event require the railroad company to install and maintain, at or near each crossing, on both sides of it, a sign known as the sawbuck crossing sign with the lettering 'Railroad Crossing' inscribed thereon with a suitable inscription indicating the number of tracks." This language is in RCW 81.53.030, which requires petitions to be filed with the Commission for authority to build any new grade crossing. The statute was enacted in 1913.

[35] RCW 81.53.240.

56 **COMMISSION ACTION:** After considering the question of statutory authority to adopt rules regarding this proposal, the Commission directs the Secretary to withdraw the rule proposed at WSR # 04-15-140, and continued in WSR # 04-17-057, WSR # 04-21-037, WSR # 04-23-053, and WSR # 04-24-087.

ORDER

THE COMMISSION ORDERS:

57 The rule proposed at WSR # 04-15-140, and continued in WSR # 04-17-057, WSR # 04-21-037, WSR # 04-23-053, and WSR # 04-24-087 shall be withdrawn.

DATED at Olympia, Washington, this ____ day of January, 2005.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

MARILYN SHOWALTER, Chairwoman

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner