BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. MEEKER SOUTHERN RAILROAD, Respondent.	DOCKET TR-110221 MEEKER'S ANSWER TO THE COMMISSION'S COMPLAINT

1 In response to the Washington Utilities and Transportation Commission's Complaint on its own motion, Respondent Meeker Southern Railroad ("Meeker Southern"), by and through its attorney David L. Halinen, answers and alleges affirmative defenses as follows:

ANSWER IN REGARD TO THE COMMISSION'S ALLEGATIONS OF THE PARTIES

2 In regard to Complaint ¶2, Meeker Southern admits that the Washington Utilities and Transportation Commission is an agency of the State of Washington with jurisdiction over public railroad-highway grade crossings within the State of Washington under RCW Chapter 81.53 but alleges that the extent of the Commission's jurisdiction may be subject to federal preemption.

3 In regard to Complaint ¶3, Meeker Southern admits that it is a company that owns and operates a railroad in the State of Washington.

ANSWER IN REGARD TO THE COMMISSION'S ALLEGATIONS OF JURISDICTION

4 In regard to Complaint ¶4, Meeker Southern (a) admits that the Commission has jurisdiction over the subject matter of this Complaint pursuant to RCW 80.01.040,

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RCW 81.01.010, RCW 81.04.110, RCW 81.04.380, and RCW 81.04.460 but alleges that the extent of the Commission's jurisdiction may be subject to federal preemption and (b) admits that the Commission has jurisdiction over Meeker Southern because it is a public service company under RCW Chapter 81.04 but alleges that the extent of the Commission's jurisdiction may be subject to federal preemption.

ANSWER IN REGARD TO THE COMMISSION'S ALLEGATIONS OF BACKGROUND

5 In regard to Complaint ¶5, Meeker Southern admits that the alleged facts set forth in Complaint ¶¶6 through 13 establish probable cause for the Commission to complain against the activities of Meeker Southern and to seek a penalty in accordance with applicable law.

6 In regard to Complaint ¶6, Meeker Southern admits all of the allegations therein.

7 In regard to Complaint ¶7, Meeker Southern admits all of the allegations therein.

8 In regard to Complaint ¶8, Meeker Southern admits all of the allegations therein.

9 In regard to Complaint ¶9, Meeker Southern admits all of the allegations therein.

10 In regard to Complaint ¶10, Meeker Southern admits all of the allegations therein.

11 In regard to Complaint ¶11, Meeker Southern admits all of the allegations therein.

12 In regard to Complaint ¶12, Meeker Southern admits all of the allegations therein.

13 In regard to Complaint ¶13, Meeker Southern admits that Staff's investigation asserts that Meeker Southern violated Order 01 in Docket TR-100036 each of 50 times that Meeker Southern had a train cross over 134th Avenue East on the spur track for the purposes of delivering or picking up freight cars from Sound Delivery Service between October 17, 2010 and December 20, 2010. However, because (a) Condition 3 of Order 01 required that "[a]ll work . . . be completed to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff *prior to the*

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*Petitioner **starting** operation of the spur line and Phase 1 Service Siding*"[1] (emphasis added) and (b) ***starting*** *operation of the spur line and Phase 1 Service Siding* only occurred once (during October 2010), Meeker Southern only admits to a single violation of Order 01. Meeker Southern denies that the other 49 crossings of 134th along the spur line were (i) "starts" of *the operation of the spur line and Phase 1 Service Siding* and (ii) violations of Order 01 in Docket TR-100036.

ANSWER IN REGARD TO THE COMMISSION'S ALLEGATIONS OF APPLICABLE LAW AND REGULATIONS

14 In regard to Complaint ¶14, Meeker Southern admits that under state law, a common carrier includes railroads and railroad companies. RCW 81.04.010(11).

15 In regard to Complaint ¶15, Meeker Southern admits that the term "public service company" includes every common carrier. RCW 81.04.010(16).

16 In regard to Complaint ¶16, Meeker Southern admits that under RCW 81.04.380, (a) every public service company that violates any Commission order is subject to a penalty of up to one thousand dollars for every such violation and (b) in the case of a continuing violation, every day's continuance thereof shall be a separate and distinct offense.

17 In regard to Complaint ¶17, Meeker Southern admits that the Commission is authorized to file a complaint on its own motion setting forth any act or omission by any public service company that violates any law or any order or rule of the Commission. RCW 81.04.110.

ANSWER IN REGARD TO THE COMMISSION'S ALLEGATIONS OF COMPLAINT

18 In regard to Complaint ¶18, Meeker Southern admits that the Commission, through its Staff, re-alleged the allegations contained in Complaint paragraphs 5 through 13.

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[1] The phrase "prior to starting operation of the spur line" in Condition 3 of Order 01 of Docket TR-100036 is not synonymous with a phrase like "prior to any crossing of 134th along the spur line," a phrase that Staff appears to be reading into Condition 3.

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19 In regard to Complaint ¶19, Meeker Southern admits that it violated Commission Order 01 in Docket TR-100036 by commencing operation of the spur track and Phase 1 Service Siding at the 134th Avenue East railroad crossing prior to all proposed work shown on the design drawings being completed to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff. Also in regard to Complaint ¶19, Meeker Southern admits that it had a train cross 134th along the spur track on 50 occasions for the purposes of delivering or picking up freight cars from Sound Delivery Service between October 17, 2010 and December 20, 2010. Meeker Southern denies all other allegations set forth in Complaint ¶19.

AFFIRMATIVE DEFENSES

20 Meeker Southern asserts in the alternative the following affirmative defenses:

a. **Affirmative Defense 1: Only a Single Violation Occurred.** Because (i) Condition 3 of Order 01 in Docket TR-100036 required that "[a]ll work . . . be completed to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff *prior to the Petitioner **starting** operation of the spur line and Phase 1 Service Siding*" (emphasis added) and (ii) ***starting** operation of the spur line and Phase 1 Service Siding* could have and did only occur once, only a single violation of Order 01 occurred, a violation that occurred when Meeker Southern started operation of the spur line and Phase 1 Service Siding during October 2010 by having its first train hauling freight to Sound Delivery Service cross 134th Avenue East along the spur line. None of the subsequent 49 crossings of 134th along the spur line were *starts* of the operation of the spur line and Phase 1 Service Siding and thus none of them were violations of Order 01 in Docket TR-100036.

b. **Affirmative Defense 2: Alternatively, a Single Violation Occurred Only on Each Day that Crossings Occurred.** Each separate crossing of 134th along the spur line on each day that crossings occurred cannot possibly be construed to be Meeker Southern ***starting** operation of the spur line and Phase 1 Service Siding*. While Meeker contends that there was only one start of operation of the spur line and Phase 1 Service Siding (see Affirmative Defense 1, above) assuming, *arguendo*,

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that the first crossing of 134th along the spur line on each of the 18 days that such occurred (for the purposes of delivering or picking up freight cars from Sound Delivery Service between October 17, 2010 and December 20, 2010) amounted to Meeker Southern ***starting*** *operation of the spur line and Phase 1 Service Siding*, only 18 violations of Order 01 occurred, not 50 violations as Staff has alleged.

c. **Affirmative Defense 3: Mitigating Circumstances Militate Against Imposition of a Penalty.** Alone or in connection with Affirmative Defenses 1, 2, 4, and 5, several mitigating circumstances exist relating to the violation. Some of them are set forth in the table that is part of Exhibit B attached to my February 15, 2011 letter to Betty Young, Compliance Investigator, Transportation Safety Enforcement, Washington Utilities and Transportation Commission, a letter with its exhibits hereby incorporated by reference. [A copy of that letter with its exhibits, including above-referenced Exhibit B, is attached to this Answer as Attachment 1 and is also attached (as Appendix Q) to the report of the Staff Investigation of Meeker Southern Railroad dated March 2011 prepared by Ms. Young.] Further elaboration of those mitigating circumstances, as well as identification and discussion of additional mitigating circumstances, are set forth on pages 2 through 10 of my February 28, 2011 letter addressed jointly to Fronda Woods, Assistant Attorney General, Washington Utilities and Transportation Commission, and to Ms. Young, a letter with its attached exhibits that is hereby incorporated by reference. [A copy of that letter along with its six attached exhibits labeled Exhibits 1 through 6 is attached to this Answer as Attachment 2 and is also attached (as Appendix R) to the report of the Staff Investigation of Meeker Southern Railroad dated March 2011 prepared by Ms. Young.]

d. **Affirmative Defense 4: Meeker Is Already Bearing a $22,600 Expense That Is a Functional Equivalent to an Extensive Civil Penalty and, in View Thereof, the Commission Should Not Impose a Penalty:** Meeker Southern is already bearing an expense that is a functional equivalent of a civil penalty amounting to $22,600—see the

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main text of my Attachment 2 letter to Ms. Woods and Ms. Young on pages 31 through 33 thereof[2] and see footnotes 11 and 12 on pages 32 and 33 thereof. The Commission should not impose a civil penalty on

[2] The main text of my Attachment 2 letter to Ms. Woods and Ms. Young on pages 31 through 33 states:

Effect of a Penalty

In considering whether or not Commission Staff should recommend that the Commission impose a penalty, several factors should be kept in mind in view of the Commission's PSE Case Opinion relating to the effect of a penalty.

First of all, note that in working with Public Works officials during mid-December 2010 to determine the extent of 134th Avenue East roadway improvements that ought to be completed, instead of merely making a slight adjustment to the roadway slope south of the spur track and extending south the paving work on an extension of that adjusted slope roughly another 20 feet beyond the south end of the repaved roadway section that Meeker's contractor had built during October 2007 (i.e., slope adjustment and extended paving work that would have fully met the roadway design specified on the originally approved civil drawings), Meeker promptly agreed with Public Works and with Commission Staff to regrade and repave 134th to the north of the main line track about 60 feet because doing so will provide a better roadway at the crossing.[11] That roadway work to the north of the main line track, the design of which is now reflected on the revised civil drawings that Public Works approved on January 25, 2011 with the agreement of Commission Staff, will correct a longstanding roadway edge sag problem along the west edge of the roadway a short distance to the north of the existing main line track. Meeker had no legal duty to correct that problem and could not constitutionally have been compelled to correct it in connection with Meeker's addition of the spur track because the spur track lies to the south of the main line track rather than to the north of it [and therefore the spur track did not exacerbate the problem to the north, leaving no "nexus" between the roadway's existing problem to the north and installation of the spur track to the south—see *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)]. By agreeing in mid-December to do that roadway work to the north of the main line track rather than merely make a slight adjustment to the roadway slope south of the spur track and extend south the paving work on an extension of that adjusted slope roughly another 20 feet, **Meeker (a) has already incurred a cost of approximately $10,000 in topographic surveying and civil engineering design fees from Sitts & Hill Engineers and (b) estimates an additional construction cost of approximately $12,600 beyond the approximately $3,500 that it would have cost to extend the paving to the south approximately another 20 feet to comply with the originally approved civil drawings.[13] That combined $22,600 surveying, engineering, and construction expense incurred by Meeker in good faith for the safety and benefit of the general motoring public should be viewed as the functional equivalent of a civil penalty. The Commission should not impose a civil penalty on top of that expense.**

(Emphasis added.)

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top of that expense. Affirmative Defense 4 should be considered alone and in connection with Affirmative Defenses 1, 2, 3, and 5.

e. **Affirmative Defense 5: In View of (a) the Approach to Civil Penalties the Commission Took in *WUTC v. Puget Sound Energy, Inc.*, Docket No. UG-001116 (the "PSE Case") and (b) a Comparison and Contrasting of the Circumstances of that Case with the Circumstances of the Subject Case (including the comparison of the $106,000 in civil penalties and funding of an anti-drug and alcohol misuse awareness training program in the PSE Case in relation to the $22,600 Functional Equivalent of a civil penalty in the subject case), the Commission Should Not Impose a Penalty Against Meeker Southern.** Pages 11 through the middle of page 14 of my Attachment 2 letter to Ms. Woods and Ms. Young describe in detail the approach to civil penalties the Commission took in *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.* (Docket No. UG-001116; 2002 Wash. UTC LEXIS 235) (July 25, 2002) (the "PSE Case").[3] Pages 14 through 35 of my Attachment 2 letter set forth a detailed application of the approach to penalties used in the PSE Case to Meeker Southern's violation, including a comparison and contrasting of the circumstances of PSE's violation with the circumstances of Meeker Southern's violation (such as a comparison of the Commission-affirmed settlement agreement in the PSE case that provided for a combination of only $106,000 in civil penalties and funding of an anti-drug and alcohol misuse awareness training program in that case in relation to the $22,600 functional equivalent of a civil penalty that Meeker Southern is already bearing in the subject case, despite the fact that the violation in the PSE case was clearly more severe and a much greater risk to public safety and despite the fact that PSE has 5,000 times the annual earnings that Meeker

[3] The PSE Case was cited and used for comparative analysis in my Attachment 2 letter because it describes in detail factors that the Commission considers in regard to penalty cases and because Meeker Southern is aware of no reported Commission decisions relating to penalties concerning violations by a railroad. (See the first paragraph on page 11 of my Attachment 2 letter.)

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Southern has).[4] Affirmative Defense 5 should be considered alone and in connection with Affirmative Defenses 1, 2, 3, and 4.

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[4] From pages 33 to 35 of my Attachment 2 letter to Ms. Woods and Ms. Young, the main text states:

> The second factor that should be kept in mind in relation to the effect of imposition of any penalty on Meeker is that the above-noted $22,600 functional equivalent of a civil penalty that Meeker has already incurred is a tremendously greater expense for tiny short line railroad company Meeker than the $106,000 total amount of the $50,000 civil penalty and $56,000 cost to implement an anti-drug and alcohol misuse awareness-training program for Puget's employees was for utility giant Puget in the PSE case. Meeker is one of three operating divisions of Ballard Terminal Railroad Company L.L.C. ("BTRC"). (The other two are BTRC's Ballard Terminal division and Eastside Rail division.) Mr. Cole has advised me that the total income that BTRC *earned* (not received) by all three of those divisions during the entirety of 2010 was only $664,064. In contrast, Puget's January 2011 online Fact Sheet reports annual revenues of $3.32 billion—see my attached mark up of that Fact Sheet, Exhibit 6. That means that *Puget's annual revenues are almost exactly 5,000 times greater than BTRC's gross earnings.*
>
> In proportion to each company's annual earnings, the total $106,000 that Puget had to pay in the Commission-approved settlement of the PSE case would be like BTRC/Meeker only having to pay $21 in total. Imposition of any civil penalty upon Meeker when Meeker is already bearing a $22,600 functional equivalent of a civil penalty would be manifestly unjust and unfair. That is all the more evident when contrasting (a) the Commission's finding in the PSE Case Opinion that Puget's "*lack of the required [drug and alcohol] testing program [may have] allowed an impaired person to make critical judgments that will contribute to a future incident,*" which the Commission stated "*is a very serious matter and warrants substantial action,*" with (b) the following two facts:
>
> (i) As I pointed out in detail on pages 3 to 7, above, under the particular operational circumstances in Meeker's case, use of the spur track for transit of Sound Delivery's railcars during the period of the violation posed no significant safety risk to motorists or pedestrians at the 134th crossing; and
>
> (ii) As explained in detail on page 3 above in relation to Terry Lawrence's hearing testimony, overall public safety and worker safety were enhanced by the spur's premature use because that use enabled the unloading of 25 of the 27 railcar loads of the 6-foot diameter, 80- to 85-foot-long, up to 33-ton pipe segments to shift from Meeker's East Puyallup team track (where the unloaded pipe had to be loaded onto trucks and driven to the Sound Delivery site for unloading there) to Sound Delivery's new loading dock at the Sound Delivery site (where the unloading to the Sound Delivery site was made directly onto Sound Delivery's loading dock, which was much better suited for the unloading operation).
>
> The third factor that should be kept in mind (a factor that is related to the first two) is that the $22,600 functional equivalent of a civil penalty is already more than large enough to

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REQUEST FOR TELEPHONIC PREHEARING CONFERENCE

21 Meeker Southern hereby requests that a telephonic prehearing conference be scheduled concerning this case.

DATED this 21st day of April 2011.

HALINEN LAW OFFICES, P.S.

By: David L. Halinen
David L. Halinen
WSBA #15923
Attorney for Meeker Southern Railroad

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connote the significance of Meeker's violation. The addition of any direct civil penalty imposed by the Commission to that already very large functional equivalent of a penalty would make the total very excessive in view of the PSE Case Opinion. That is extremely clear in view of both (a) the great degree of cooperation and correction that Meeker has exhibited as I have demonstrated on pages 16 through 30, above (cooperation that, unlike the lack of an admission by Puget of a violation in the PSE Case involved a straightforward admission of a violation by Meeker in the subject case), and (b) the above-explained relative sizes of the Commission-approved PSE $106,000 settlement amount and the BTRC/Meeker $22,600 functional equivalent of a civil penalty in relation to the 5,000-times-greater revenue that PSE has than BTRC has.

(Italics in the original.)

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ATTACHMENT 1

TO MEEKER'S ANSWER TO THE COMMISSION'S COMPLAINT

DOCKET TR-110221

HALINEN LAW OFFICES, P.S.

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February 15, 2011

VIA EMAIL AND PRIORITY MAIL

Washington Utilities and Transportation Commission
1300 S. Evergreen Park Dr. SW
PO Box 47250
Olympia, WA 98504-7250

Attn: Betty Young, Compliance Investigator, Transportation Safety

Re: Docket No. TR-100036
My Client Meeker Southern Railroad
(USDOT Crossing No. 085536 R)
(WUTC Crossing No. 42A32.40)
Meeker's Response to David Pratt's February 2, 2011 Staff Information Request

Dear Ms. Young:

On behalf of my client Meeker Southern Railroad ("Meeker"), I am writing to herewith provide you Meeker's response to the three-section Staff Information Request set forth in the February 2, 2011 letter sent to me by David Pratt, the Commission's Assistant Director for Transportation Safety.

Meeker's Response to Section 1 and My Related Comments

Meeker understands that Section 1 of the Staff Information Request focuses on the train movements delivering freight cars to or picking up freight cars from Meeker's customer Sound Delivery Service over the 134th Avenue East crossing from October 17, 2010 through December 18, 2010 regardless of whether the delivery/pickup point was (a) at the Sound Delivery Service site south of and abutting the east end of Meeker's "Phase 1 Service Siding" that Meeker installed during October 2010 or (b) Meeker's long-existing service siding on the north side of Meeker's main line track located approximately a quarter mile east of 134th Avenue East at Meeker's "East Puyallup Yard and Shops Facility." Use of the former of those two delivery/pickup points involves crossing 134th along the spur track, while use of the latter involves crossing 134th along the main line track. Based on that understanding, Meeker has prepared a two-page *Log of 134th Ave. E Crossings for Sound Delivery Service During the Period of October 17 2010 through December 18, 2010*, which is contained as the first part of Exhibit A (immediately following the Exhibit A cover page).

Section 1 of the Staff Information Request set forth the following nine bullet points of specific information sought in regard to the above-noted train movements:

- Date
- Time
- Track (main or spur)
- Direction
- Destination
- Length of train in feet
- Type and number of train cars
- Whether the movement was a test train or a load hauled for compensation
- How the crossing was protected during train movements

My comments concerning each of these bullet points are addressed below.

"Date" and "Time" Bullet Points

Note that the first column of the Exhibit A log sets forth the date of each of the subject crossing movements.

The second column of the Exhibit A log (under the heading "Time") sets forth a *time range* during which the movement occurred. As explained in endnote "*" of the Exhibit A log, during the October 17, 2010 through December 18, 2010 time period, specific times at which the train crossings occurred were not recorded. However, the time ranges listed in the second column are accurate because they are the recorded time ranges when Meeker's train crew was working on each of the days when the subject crossing movements took place. (None of the subject crossings occurred outside of the periods when the train crew was working.) Note also that the second column of the Exhibit A log indicates that the crossings on October 17, 2010 were on a Sunday.

"Track (Main or Spur)" Bullet Point

Note that the third column of the Exhibit A log (under the heading "Track") in every instance lists the spur track as the track across which each of the subject crossing movements occurred. However, endnote "**" of the Exhibit A log qualifies that by explaining:

> All crossings listed are shown as having taken place on the spur track because the associated freight cars were all deliveries to or pick-ups from Sound Delivery Service as the customer. Most if not all of these deliveries and pick-ups were from or to the Sound Delivery site. However, a few of these crossings may have involved delivery of cars via the main line track for pick-up by Sound Delivery Service at Meeker Southern's siding east of 134th, which is accessible from the south side of 80th Street East.

Meeker has advised me that its records for the October 17, 2010 through December 18, 2010 time period do not distinguish which of the two delivery/pick-up locations for the Sound Delivery freight cars were used.

"Direction" and "Destination" Bullet Points

The fourth column of the Exhibit A log (under the heading "Direction") sets forth the direction of each of the subject crossing movements.

Note that the fifth column of the Exhibit A log (under the heading "Destination") indicates that the two October 17, 2010 crossings were for "testing of track only." No cars were delivered to Sound Delivery in regard to those two crossings. All of the other eastbound crossings are shown in the fifth column of the Exhibit A log as having Sound Delivery as the destination, although (consistent with above-quoted endnote "**" of the Exhibit A log) a few of those crossings may have involved delivery of cars via the main line track for pick-up by Sound Delivery Service at Meeker Southern's siding east of 134th, which is accessible from the south side of 80th Street East. In regard to all of the westbound crossings (other than the October 17, 2010 westbound crossing), the fifth column of the Exhibit A log shows the destination as "unknown" because data was not recorded as to the westbound destinations.

"Train Length in Feet" Bullet Point

The sixth column of the Exhibit A log (under the heading "Length") indicates what the *maximum* length of each train could have been. When the crossing involved Meeker's engine only, the 50-foot length of the engine is noted in the sixth column. In regard to crossings involving the engine plus one or more freight cars, Meeker has advised me that its records for the October 17, 2010 through December 18, 2010 time period do not indicate the particular lengths of the freight cars involved but that the longest conceivable length per freight car would have been 100 feet from coupler knuckle to coupler knuckle. (See endnote "***" of the Exhibit A log.)

"Type and Number of Train Cars" Bullet Point

The seventh and last column of the Exhibit A log (under the heading "Train Components") sets forth the engine plus the type of car (all of which were freight cars) and the number of cars that comprised each train.

The "Whether the Movement was a Test Train or a Load Hauled for Compensation" Bullet Point

Meeker addresses the issue of test trains and loads hauled for compensation at the top of the page of Exhibit A that immediately follows the two pages of the log.

The "How the Crossing Was Protected During Train Movements" Bullet Point

Meeker addresses the issue of how the crossing was protected during train movements beginning at the middle of the page of Exhibit A that immediately follows the two pages of the log.

Meeker's Response to Section 2

In accompanying Exhibit B, Meeker sets forth its reasons why it commenced operational use of the new spur track prior to satisfying the conditions in the Commission's Order 01 in Docket TR-100036.

Meeker's Response to Section 3

In accompanying Exhibit C, Meeker sets forth its rail car logs for October, November, and December of 2010 and for January 2011 in response to section 3 of Mr. Pratt's request letter.

Please let me know if you have any questions or comments. Note that I will be sending you a separate letter tomorrow with my legal argument concerning the inappropriateness of civil penalties under the subject circumstances.

Sincerely,

HALINEN LAW OFFICES, P.S.

David L. Halinen

Enclosures (as noted above)

cc: Meeker Southern Railroad
Attn: Byron Cole, Manager (via email, with copies of enclosures)

Meeker Southern Railroad
Attn: James Forgette, Operations Manager (via email, with copies of enclosures)

Kathy Hunter, Deputy Assistant Director, Transportation Safety, WUTC (via email, with copies of enclosures)

Fronda Woods, Washington Attorney General's Office (via email, with copies of enclosures)

Paul Curl, Transportation Safety, WUTC (via email, with copies of enclosures)

Exhibit A

to the February 15, 2011 response letter from Meeker Southern Railroad's attorney David L. Halinen to Washington Utilities and Transportation Commission, Attn: Betty Young, Compliance Investigator, Transportation Safety

Specific information related to each of Meeker Southern Railroad's "Sound Delivery Service" train movements over the 134th Avenue crossing during the period from October 17, 2010 through December 18, 2010

Prepared February 15, 2011

I, James Forgette, the Operations Manager for Meeker Southern Railroad, hereby certify that the data and information in the following pages of this exhibit are true and correct to my best knowledge and belief.

James Forgette 2-15-11

James Forgette **Date**

Meeker Southern Railroad
Log of 134th Ave. E Train Crossings for Sound Delivery Service
for the period of October 17, 2010 through December 18, 2010

Date	Time* Sunday	Track**	Direction	Destination	Length (ft)***	Train Components
10/17/2010	1-5 PM	spur	east	testing of track only	≤ 350 ft	engine + 3 freight cars
10/17/2010	1-5 PM	spur	west	testing of track only	≤ 350 ft	engine + 3 freight cars
10/18/2010	8-12 AM	spur	east	Sound Delivery	≤ 350 ft	engine + 3 freight cars
10/18/2010	8-12 AM	spur	west	unknown	50	engine
10/22/2010	8-1130 AM	spur	east	Sound Delivery	50	engine
10/22/2010	8-1130 AM	spur	west	unknown	≤ 350 ft	engine + 3 freight cars
10/25/2010	8-10 AM	spur	east	Sound Delivery	≤ 150 ft	engine + 1 freight car
10/25/2010	8-10 AM	spur	west	unknown	50	engine
10/27/2010	8-10 AM	spur	east	Sound Delivery	50	engine
10/27/2010	8-10 AM	spur	west	unknown	≤ 150 ft	engine + 1 freight car
11/1/2010	8-10 AM	spur	east	Sound Delivery	≤ 350 ft	engine + 3 freight cars
11/1/2010	8-10 AM	spur	west	unknown	50	engine
11/3/2010	8-10 AM	spur	east	Sound Delivery	50	engine
11/3/2010	8-10 AM	spur	west	unknown	≤ 350 ft	engine + 3 freight cars
11/5/2010	8-1130 AM	spur	east	Sound Delivery	≤ 350 ft	engine + 3 freight cars
11/5/2010	8-1130 AM	spur	west	unknown	50	engine
11/5/2010	8-1130 AM	spur	east	Sound Delivery	50	engine
11/5/2010	8-1130 AM	spur	west	unknown	≤ 350 ft	engine + 3 freight cars
11/5/2010	8-1130 AM	spur	east	Sound Delivery	≤ 350 ft	engine + 3 freight cars
11/5/2010	8-1130 AM	spur	west	unknown	50	engine
11/8/2010	8AM-1PM	spur	east	Sound Delivery	50	engine
11/8/2010	8AM-1PM	spur	west	unknown	≤ 350 ft	engine + 3 freight cars
11/8/2010	8AM-1PM	spur	east	Sound Delivery	≤ 350 ft	engine + 3 freight cars
11/8/2010	8AM-1PM	spur	west	unknown	50	engine
11/8/2010	8AM-1PM	spur	east	Sound Delivery	50	engine
11/8/2010	8AM-1PM	spur	west	unknown	≤ 350 ft	engine + 3 freight cars
11/10/2010	8-1030 AM	spur	east	Sound Delivery	≤ 150 ft	engine + 1 freight car
11/10/2010	8-1030 AM	spur	west	unknown	50	engine
11/12/2010	8-10 AM	spur	east	Sound Delivery	50	engine
11/12/2010	8-10 AM	spur	west	unknown	≤ 150 ft	engine + 1 freight car

11/12/2010	8-10 AM	spur	east	Sound Delivery	≤ 150 ft	engine + 1 freight car
11/12/2010	8-10 AM	spur	west	unknown	50	engine
11/15/2010	8-12 AM	spur	east	Sound Delivery	50	engine
11/15/2010	8-12 AM	spur	west	unknown	≤ 150 ft	engine + 1 freight car
11/22/2010	8-10 AM	spur	east	Sound Delivery	≤ 250 ft	engine + 2 freight cars
11/22/2010	8-10 AM	spur	west	unknown	50	engine
11/24/2010	11AM- 1PM	spur	east	Sound Delivery	50	engine
11/24/2010	11AM- 1PM	spur	west	unknown	≤ 250 ft	engine + 2 freight cars
12/3/2010	8-12 AM	spur	east	Sound Delivery	≤ 250 ft	engine + 2 freight cars
12/3/2010	8-12 AM	spur	west	unknown	50	engine
12/6/2010	830-1030AM	spur	east	Sound Delivery	50	engine
12/6/2010	830-1030AM	spur	west	unknown	≤ 250 ft	engine + 2 freight cars
12/8/2010	8-10 AM	spur	east	Sound Delivery	≤ 150 ft	engine + 1 freight car
12/8/2010	8-10 AM	spur	west	unknown	50	engine
12/9/2010	1130-230PM	spur	east	Sound Delivery	50	engine
12/9/2010	1130-230PM	spur	west	unknown	≤ 150 ft	engine + 1 freight car
12/17/2010	8-10 AM	spur	east	Sound Delivery	≤ 250 ft	engine + 2 freight cars
12/17/2010	8-10 AM	spur	west	unknown	50	engine
12/17/2010	8-10 AM	spur	east	Sound Delivery	50	engine
12/17/2010	8-10 AM	spur	west	unknown	≤ 250 ft	engine + 2 freight cars
12/17/2010	8-10 AM	spur	east	Sound Delivery	≤ 350 ft	engine + 3 freight cars
12/17/2010	8-10 AM	spur	west	unknown	50	engine

Time* The time range shown for each crossing event is the total time range that the train crew worked that day. (Example: 8-10 AM means the crew start working at 8 am and finished by 10 am.) The actual crossings shown took place sometime during each such period. The specific time at which each crossing event took place was not recorded during the period October 17, 2010 through December 18, 2010.

Track** All crossings listed are shown as having taken place on the spur track because the associated freight cars were all deliveries to or pick-ups from Sound Delivery Service as the customer. Most if not all of these deliveries and pick-ups were from or to the Sound Delivery site. However, a few of these crossings may have involved delivery of cars via the main line track for pick-up by Sound Delivery Service at Meeker Southern's siding east of 134th, which is accessible from the south side of 80th Street East.

Length (ft)*** Actual length of each freight car is unknown, but no single freight car was longer than 100 feet from coupling knuckle to coupling knuckle.

end of log

Response to the Commission's request for information as "whether [each] movement was a test train or a load hauled for compensation"

With the exception of the freight cars hauled along the spur on October 17, 2010, all of the eastbound freight cars referenced on the train crossing log set forth on the two preceding pages were hauled for compensation to Meeker's customer Sound Delivery Service. However, the train movements on the spur from October 18, 2010 through November 3, 2010 had a dual of testing and hauling freight cars for compensation.

Testing operations, which were personally overseen by Meeker Southern Railroad's general manager Byron Cole, involved (a) examination of the spur track bed and rails for stability with different size and weight freight car loads, (b) application of lubricant on the spur track rails and examination of the functioning of the rails with that lubricant with different size and weight freight car loads, and (c) examination of clearances between the loaded freight cars of different sizes and loading conditions along the South Delivery Service site's loading dock.

Response to the Commission's request for information as to "how the crossing was protected during train movements"

All of the subject train movements during the period from October 18, 2010 through December 18, 2010 were protected by all of the following means:

(1) By passive warning devices on each side of the crossing, which consisted of (a) "2 Tracks" Cross-Buck Signs near the tracks, (b) cross-buck pavement markings south of the crossing along 134th Avenue East, and (c) cross-buck pavement markings on 80th Street East to the east of 134th Avenue East;

(2) By sounding the locomotive horn at each train's approach of the 134th crossing in accordance with CFR 49 CFR 222.21 (a section entitled "When must a locomotive horn be used?");[1]

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[1] The relevant divisions of the Code of Federal Regulations down to and including CFR 49 CFR 222.21 are as follows (along with the text of CFR 49 CFR 222.21):

TITLE 49 - TRANSPORTATION

SUBTITLE B - OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER II - FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 222 - USE OF LOCOMOTIVE HORNS AT *PUBLIC HIGHWAY - RAIL GRADE CROSSINGS*

subpart b - USE OF LOCOMOTIVE HORNS

222.21 - When must a locomotive horn be used?

(a) Except as provided in this part, **the locomotive horn on the lead locomotive of a train**, lite locomotive consist, **individual locomotive**, or lead cab car ***shall be sounded when such locomotive*** or lead cab car **is approaching a public highway-rail grade**

(3) Sounding the locomotive bell at each train's approach of the 134th crossing; and

(4) Providing warning at the 134th crossing consistent with the relevant portions of Rule 6.32.1 of the General Code of Operating Rules, Sixth Edition (Effective April 7, 2010) (known as "GCOR").[2]

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crossing. Sounding of the locomotive horn with two long, one short, and one long blast shall be initiated at a location so as to be in accordance with paragraph (b) of this section and shall be repeated or prolonged until the locomotive or train occupies the crossing. This pattern may be varied as necessary where crossings are spaced closely together.

(b)(1) Except as provided in paragraph (b)(2) of this section, **the locomotive horn shall begin to be sounded at least 15 seconds, but no more than 20 seconds, before the locomotive enters the crossing.**

(2) Trains, locomotive consists, and individual locomotives traveling at speeds in excess of 45 mph shall not begin sounding the horn more than one-quarter mile (1,320 feet) in advance of the nearest public highway-rail grade crossing, even if the advance warning provided by the locomotive horn will be less than 15 seconds in duration.

(c) As stated in 222.3(c) of this part, this section does not apply to any Chicago Region highway-rail grade crossing at which railroads were excused from sounding the locomotive horn by the Illinois Commerce Commission, and where railroads did not sound the horn, as of December 18, 2003.

(d) **Trains**, locomotive consists **and individual locomotives that have stopped in close proximity to a public highway-rail grade crossing may approach the crossing and sound the locomotive horn for less than 15 seconds before the locomotive enters the highway-rail grade crossing, if the locomotive engineer is able to determine that the public highway-rail grade crossing is not obstructed and either:**

(1) The public highway-rail grade crossing is equipped with automatic flashing lights and gates and the gates are fully lowered; or

(2) **There are no conflicting highway movements approaching the public highway-rail grade crossing.**

(e) Where State law requires the sounding of a locomotive audible warning device other than the locomotive horn at public highway-rail grade crossings, that locomotive audible warning device shall be sounded in accordance with paragraphs (b) and (d) of this section.

(Emphasis added.)

[2] The General Code of Operating Rules is an extensive general volume of railroad operating rules adhered to by numerous railroad companies throughout the United States. GCOR Rule 6.32.1 states:

6.32.1 Providing Warning Over Road Crossings

When cars are shoved, kicked or a gravity switch move is made *over road crossings at grade*, *an employee must be on the ground at the crossing to provide warning until crossing is occupied. Make any movement over the crossing only on the employee's signal.*

Warning is <u>not required</u> when crossing is equipped with:

• Gates that are fully lowered.
or

• Flashing lights or *<u>passive warning devices</u> when it is clearly seen that no traffic is approaching or stopped at the crossing.* Shoving movements must not exceed 15 MPH over crossing until occupied.

(Emphasis added.)

Exhibit B

to the February 15, 2011 response letter from Meeker Southern Railroad's attorney David L. Halinen to Washington Utilities and Transportation Commission, Attn: Betty Young, Compliance Investigator, Transportation Safety

Meeker Southern's explanation, including mitigating factors, of why the company commenced operational use of the new spur track prior to satisfying the conditions in the Commission's Order 01 in Docket TR-100036.

I, James Forgette, the Operations Manager for Meeker Southern Railroad, hereby certify that the data and information in the following pages of this exhibit are true and correct to my best knowledge and belief.

James Forgette 2-15-11

James Forgette **Date**

Reasons why Meeker Southern Railroad commenced operational use of the new spur track prior to satisfying the conditions in the Commission's Order 01 in Docket TR-100036		
Reason and/or Mitigating Factor Number	**Reason and/or Mitigating Factor**	**Comments**
1	Meeker's customer Sound Delivery Service had (and continues to have) a desperate need to have freight rail cars loaded at its new facility located at the east end of Meeker's new spur track.	
2	Without use of the new spur track, the freight cars would have had to have continued to be delivered via the main line track for unloading by Sound Delivery Service at Meeker's long-time existing service siding along the north side of the main line track located approximately a quarter mile east of 134th Avenue East (at Meeker's "East Puyallup Yard and Shops Facility"), a siding that is only accessible by motor vehicle from the south side of 80th Street East.	
3	By the time that use of the new spur had begun, (a) the spur track and its bedding had been installed in accordance with the approved civil drawings and (b) substantial 134th Avenue NE road improvements had been made. Even though all of the road improvements contemplated by the approved civil drawings had not been completed, the road improvements that had been made substantially enhanced the condition of the 134th Avenue East roadway at the crossing over the long-standing poor condition that existed prior to the spur track installation.	
4	With the enhanced roadway condition of 134th and the ability to	Unloading by Sound Delivery Service at Meeker's East Puyallup Yard and

	safely run all trains crossing along the spur track outside of 134th's PM peak traffic hours (trains that were all 350 feet or less in length) at slow, safe speeds of approximately only 5 mph, in Meeker's view overall safety to both the public and Sound Delivery's workers was enhanced by using the spur track to deliver freight cars directly to the new Sound Delivery Site for unloading at Sound Delivery's new loading dock rather than continuing to deliver those freight cars via the main line track for unloading by Sound Delivery Service at Meeker's East Puyallup Yard and Shops Facility.	Shops Facility necessitated Sound Delivery's forklifts (forklifts that were generally needed for use in Sound Delivery's outside storage yard) being driven or trucked on surface streets through the 134th crossing in order to get to 80thStreet East to access that Facility. Once the forklifts were there, the Sound Delivery forklift operators then had to unload the delivered freight cars and load the materials onto transport trucks for hauling back to the Sound Delivery yard. All of the Sound Delivery haul trucks picking up materials unloaded by the forklifts at Meeker's East Puyallup Yard and Shops Facility would have had to continue to cross the public trail and be loaded by the forklifts.

Exhibit C

to the February 15, 2011 response letter from Meeker Southern Railroad's attorney David L. Halinen to Washington Utilities and Transportation Commission, Attn: Betty Young, Compliance Investigator, Transportation Safety

Spreadsheets of Meeker Southern monthly rail car logs for the four-month period from October 2010 through January 30, 2011

I, James Forgette, the Operations Manager for Meeker Southern Railroad, hereby certify that the data and information in the following pages of this exhibit are true and correct to my best knowledge and belief.

James Forgette 2-15-11

James Forgette **Date**

MEEKER SOUTHERN
RAILCAR LOG
OCTOBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
PTTX	**137250**	OPT PIPE	10/01/10 FRI 0035	10/01/10 FRI 0930	10/06/10 WED 0800	10/06/10 WED 0900	(+) 128 HOUR (--) 120 MSN (+) 008 OPT	1	372
PTTX	**930911**	SDS/SHAPE	10/03/10	10/04/10	10/06/10	10/06/10	0	2	373
OFFD	10/03/10	SUN 0631	SUN 1100	MON 0900	WED 0800	WED 0900			
OFFR	10/03/10	SUN 0518							
TTPX	**811161**	OPT/IRON	10/03/10	10/04/10	10/06/10	10/06/10	0	3	374
OFFD	10/03/10	SUN 0631	SUN 1100	MON 0930	WED 0800	WED 0900			
OFFR	10/03/10	SUN 0518							
TTPX	**142168**	OPT/IRON	10/03/10	10/04/10	10/06/10	10/06/10	0	4	375
OFFD	10/03/10	SUN 0631	SUN 1100	MON 0930	WED 0800	WED 0900			
OFFR	10/03/10	SUN 0518							
BNSF	**546189**	OPT/IRON	10/03/10	10/04/10	10/06/10	10/06/10	0	5	376
OFFD	10/03/10	SUN 0631	SUN 1100	MON 0930	WED 0800	WED 0900			
OFFR	10/03/10	SUN 0518							
TTPX	**80049**	SDS/SHAPE	10/03/10	10/04/10	10/06/10	10/06/10	0	6	377
OFFD	10/03/10	SUN 0631	SUN 1100	MON 0900	WED 0800	WED 0900			
OFFR	10/03/10	SUN 0518							
ICE	**69008**	OPT IRON	10/06/10 WED 0247 TA BNSF NO ICHD	10/06/10 WED 0830 MSN NO REPORT	10/08/10 FRI 0800 MSN NO REPORT	10/08/10 FRI 0830 MSN NO REPORT	0	7	378
ICE	**69017**	OPT IRON	10/06/10 WED 0247 TA BNSF NO ICHD	10/06/10 WED 0830 MSN NO REPORT	10/08/10 FRI 0800 MSN NO REPORT	10/08/10 FRI 0830 MSN NO REPORT	0	8	379
HS	**2885**	OPT PLST	10/07/10 THU 2351	10/08/10 FRI 0900	10/11/10 MON 0800	10/11/10 MON 0930	0	9	380
HS	**2894**	OPT PLST	10/07/10 THU 2351	10/08/10 FRI 0900	10/11/10 MON 0800	10/11/10 MON 0930	0	10	381

MEEKER SOUTHERN
RAILCAR LOG
OCTOBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
PTTX	**913294**	SDS CAST	10/10/10 SUN 1348	10/11/10 MON 0830	10/15/10 FRI 0800	10/15/10 FRI 1030	0	11	382
PTTX	**136349**	SDS CAST	10/10/10 SUN 1348	10/11/10 MON 0830	10/15/10 FRI 0800	10/15/10 FRI 1030	0	12	383
PTTX	**142158**	OPT IRON	10/10/10 SUN 1348	10/11/10 MON 0900	10/13/10 WED 1500	10/15/10 FRI 1030	0	13	384
CEFX	**30124**	OPT IRON	10/10/10 SUN 1348	10/11/10 MON 0900	10/13/10 WED 1500	10/15/10 FRI 1030	0	14	385
PTTX	**141157**	SDS PIPE	10/15/10 FRI 0243	10/15/10 FRI 0900	10/20/10 WED 0800	10/20/10 WED 1258	0	15	386
PTTX	**136106**	SDS PIPE	10/15/10 FRI 0243	10/15/10 FRI 0900	10/20/10 WED 0800	10/20/10 WED 1258	0	16	387
PTTX	**136022**	SDS PIPE	10/15/10 FRI 0243	10/15/10 FRI 0930	10/20/10 WED 0800	10/20/10 WED 1258	0	17	388
PTTX	**137269**	OPT IRON	10/15/10 FRI 0243	10/15/10 FRI 0930	10/20/10 WED 0800	10/20/10 WED 1258	0	18	389
PTTX	**137295**	OPT IRON	10/15/10 FRI 0243	10/15/10 FRI 0930	10/20/10 WED 0800	10/20/10 WED 1258	0	19	390
PTTX	**142133**	OPT IRON	10/15/10 FRI 0243	10/15/10 FRI 0930	10/20/10 WED 0800	10/20/10 WED 1258	0	20	391

MEEKER SOUTHERN
RAILCAR LOG
OCTOBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
GATX	**96029**	CBC WAX	10/15/10 FRI 0243	10/15/10 FRI 1000	10/21/10 THU 0728	10/22/10 FRI 1058	0	21	392
PTTX	**137249**	SDS PIPE	10/16/10 SAT 2131	10/18/10 MON 0930	10/22/10 FRI 0800	10/22/10 FRI 1058	0 EXTRA HOURS - MSN	22	393
PTTX	**141124**	SDS PIPE	10/16/10 SAT 2131	10/18/10 MON 0930	10/22/10 FRI 0800	10/22/10 FRI 1058	0 EXTRA HOURS - MSN	23	394
PTTX	**141181**	SDS CAST	10/16/10 SAT 2131	10/18/10 MON 0930	10/22/10 FRI 0800	10/22/10 FRI 1058	0 EXTRA HOURS - MSN	24	395
PTTX	**137278**	OPT IRON	10/22/10 FRI 0307	10/22/10 FRI 1000	10/25/10 MON 0800	10/25/10 MON 0900	0	25	396
PTTX	**142160**	OPT IRON	10/22/10 FRI 0307	10/22/10 FRI 1000	10/27/10 WED 0800	10/27/10 WED 0930	(+) 127 HOUR (--) 120 MSN (+) 007 OPT	26	397
TILX	**194836**	OPT EMPTY	10/22/10 FRI 0307	10/22/10 FRI 1000	10/27/10 WED 0800	10/27/10 WED 0930	0	27	398
GLNX	**21118**	OPT EMPTY	10/22/10 FRI 0307	10/22/10 FRI 1000	10/27/10 WED 0800	10/27/10 WED 0930	0	28	399
TEIX	**20511**	OPT EMPTY	10/22/10 FRI 0307	10/22/10 FRI 1000	10/27/10 WED 0800	10/27/10 WED 0930	0	29	400
PTTX	**142405**	SDS PIPE	10/24/10 SUN 1237	10/25/10 MON 0930	10/27/10 WED 0800	10/27/10 WED 0930	0	30	401

MEEKER SOUTHERN
RAILCAR LOG
OCTOBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
PTTX	**137267**	SDS PIPE	10/31/10 SUN 1522	11/01/10 MON 0900	11/01/10 MON 1432	11/03/10 WED 0900	0	31	402
PTTX	**141025**	SDS PIPE	10/31/10 SUN 1522	11/01/10 MON 0900	11/01/10 MON 1432	11/03/10 WED 0900	0	32	403
PTTX	**141086**	SDS PIPE	10/31/10 SUN 1522	11/01/10 MON 0900	11/01/10 MON 1432	11/03/10 WED 0900	0	33	404

MEEKER SOUTHERN
RAILCAR LOG
OCTOBER, 2010

Railcar	Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
RAILCAR TOTALS:			PRODUCT TOTALS:			DEMURRAGE TOTALS:		
CBC	1		CAST	3		CBC	0	
OPT	18		COIL	0		OPT	15	HOURS
SDS	14		EMPTY	3		SDS	0	
BIGG CRNE	0		IRON	12		TPK	0	
TOTAL	33		METL	0		TOTAL	30	
			PCBD (OSB)	0				
			PIPE	10				
			PLST	2				
			PULP	0				
			RAIL	0				
			SHAPE	2				
			WAX	1				
			TOTAL	33				

MEEKER SOUTHERN
RAILCAR LOG
NOVEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
PTTX	**142167**	OPT IRON	11/01/10 MON 1402 MSN REPORT	11/01/10 MON 0930 RMI DATES INCORRECT	11/03/10 WED 0800	11/03/10 WED 0900	0	1	405
TILX	**194780**	OPT EMPTY	11/03/10 WED 0301	11/03/10 WED 0930	11/05/10 FRI 0800	11/05/10 FRI 1100	0	2	406
ICE	**69012**	OPT IRON	11/05/10 FRI 0222	11/05/10 FRI 0900	11/8//10 MON 0800	11/08/10 MON 1200	0	3	407
PTTX	**137041**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 0800	11/08/10 MON 1200	0	4	408
PTTX	**142106**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 1600	11/08/10 MON 1630	0	5	409
PTTX	**142086**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 1600	11/08/10 MON 1630	0	6	410
PTTX	**141039**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 1600	11/08/10 MON 1630	0	7	411
PTTX	**136113**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 0800	11/08/10 MON 1200	0	8	412
PTTX	**142175**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 0800	11/08/10 MON 1200	0	9	413
PTTX	**142176**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 0800	11/08/10 MON 1200	0	10	414

MEEKER SOUTHERN
RAILCAR LOG
NOVEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
PTTX	**141100**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 0800	11/08/10 MON 1200	0	11	415
PTTX	**142162**	SDS PIPE	11/05/10 FRI 0222	11/05/10 FRI 1030	11/08/10 MON 0800	11/08/10 MON 1200	0	12	416
BNSF	**546282**	OPT IRON	11/07/10 SUN 1216	11/08/10 MON 0900	11/11/10 THU 1738	11/12/10 FRI 0830	0	13	417
PTTX	**142112**	OPT IRON	11/07/10 SUN 1216	11/08/10 MON 0900	11/11/10 THU 1738	11/12/10 FRI 0830	0	14	418
PTTX	**136085**	SDS PIPE	11/12/10 FRI 0242 BNSF REPORT	11/10/10 WED 0830	11/11/10 THU 1738	11/12/10 FRI 0830	0	15	419
NS	**168236**	OPT COIL	11/12/10 FRI 0242	11/12/10 FRI 0900	11/17/10 WED 0800	11/17/10 WED 0830	0	16	420
PTTX	**141159**	SDS PIPE	11/12/10 FRI 0242	11/12/10 FRI 0900	11/15/10 MON 0800	11/15/10 MON 1130	0	17	421
BNSF	**546053**	OPT IRON	11/14/10 SUN 1213	11/15/10 MON 0900	11/17/10 WED 0800	11/17/10 WED 0830	0	18	422
BNSF	**546114**	OPT IRON	11/14/10 SUN 1213	11/15/10 MON 0900	11/17/10 WED 0800	11/17/10 WED 0830	0	19	423
HS	**2885**	OPT PLST	11/14/10 SUN 1213	11/15/10 MON 0900	11/19/10 FRI 0800	11/19/10 FRI 0900	0	20	424

MEEKER SOUTHERN
RAILCAR LOG
NOVEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
HS	**2894**	OPT PLST	11/14/10 SUN 1213	11/15/10 MON 0900	11/19/10 FRI 0800	11/19/10 FRI 0900	0	21	425
PROX	**46122**	OPT EMPTY	11/14/10 SUN 1213	11/15/10 MON 0900	12/01/10 WED 1300	12/03/10 FRI 1130	0	22	426
SRIX	**80132**	CBC WAX	11/14/10 SUN 1213	11/15/10 MON 1000	12/02/10 THU 1400	12/03/10 FRI 1130	0	23	427
UTLX	**201857**	OPT EMPTY	11/19/10 FRI 0255	11/19/10 FRI 0930	12/01/10 WED 1342	12/03/10 FRI 1130	0	24	428
UTLX **DECEMBER INVOICE**	**500071**	OPT EMPTY	11/19/10 FRI 0255	11/19/10 FRI 0930	12/10/10 FRI 0928	12/10/10 FRI 0930	0	25	429
ALY	**91708**	SDS IRON	11/21/10 SUN 1219	11/22/10 MON 0900	11/24/10 WED 0800	11/24/10 WED 1130	0	26	430
BNSF	**546056**	OPT IRON	11/21/10 SUN 1219	11/22/10 MON 0930	11/24/10 WED 0800	11/24/10 WED 1130	0	27	431
PTTX	**142031**	SDS PIPE	11/21/10 SUN 1219	11/22/10 MON 0900	11/24/10 WED 0800	11/24/10 WED 1130	0	28	432
TTPX	**806179**	OPT IRON	11/21/10 SUN 1219	11/22/10 MON 0930	11/24/10 WED 0800	11/24/10 WED 1130	0	29	433
FURX **DECEMBER INVOICE**	**125674**	OPT EMPTY	11/28/10 SUN 1245	11/29/10 MON 0930	12/10/10 FRI 0915	12/10/10 FRI 0930	0	30	434

MEEKER SOUTHERN
RAILCAR LOG
NOVEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
ICE	**69048**	OPT IRON	11/28/10 SUN 1245	11/29/10 MON 0930	12/01/10 WED 0800	12/0310 FRI 1130	0	31	435
PTTX	**137254**	OPT IRON	11/28/10 SUN 1245	11/29/10 MON 0930	12/01/10 WED 0800	12/0310 FRI 1130	0	32	436
TTPX	**805339**	OPT IRON	11/28/10 SUN 1245	11/29/10 MON 0930	12/01/10 WED 0800	12/0310 FRI 1130	0	33	436

MEEKER SOUTHERN
RAILCAR LOG
NOVEMBER, 2010

Railcar	Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
RAILCAR TOTALS:			PRODUCT TOTALS:			DEMURRAGE TOTALS:		
CBC	1		CAST	0		CBC	0	
OPT	19		COIL	1		OPT	6	
SDS	13		EMPTY	5		SDS	0	
BIGG CRNE	0		IRON	12		TPK	0	
TOTAL	33		METL	0		TOTAL	6	
			PCBD (OSB)	0				
			PIPE	12				
			PLST	2				
			PULP	0				
			RAIL	0				
			SHAPE	0				
			WAX	1				
			TOTAL	33				

MEEKER SOUTHERN
RAILCAR LOG
DECEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
PTTX	**142161**	SDS PIPE	12/03/10 FRI 0128	12/03/10 FRI 0900	12/06/10 MON 0800	12/06/10 MON 0930	0	1	437
PTTX	**142098**	SDS PIPE	12/03/10 FRI 0128	12/03/10 FRI 0900	12/06/10 MON 0800	12/06/10 MON 0930	0	2	438
CEFX	**30147**	OPT IRON	12/03/10 FRI 0128	12/03/10 FRI 0930	12/06/10 MON 0800	12/06/10 MON 0930	0	3	439
PTTX	**142104**	SDS PIPE	12/09/10 THU 1616 BNSF REPORT	12/08/10 WED 0830	12/09/10 THU 1619	12/09/10 THU 1621	0	4	440
TILX	**194836**	OPT EMPTY	12/09/10 THU 1616 BNSF REPORT	12/08/10 WED 0900	12/14/10 TUE 1050	12/16/10 THU 1130	0	5	441
BNSF	**546001**	OPT IRON	12/12/10 SUN 1216	12/13/10 MON 1100	12/16/10 THU 0800	12/16/10 THU 1130	0	6	442
BNSF	**546015**	OPT IRON	12/12/10 SUN 1216	12/13/10 MON 1100	12/16/10 THU 0800	12/16/10 THU 1130	0	7	443
BNSF	**546022**	OPT IRON	12/12/10 SUN 1216	12/13/10 MON 1100	12/17/10 FRI 0800	12/17/10 FRI 1230	0	8	444
BNSF	**546120**	OPT IRON	12/12/10 SUN 1216	12/13/10 MON 1100	12/16/10 THU 0800	12/16/10 THU 1130	0	9	445
BNSF	**546241**	OPT IRON	12/12/10 SUN 1216	12/13/10 MON 1100	12/16/10 THU 0800	12/16/10 THU 1130	0	10	446

MEEKER SOUTHERN
RAILCAR LOG
DECEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
BNSF	**546295**	OPT IRON	12/12/10 SUN 1216	12/13/10 MON 1100	12/16/10 THU 0800	12/16/10 THU 1130	0	11	447
PTTX	**136316**	SDS PIPE	12/17/10 FRI 0332	12/17/10 FRI 0930	12/17/10 FRI 1200	12/17/10 FRI 1230	0	12	448
PTTX	**137273**	SDS PIPE	12/17/10 FRI 0332	12/17/10 FRI 0930	12/21/10 TUE 0851	12/23/10 THU 1600	0	13	449
PTTX	**142102**	SDS PIPE	12/17/10 FRI 0332	12/17/10 FRI 0930	12/21/10 TUE 0851	12/23/10 THU 1600	0	14	450
PTTX	**142109**	SDS PIPE	12/17/10 FRI 0332	12/17/10 FRI 0930	12/21/10 TUE 0851	12/23/10 THU 1600	0	15	451
PTTX	**142142**	SDS PIPE	12/17/10 FRI 0332	12/17/10 FRI 0930	12/17/10 FRI 0851	12/17/10 FRI 1230	0	16	452
TTPX	**804454**	OPT IRON	12/24/10 FRI 0142 MSN REPORT	12/23/10 THU 1630	12/27/10 MON 1329	12/28/10 TUE 1000	0	17	453
TTPX	**804179**	OPT IRON	12/24/10 FRI 0142	12/24/10 FRI 0930	12/27/10 MON 1329	12/28/10 TUE 1000	0	18	454
ATSF	**68207**	OPT COIL	12/24/10 FRI 0142	12/24/10 FRI 0930	12/27/10 MON 1329	12/28/10 TUE 1000	0	19	455
GONX	**310015**	OPT IRON	12/24/10 FRI 0142	12/24/10 FRI 0930	12/27/10 MON 1329	12/28/10 TUE 1000	0	20	456

MEEKER SOUTHERN
RAILCAR LOG
DECEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
TILX	**190452**	OPT	12/24/10	12/24/10	01/01/11	01/03/10	0	21	457
JANUARY INVOICE		EMPTY	FRI 0142	FRI 0930	MON 0220	MON 0900			
BNSF	**546102**	SDS	12/26/10	12/28/10	12/29/10	12/29/10	0	22	458
		SHAPE	SUN 1232	TUE 0900	WED 0800	WED 0930			
BN	**580437**	OPT	12/26/10	12/28/10	12/29/10	12/29/10	0	23	459
		IRON	SUN 1232	TUE 0930	WED 0800	WED 0930			
ATSF	**68046**	SDS	12/29/10	12/29/10	12/31/10	12/31/10	0	24	460
		METAL	WED 0259	WED 0930	FRI 0800	FRI 0930			
BNSF	**546062**	OPT	12/29/10	12/29/10	12/31/10	12/31/10	0	25	461
		IRON	WED 0259	WED 0900	FRI 0800	FRI 0930			
HS	**3127**	OPT	12/29/10	12/29/10	12/31/10	12/31/10	0	26	462
		PLST	WED 0259	WED 0900	FRI 0800	FRI 0930			
HS	**3137**	OPT	12/29/10	12/29/10	12/31/10	12/31/10	0	27	463
		PLST	WED 0259	WED 0900	FRI 0800	FRI 0930			
TTPX	**806353**	OPT	12/29/10	12/29/10	12/31/10	12/31/10	0	28	464
		IRON	WED 0259	WED 0900	FRI 0800	FRI 0930			

MEEKER SOUTHERN
RAILCAR LOG
DECEMBER, 2010

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
RAILCAR TOTALS:			**PRODUCT TOTALS:**			**DEMURRAGE TOTALS:**			
CBC	0		CAST	0		CBC	0		
OPT	18		COIL	1		OPT	0		
SDS	10		EMPTY	2		SDS	0		
BIGG CRN	0		IRON	13		TPK	0		
TOTAL	28		METAL	1		TOTAL	0		
			PCBD (OSB)	0					
			PIPE	8					
			PLST	2					
			PULP	0					
			RAIL	0					
			SHAPE	1					
			WAX	0					
			TOTAL	28					

MEEKER SOUTHERN
RAILCAR LOG
JANUARY, 2011

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
BNSF	**546277**	OPT IRON	01/02/11 SUN 1251	01/03/11 MON 0900	01/03/11 MON 1511	01/05/11 WED 0900	0	1	1
JTLX	**44**	OPT IRON	01/02/11 SUN 1251	01/03/11 MON 0900	01/03/11 MON 1511	01/05/11 WED 0900	0	2	2
TTPX	**806223**	OPT IRON	01/02/11 SUN 1251	01/03/11 MON 0900	01/03/11 MON 1511	01/05/11 WED 0900	0	3	3
TTPX	**806198**	OPT IRON	01/05/11 WED 0101	01/05/11 WED 0900	01/07/11 FRI 0634	01/07/11 FRI 0900	0	4	4
BNSF	**545505**	OPT IRON	01/05/11 WED 0101	01/05/11 WED 0900	01/07/11 FRI 0634	01/07/11 FRI 0900	0	5	5
PROX	**46122**	OPT EMPTY	01/07/11 FRI 0211	01/07/11 FRI 0930	01/31/11 MON 1252	01/31/11 MON 1254	0	6	6
UTLX	**201857**	OPT EMPTY	01/07/11 FRI 0211	01/07/11 FRI 0930	01/21/11 FRI 1049	01/24/11 FRI 0931	0	7	7
BNSF	**545461**	SDS SHAPE	01/09/11 SUN 1253	01/10/11 MON 0930	01/14/11 FRI 0800	01/14/11 FRI 0931	0	8	8
BN	**621845**	SDS SHAPE	01/14/11 FRI 0240	01/14/11 FRI 1001	01/18/11 TUE 0800	01/18/11 TUE 0930	0	9	9
BNSF	**545539**	SDS SHAPE	01/14/11 FRI 0240	01/14/11 FRI 1001	01/18/11 TUE 0800	01/18/11 TUE 0930	0	10	10

MEEKER SOUTHERN
RAILCAR LOG
JANUARY, 2011

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
UTLX	**201851**	OPTIMUS EMPTY	01/14/11 FRI 0240	01/14/11 FRI 1030	01/21/11 FRI 1212	01/24/11 FRI 0931	0	11	11
ICE	**69039**	OPTIMUS IRON	01/16/11 SUN 1250	01/18/11 TUE 1000	01/19/11 WED 1148	01/24/11 FRI 0931	0	12	12
FURX	**125674**	OPTIMUS EMPTY	01/21/11 FRI 0259	01/24/11 MON 1000	01/31/11 MON 0800	01/31/11 MON 1254	0	13	13
UTLX	**500071** **JANUARY INVOICE**	OPTIMUS EMPTY	01/21/11 FRI 0259	01/24/11 MON 1000	02/01/11 TUE 0844			14	14
ATSF	**68219**	OPTIMUS COIL	01/26/11 WED 1008	01/28/11 FRI 1030	01/31/11 MON 0800	01/31/11 MON 1254	0	15	15
CSS	**19059**	OPTIMUS IRON	01/26/11 WED 1008	01/28/11 FRI 1030	01/31/11 MON 0800	01/31/11 MON 1254	0	16	16
TILX	**194836** **JANUARY INVOICE**	OPTIMUS EMPTY	01/26/11 WED 1008 WHL 1/28/11 1015					17	17
UTLX	**58638** **JANUARY INVOICE**	OPTIMUS EMPTY	01/26/11 WED 1008 WHL 1/28/11 1015					18	18
UTLX	**500138** **JANUARY INVOICE**	OPTIMUS EMPTY	01/26/11 WED 1008	01/31/11 MON 1045				19	19
PTTX	**142160**	OPTIMUS IRON	01/28/11 FRI 0051	01/28/11 FRI 1030	01/31/11 MON 1700			20	20

MEEKER SOUTHERN
RAILCAR LOG
JANUARY, 2011

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
BNSF	**511955**	SDS METAL	01/28/11 FRI 0051	01/28/11 FRI 1000	01/31/11 MON 0800	01/31/11 MON 1254		21	21
TTPX	**804722**	OPTIMUS IRON	01/28/11 FRI 0051	01/28/11 FRI 1030	01/31/11 MON 1700			22	22
TTPX	**804911**	OPTIMUS IRON	01/28/11 FRI 0051	01/28/11 FRI 1030	01/31/11 MON 1700			23	23
BNSF	**546181**	OPTIMUS IRON	01/30/11 SAT 1112	01/31/10 TUE 1045	02/01/11 TUE 1700			24	24

MEEKER SOUTHERN
RAILCAR LOG
JANUARY, 2011

Railcar		Commodity	Date Received	Date Placed	Date Released	Date Interchanged	Demurrage	month#	YTD #
RAILCAR TOTALS:			PRODUCT TOTALS:			DEMURRAGE TOTALS:			
CBC	0		CAST			CBC	0		
OPT	20		COIL	1		OPT			
SDS	4		EMPTY	8		SDS			
TOTAL	24		IRON	11		TPK	0		
			METAL	1		TOTAL			
			PCBD (OSB)						
			PIPE						
			PLST						
			PULP						
			RAIL						
			SHAPE	3					
			WAX						
			TOTAL	24					

ATTACHMENT 2

TO MEEKER'S ANSWER TO THE COMMISSION'S COMPLAINT

DOCKET TR-110221

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February 28, 2011

VIA EMAIL AND PRIORITY MAIL

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Attn: Betty Young, Compliance Investigator, Transportation Safety Enforcement

Re: Docket No. TR-100036
My Client Meeker Southern Railroad
(USDOT Crossing No. 085536 R)
(WUTC Crossing No. 42A32.40)
Arguments as to Why, in View of Mitigating Circumstances and the Functional Equivalent of a Civil Penalty that Meeker Has Already Incurred, Civil Penalties Should Not Be Imposed Upon Meeker

Dear Ms. Woods and Ms. Young:

On behalf of my client Meeker Southern Railroad ("Meeker"), I am writing in follow-up to my February 15, 2011 letter to you, Ms. Young, a letter with attached exhibits that provided you with Meeker's response to the three-section Staff Information Request set forth in the February 2, 2011 letter sent to me by David Pratt, the Commission's Assistant Director for Transportation Safety. Following a summary of background facts, today's letter sets forth arguments on Meeker's behalf as to why the Commission should not impose civil penalties on Meeker.

Background

Meeker's Straightforward Admission of the Violation

During the January 26, 2011 hearing before Administrative Law Judge Adam Torem, Meeker's general manager, Byron Cole, straightforwardly and repeatedly admitted that Order 01

had been violated. (Specifically, Meeker had violated Condition 3 of Order 01[1] by starting operation of the spur line and Phase 1 Service Siding during October 2010 before all work for the proposed spur track and the Phase 1 Service Siding shown on the project design drawings had been completed to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff.) During the hearing, Mr. Cole apologized for the violation and promised to meticulously adhere to the Amended Order (Order 03) that Judge Torem issued near the hearing's conclusion. (That order, among other things, modified Condition 3 of Order 01 to allow immediate use of the spur and Phase 1 Service Siding subject to the Special Requirements and Restrictions set forth in Table 2 attached to Order 03 as Exhibit B.[2])

Mitigating Circumstances Relating to the Violation

Significant mitigating circumstances underlie Meeker's violation of the Order. Some of them are set forth in the table that is part of Exhibit B accompanying my February 15, 2011 letter to you, Ms. Young, a table that I hereby incorporate by reference into this letter.

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[1] Condition 3 of Order 01 states:

> All work for the proposed spur track and the Phase 1 Service Siding shown on the design drawings shall be completed to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff prior to the Petitioner starting operation of the spur line and Phase 1 Service Siding.

[2] Paragraph (5) of Order 03 states:

> (5) Approval Condition 3 of Order 01 is hereby amended to state:
>
> (3) All work for the proposed spur track and the Phase 1 Service Siding (except for approximately the east 300 feet of the siding, which may be completed at any time after the commencement of operation of the remainder of the automatic flashing lights crossing signal system) shown on the design drawings shall be completed (a) in a timeframe consistent with the time schedule set forth in Table 1 attached to this amending Order as Exhibit A (unless otherwise approved by both Commission Staff and Public Works) and (b) to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff ~~prior to the Petitioner starting operation of the spur line and Phase 1 Service Siding~~; PROVIDED, HOWEVER, that (i) Petitioner may immediately operate the spur line and Phase 1 Service Siding subject to the Special Requirements and Restrictions set forth in Table 2 attached to this Amending Order as Exhibit B and (ii) following installation and commencement of operation of the remainder of the automatic flashing lights crossing signal system for the crossing and of corresponding traffic control signs (which must occur by March 18, 2011 unless otherwise approved by both Commission Staff and Public Works), Petitioner must thereafter operate the spur line and Phase 1 Service Siding with the automatic flashing lights crossing signal system in operation.

Terry Lawrence's Hearing Testimony Explained How Both Public Safety and Worker Safety Were Enhanced by the Spur's Use

In regard to the mitigating circumstances summarized in the table, note that during the January 26, 2011 hearing, extensive testimony by Terry Lawrence, the president of Meeker's now-spur-connected customer Sound Delivery Service, testified that beginning mid-last October Sound Delivery Service needed to take delivery of 27 railcar loads of "big, heavy, lengthy pipe," pipe that was 80 to 85 feet in length. [Mr. Cole has explained to me that (a) each piece of pipe was six feet in diameter and weighed up to as much as 33 tons and (b) was loaded on the railcars with two pipes side-by-side on the bottom of the railcars with the third pipe balanced on top of the middle of the bottom two).] The first two of those railcar loads of pipe were unloaded at Meeker's team track located along the north side of Meeker's main line track approximately a quarter mile east of 134th Avenue East and just south of 80th Street East (at Meeker's "East Puyallup Yard and Shops Facility"), a siding that is only accessible by motor vehicle from the south side of 80th Street East. Mr. Lawrence pointed out during his testimony that a bike path/walking trail was in close proximity to that siding.[3] He further pointed out that handling the heavy, bulky, long lengths of pipe being unloaded from railcars and loaded onto delivery trucks at that location was hazardous and necessitated the use of two and sometimes three forklifts working together He explained that, by unloading the rest of the railcars at the new Sound Delivery Service loading dock along the end of the newly constructed Phase 1 Service Siding (rather than at Meeker's East Puyallup Yard and Shops Facility), (i) the risk of Sound Delivery's unloading and unloading of such extremely large pipe in relatively close proximity to the public trail was eliminated and (ii) various risks to Sound Delivery's workers (risks arising from the pipes' extreme size) were also eliminated.

Sound Delivery's Railcars Had to Pass through the 134th Crossing Whether They Were Unloaded at Meeker's East Puyallup Yard and Shops Facility or at the Sound Delivery Site

Whether Sound Delivery unloaded its railcars at Meeker's East Puyallup Yard and Shops Facility or at the Sound Delivery Service site, those railcars had to pass through the 134th Avenue East crossing. Crossing of 134th could not be avoided by using the Meeker's existing service siding at Meeker's East Puyallup Yard and Shops Facility.

Under the Particular Operational Circumstances at Hand, Use of the Spur for Transit of Sound Delivery's Railcars Posed No Significant Safety Risk to Motorists or Pedestrians at the 134th Crossing

During the time of day of each spur crossing over the period of the violation of Condition 3 of Order 01, no significant risk to public safety was posed at the 134th crossing by (a) operating the spur track for transit of railcars to and from the Sound Delivery site versus (b)

[3] Byron Cole pointed out during his hearing testimony that the bike path/walking trail was 60 feet from that siding.

using the main line track to take those railcars to and from Meeker's East Puyallup Yard and Shops Facility. The following facts make clear why.

First, the spur track is in close proximity to and generally parallel with the main line track at the 134th crossing (a distance ranging from only about 17 to 19 feet away from the main line track). This modest change to the 134th crossing is not confusing to the motoring public.

Second, all of Meeker's trains (whether on the spur track or main line track) have been run very slowly through the crossing (at a speed generally not exceeding approximately 5 mph).

Third, as noted in Exhibit A to my February 15, 2011 letter to you, Ms. Young, all train movements through the 134th crossing during the period from October 18, 2010 through December 18, 2010 were protected by all of the following means:

(1) Passive warning devices on each side of the crossing, devices that consisted of (a) "2 Tracks" Cross-Buck Signs near the tracks, (b) cross-buck pavement markings south of the crossing along 134th Avenue East, and (c) cross-buck pavement markings on 80th Street East to the east of 134th Avenue East;

(2) Sounding the locomotive horn at each train's approach of the 134th crossing in accordance with CFR 49 CFR 222.21 (a section entitled "When must a locomotive horn be used?");[4]

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[4] The relevant divisions of the Code of Federal Regulations down to and including CFR 49 CFR 222.21 are as follows (along with the text of CFR 49 CFR 222.21):

TITLE 49 - TRANSPORTATION

SUBTITLE B - OTHER REGULATIONS RELATING TO TRANSPORTATION

CHAPTER II - FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 222 - USE OF LOCOMOTIVE HORNS AT *PUBLIC HIGHWAY - RAIL GRADE CROSSINGS*

subpart b - USE OF LOCOMOTIVE HORNS

222.21 - When must a locomotive horn be used?

(a) Except as provided in this part, **the locomotive horn on the lead locomotive of a train,** lite locomotive consist, **individual locomotive,** or lead cab car ***shall be sounded when such locomotive*** or lead cab car **is approaching a public highway-rail grade crossing. Sounding of the locomotive horn with two long, one short, and one long blast shall be initiated at a location so as to be in accordance with paragraph (b) of this section and shall be repeated or prolonged until the locomotive or train occupies the crossing. This pattern**

(3) Sounding the locomotive bell at each train's approach of the 134th crossing; and

(4) Providing warning at the 134th crossing consistent with the relevant portions of Rule 6.32.1 (Providing Warning Over Road Crossings) of the General Code of Operating Rules, Sixth Edition (Effective April 7, 2010) (known as "GCOR").[5]

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may be varied as necessary where crossings are spaced closely together.

(b)(1) Except as provided in paragraph (b)(2) of this section, **the locomotive horn shall begin to be sounded at least 15 seconds, but no more than 20 seconds, before the locomotive enters the crossing.**

(2) Trains, locomotive consists, and individual locomotives traveling at speeds in excess of 45 mph shall not begin sounding the horn more than one-quarter mile (1,320 feet) in advance of the nearest public highway-rail grade crossing, even if the advance warning provided by the locomotive horn will be less than 15 seconds in duration.

(c) As stated in 222.3(c) of this part, this section does not apply to any Chicago Region highway-rail grade crossing at which railroads were excused from sounding the locomotive horn by the Illinois Commerce Commission, and where railroads did not sound the horn, as of December 18, 2003.

(d) **Trains**, locomotive consists **and individual locomotives that have stopped in close proximity to a public highway-rail grade crossing may approach the crossing and sound the locomotive horn for less than 15 seconds before the locomotive enters the highway-rail grade crossing, if the locomotive engineer is able to determine that the public highway-rail grade crossing is not obstructed and either:**

(1) The public highway-rail grade crossing is equipped with automatic flashing lights and gates and the gates are fully lowered; or

(2) **There are no conflicting highway movements approaching the public highway-rail grade crossing.**

(e) Where State law requires the sounding of a locomotive audible warning device other than the locomotive horn at public highway-rail grade crossings, that locomotive audible warning device shall be sounded in accordance with paragraphs (b) and (d) of this section.

(Emphasis added.)

[5] The General Code of Operating Rules is an extensive general volume of railroad operating rules adhered to by more than a hundred railroad companies throughout the United States. GCOR Rule 6.32.1 states:

6.32.1 Providing Warning Over Road Crossings

When cars are shoved, kicked or a gravity switch move is made *over road crossings at grade, an employee must be on the ground at the crossing to provide warning until crossing is occupied. Make any movement over the crossing only on the employee's signal.*

(Meeker has advised me that those means together with the slow train speeds were the crossing safety protocol that Meeker has always used along the main line track at the 134th crossing prior to the installation of the spur track.)

Fourth, the loss of roadway length available for queuing of northbound motor vehicles along 134th south of the crossing (a loss equivalent to just the length of one motor vehicle resulting from the installation of the spur track 17 to 19 feet south of the main line track) would only have been an issue if the spur track would have been used for trains crossing 134th along the spur with a length in excess of 350 feet during the weekday PM peak traffic hour of 4:45 PM to 5:45 PM. However, during the period of the violation of Order 01, the spur track was never used for trains with a length in excess of 350 feet during the weekday PM peak traffic hour of 4:45 PM to 5:45 PM.[6] Accordingly, the actual operation of Meeker's trains through the spur crossing did not cause queued northbound traffic to extend into Pioneer Way to the south of the crossing.

Fifth, by the time that use of the new spur had begun, substantial 134th Avenue East road improvements had been made. Even though all of the road improvements contemplated by the originally approved civil drawings had not been completed by that point in time, the road improvements that Meeker's contractor had made substantially enhanced the condition of the 134th roadway at the crossing over the previous, long-standing poor condition of the roadway at the crossing that existed prior to the spur-track installation. (Note that, historically, Pierce

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> *Warning is <u>not required</u> when crossing is equipped with:*
>
> • Gates that are fully lowered.
> or
>
> • Flashing lights or *<u>passive warning devices</u> when it is clearly seen that no traffic is approaching or stopped at the crossing.* Shoving movements must not exceed 15 MPH over crossing until occupied.

(Emphasis added.)

[6] The table that is part of Exhibit A accompanying my February 15, 2011 letter to you, Ms. Young, lists the train lengths and time ranges during which all of the trains using the spur passed through the 134th Avenue East crossing from October 17, 2010 through December 18, 2010. The Exhibit A table shows that none of those trains exceeded 350 feet in length and that none of them passed through the 134th crossing during the weekday PM peak traffic hour of 4:45 PM to 5:45 PM. Likewise, in regard to trains using the spur track during the time period from December 19, 2010 until Order 01 was amended by Order 03 on January 26, 2011 (i.e., the time period during which flagging of train crossings along the spur track was performed by certified flaggers), the data set forth in Meeker's Report #1 and Report #2 submitted to Commission Staff show that (a) none of those trains were comprised of more than an engine plus three cars (and thus none of them had a length exceeding 350 feet because the engine length from knuckle coupler to knuckle coupler is 50 feet and the maximum length of any of the freight cars that Meeker hauled was 100 feet from knuckle coupler to knuckle coupler) and (b) none of the trains passed through the 134th crossing during a weekday PM peak traffic hour of 4:45 PM to 5:45 PM.

County has been solely responsible for the expense of the construction and maintenance of 134th near the crossing,[7] but maintenance of 134th was obviously lacking.) Meeker's general manager, Byron Cole, has reported to me that upon the completion of the roadway paving work done by Meeker's roadway contractor during October 2010, numerous smiling drivers who passed through the crossing (drivers who appeared to have been long accustomed to the poor condition of 134th at the crossing) gave him a "thumbs up" sign in appreciation of the much-improved roadway condition.

Sixth, Meeker has only ever had one locomotive located and operating on its main line track or any of its connected spur or siding tracks. Because that is the case, no more than one train has ever been available to operate near or pass through the 134th crossing at the same point in time. Accordingly, (a) no actual risk of a second train has been posed to motorists or pedestrians at the 134th crossing in conjunction with the use of the spur and (b) no confusion to motorists has ever been caused by a second train at or near the 134th crossing in conjunction with the use of the spur.

In sum, the use of the spur for transit of Sound Delivery's railcars during the period of the violation of Order 01 posed no significant safety risk to motorists or pedestrians at the 134th crossing. The close proximity of the spur to the main line track and Meeker's continuation of its slow train speeds and the other elements of its above-described crossing safety protocol on both the spur track and main line track at the 134th crossing have together prevented the use of the new spur track from causing any confusion to the motoring public. Further, the short train lengths on the spur and the fact that all periods of actual spur-crossing use have been outside of weekday PM peak traffic hours have prevented spur use from queuing automobile traffic south of the spur track into Pioneer Way. Also, use of the spur did not commence until 134th roadway improvements were made that substantially improved the condition of the roadway over its long-standing poor condition. In addition, the fact that Meeker only has a single locomotive and thus has never been able to operate more than a single train on the main line track, let alone near or through the 134th crossing, at the same time has avoided any possible increase in actual risk or motorist confusion in conjunction with the use of the spur track if Meeker had more than one operational engine.

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[7] Note that a "Highway Easement" (Highway Easement No. 25874—a colored copy of which is attached as Exhibit 1) for the roadway that eventually became 134th was granted to Pierce County by the Northern Pacific Railway Company on three terms, the first of which stated:

> 1. The street or road shall be constructed ***and maintained*** in a good and workmanlike manner and kept as safe for public travel as possible. **The expense of construction and maintenance thereof shall be borne by *the grantee*; and the Railway Company shall not be liable for or assessed for any of the expense of construction or maintenance.**

(Emphasis added.)

Throughout the Entire Period of the Violation of Order 01, the Operation of the Spur Generally Complied with the Four Operating Limitations Set Forth in What Eventually Became Exhibit B to Order 03 (and, from and after the January 6, 2011 Agreement Among Meeker, Public Works, and Commission Staff as to those Four Operating Limitations, the Operation of the Spur Fully Complied with Them)

The four special operational limitations on the spur track listed as Requirement/Limitation #1 through #4 as now set forth on Exhibit B (Table 2) to Order 03 (operational limitations that are identical to Requirement/Limitation #1 through #4 agreed to on January 6, 2011 by counsel on behalf of Meeker, counsel on behalf of Pierce County Public Works, and legal counsel on behalf of Commission Staff and set forth in Table 2 attached to my January 6, 2011 letter to David W. Danner, the Commission's Executive Director and Secretary) are listed in the table below along with corresponding comments as to how those limitations related to actual spur-track operations.

SUMMARY OF COMPLIANCE WITH REQUIREMENT/LIMITATIONS #1 THROUGH #4 OF TABLE 2 FROM OCTOBER 17, 2010 THROUGH JANUARY 26, 2011

(a table attached as Exhibit B to WUTC Order 03, which table sets forth "Special Requirements and Operational Limitations Concerning Meeker Southern Railroad's Crossings of 134th Avenue East Via the Mainline and Recently Installed Spur Track Prior to Completion and Commencement of Operation of the Planned Flashing Lights Crossing Signal System")

Requirement/ Limitation #	Description of Requirement/Limitation	Comments
1	Average number of days per week that the spur track will be used for crossings of 134th: **3 days**	The time period from Sunday October 17, 2010 through January 26, 2011 is a 14½-week period. The total number of days during that period that the spur was used for crossings of 134th Avenue East was 27 days. Thus, **the average number of days per week that the spur track was used for crossing during the subject period is calculated as follows:** $\frac{27 \text{ days}}{14.5 \text{ weeks}}$ = **1.86 days per week** **That was less than the subject limitation.**
2	Maximum number of crossings per day that the	For the period from October 17, 2010 through December 18, 2010, the Exhibit A table

	spur track may be used for crossings of 134th: **4**	accompanying my February 15, 2011 letter to the Commission (Attn: Betty Young) shows that 6 crossings occurred on three different days (namely, November 5, 2010, November 8, 2010, and December 17, 2010—all three of those days being days prior to the January 6, 2011 agreement by counsel on behalf of Meeker, counsel on behalf of Pierce County Public Works, and counsel on behalf of Commission Staff) and that only 2 crossings occurred on the other 16 spur-crossing days. (Not more than four spur crossings per crossing day occurred on any day after the January 6, 2011 agreement.) For the period from December 19, 2010 through January 8, 2011, the log (spreadsheet) in Meeker's Report #1 concerning limited operation of the spur track shows that only 2 spur crossings occurred on all four of the spur-crossing days. For the period from January 9, 2011 through January 26, 2011, the log (spreadsheet) in Meeker's Report #2 concerning limited operation of the spur track and main line track shows that 4 spur crossings occurred on one day (namely, January 14, 2011) and that only 2 spur crossings occurred on all of the other three spur-crossing days. Note that the *average* number of spur crossings per spur-crossing days was as follows: (3x6) + (1x4) + (2x23) crossings = **2.52 crossings per day** 27 spur-crossing days
3	Hours during the day that spur crossings will be limited to: **9:00 AM to 3:00 PM**	For the period from October 17, 2010 through December 18, 2010, the Exhibit A table accompanying my February 15, 2011 letter to the Commission (Attn: Betty Young) only indicates a time range when the train crew was working. The actual crossing times were not logged. Except for the very first crossing day (October 17, 2010, which was a Sunday, a light traffic volume day on area roadways, on which the crew finished work at 5 PM), the crew finished its workday no later than

		2:30 PM each day. Meeker's Operations Manager, James Forgette, has advised me that on most spur-crossing days of the period, the train crew's start time was 8:00 AM and, on those days, the earliest any crossing of the spur track would have occurred would have been about 8:15 AM. For the period from December 19, 2010 through January 8, 2011, the log (spreadsheet) in Meeker's Report #1 concerning limited operation of the spur track shows that all spur crossings occurred between the hours of 9:00 AM and 3:00 PM. (Note that by December 19, 2010, on Meeker's behalf I had already discussed with Pierce County Public Works officials limiting the hours for spur crossings prior to completion of the automatic flashing-lights signal system to the hours between 9:00 AM and 3:00 PM. Accordingly, Meeker no longer ran any trains along the spur track through the 134th crossing before 9:00 AM.) For the period from January 9, 2011 through January 26, 2011, the log (spreadsheet) in Meeker's Report #2 concerning limited operation of the spur track and main line track shows that all spur crossings occurred between the hours of 9:00 AM and 3:00 PM.
4	Maximum number of train cars per train to be operated through the spur crossing: **3 cars plus an engine**	The Exhibit A table accompanying my February 15, 2011 letter to the Commission, the log (spreadsheet) in Meeker's Report #1, and the log (spreadsheet) in Meeker's Report #2 all show that the maximum number of train cars per train operated through the spur crossing was 3 cars plus an engine.

Note that by December 19, 2010, on Meeker's behalf I had already discussed with Pierce County Public Works officials flagging the crossings of 134th along the spur track by certified flaggers. Consistent therewith, during the week of December 19, 2010, flagging of the 134th crossings along the spur track by certified flaggers commenced. By the week of January 9, 2011 (following a January 6, 2011 agreement by counsel on behalf of Meeker, counsel on behalf of Pierce County Public Works, and counsel on behalf of the Commission Staff), flagging of the 134th crossings along both the spur track and main line track by certified flaggers was underway. That flagging requirement was included in Exhibit B (Table 2) to Order 03 as Requirement/Limitation #5.

Why the Commission Should Not Impose Civil Penalties on Meeker

Prior to the January 26, 2011 hearing before Judge Torem, I had my legal assistant extensively search for any WUTC civil penalty case decisions involving railroads. She found none. When I spoke to you, Ms. Woods, by phone late the afternoon of Thursday, February 17, 2011, I mentioned that to you and then asked whether you were aware of any WUTC civil penalty case decisions involving railroads. You explained to me that you have had occasion to review numerous WUTC case decisions involving railroads but had not come across and were unaware of any such case decisions involving civil penalties in the context of railroads.

I mentioned to you that my legal assistant had found a WUTC decision concerning acceptance of a settlement agreement involving a penalty in the context of the WUTC's regulatory role concerning a natural gas pipeline utility and that that case provides guidance on the question of whether or not a civil penalty should be imposed on Meeker in view of the above-noted mitigating circumstances and in view other circumstances that I will address below.

The Approach to Penalties the Commission Used in *WUTC v. Puget Sound Energy, Inc.*, Docket No. UG-001116 (the "PSE Case")

The natural gas pipeline utility case I mentioned to you concerning acceptance of a settlement agreement involving a civil penalty is *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.* (Docket No. UG-001116; 2002 Wash. UTC LEXIS 235) (July 25, 2002). (I refer below to the decision rendered in that case as the "PSE Case Opinion." A copy of that opinion that I have marked up is attached to this letter as Exhibit 2.) On pages 4 to 5 of the PSE Case Opinion, the Commission stated:

> We recognize that the primary function of penalties is to gain compliance. The direct concern of any penalty is compliance by an accused violator. An additional concern is the demonstration to other regulated entities and the public that the while the Commission encourages compliance, it will take appropriate action, including the assessment of penalties, when it discovers violations.
>
> In accepting a settlement that proposes a penalty, the Commission will look to see **whether the proposal is *proportioned* to the gravity of the apparent violations and to assure against future violations.** In setting the amount of a penalty, it is appropriate to consider many factors. These include the ***seriousness* of the violations**; **the *circumstances* of the violation**, including whether the violation is intentional; the ***cooperation* of the respondent and its willingness and achievements in rectifying violations**; the ***frequency* of violations**, and ***cooperation* in investigations**; **whether or not the violation has been *corrected***; and the ***possibility of recurrence***.

(Emphasis added.) The PSE Case Opinion at page 1 notes that the "Commission's Pipeline Safety Staff conducted an inspection of Puget Sound Energy, Inc.'s, anti-drug and alcohol misuse prevention program on July 12, 2000" and that, two days short of two years later, "[o]n July 10, 2002, the Commission issued a Complaint alleging that Puget violated WAC 480-93-010, which adopts and incorporates Title 49 of the Code of Federal Regulations ('CFR'), Part 199, by failing to maintain an anti-drug and alcohol misuse prevention plan for its covered gas pipeline employees during the years 1997 through 2000." On page 3 of the PSE Case Opinion, the Commission summarized the underlying facts of the case by noting that Puget had "failed to meet the drug testing requirements of WAC 480-93-010 and 49 CFR, part 199, ***during a four year period*** and **had no such testing program for a considerable portion of that time**." (Emphasis added.) The Commission also noted at pages 3 to 4 of the PSE Case Opinion that "[Puget] acknowledges the existence of facts from which the Commission could conclude that it had violated the rule, and proposes along with Commission Staff that the Commission simultaneously issue a complaint against it and accept a settlement between the parties that provides for payment of a penalty but no formal acknowledgment of existence of a violation." The Commission then pointed out on page 4 of the PSE Case Opinion the following:

> The circumstances of this event are of **grave concern** to the Commission. *There is a clear link between substance abuse impairment of key personnel and risk of hazard in the transportation of natural gas.* The questions that we face in this docket are how to respond to those circumstances.

(Emphasis added.)

In regard to the "actions to be taken by Puget to resolve the outstanding Complaint," the PSE Case Opinion at pages 2 to 3 summarized as follows the provisions of the settlement agreement that was before the Commission for approval:

> (1) **Puget will pay the Commission penalties *totaling $50,000*** for apparent violations of WAC 480-93-010 (Compliance with certain federal standards required), which adopts and incorporates 49 CFR, Part 199. Puget will continue to act in compliance with the substance abuse plan for covered employees that it instituted in March 2001 (the "2001 Plan"), including random drug testing at a rate equal to or greater than the required minimum level. The 2001 Plan complies with WAC 480-93-010 and 49 CFR, Part 199.
>
> (2) **Puget will spend an amount *totaling approximately $56,000*** to implement an anti-drug and alcohol misuse awareness-training program for all of its employees. This additional training will consist of a 30-minute mandatory training session for all employees covering Puget's "Substance Abuse Plan for Covered Employees" and Puget's "Substance Abuse Plan for Non-Covered Employees." The cost of this program shall be paid for with shareholder funds, and will not be recovered through rates.

(Emphasis added.)

In approving the settlement agreement with Puget, the Commission set forth on pages 5 to 7 of the PSE Case Opinion the following analysis of (a) the seriousness of Puget's violation, (b) the circumstances of the violation, (c) Puget's cooperation and attitude, (d) gaining compliance and the likelihood of recurrence, (e) the effect of a penalty, and (f) the value of settlement and appropriateness of the settlement process:

> **Seriousness of the violation.** Unquestionably, this is a serious violation. *We may never know whether lack of the required testing program allowed an impaired person to make critical judgments that will contribute to a future incident.* It is a very serious matter and warrants substantial action.
>
> **Circumstances of the violation.** The program was allowed to lapse in the period after Puget Power merged with Washington Natural Gas to become PSE. *The circumstances are by no means excusable, but they appear to be an isolated -- albeit serious -- event.*
>
> **Cooperation and attitude.** *The Company appears to have been cooperative following discovery of the problem. It did not delay progress toward rectifying the problem, and it has taken appropriate corrective action by bringing the testing program into complete compliance. Its attitude*, particularly under new corporate leadership, *has been positive.*
>
> **Gaining compliance; likelihood of recurrence.** Commission Staff is satisfied, as are we, *that the company remains in full compliance and that the likelihood of recurrence of this violation is nil.*
>
> **Effect of a penalty.** A penalty should send a message, both to companies who violate the law and to others who are watching. The message must be clear, however, and it must be thoughtfully applied. An appropriate penalty must strike the right balance and send the right message. *It must be large enough to connote the significance of the violation, yet appropriately scaled to recognize the degree of cooperation and correction obtained from the respondent.* Here, a substantially larger penalty could discourage this or other regulated companies from disclosing problems that they discover and could impair their willingness to cooperate in correcting them. The sanctions imposed in this order include a penalty and also include program enhancements at shareholder expense that might not be otherwise obtainable. We are satisfied that an acceptable balance has been struck.
>
> **Value of settlement and appropriateness of the settlement process.** The process by which this matter comes to the Commission is satisfactory and appropriate. *By cooperating in a settlement process, the Company shares*

> *responsibility and ownership of the process and the result.* While adjudications are an appropriate means of dispute resolution, they are not the only means. We believe that a less adversarial process is more likely to achieve a global resolution of issues and less likely than litigation to encourage hiding of relevant facts.

(Italics and underlining added for emphasis; boldfacing in the original.)

In regard to the seriousness of Puget's violation and the issue of Puget's cooperation and attitude, note that in the first paragraph of Commissioner Marilyn Showwalter's dissenting opinion, Ms. Showwalter stated at pages 10 to 11 of the PSE Case Opinion:

> For *four years*, PSE had virtually no drug-testing program to speak of, much less one that meets numerous state and federal requirements. These requirements are designed to ensure that the men and women who make *judgments* when burying, repairing, and operating natural gas pipelines--judgments that can have life-or-death consequences long into the future--are not affected by alcohol or drugs. The gaping breadth and gravity of PSE's abdication cannot be squared with the Settlement Agreement **in which PSE expressly denies it committed any violation.**

(Italics in the original of the opinion; boldfacing added here for emphasis.)

In the next section of this letter, I set forth a similar analysis of the circumstances in relation to Meeker's violation of Order 01 and compare it to the conclusions and decision that the Commission reached in the PSE Case to make clear why imposition of a civil penalty against Meeker would be inappropriate in view of the PSE Case Opinion.

Application of the Approach to Penalties in the PSE Case to Meeker's Violation

Seriousness of the Violation

Meeker's violation of Condition 3 of Order 01 was clear-cut and was admitted to on Meeker's behalf by Meeker's general manager, Byron Cole, at the January 26, 2011 hearing before Judge Torem. The reason Meeker violated Condition 3 was that, when Mr. Cole witnessed during the week of October 11, 2010 the unloading by Sound Delivery Service of the first two of the 27 incoming railcar loads of the 6-foot diameter, 80- to 85-foot-long, up to 33-ton pipe segments at Meeker's East Puyallup team track, he saw firsthand that public safety and the safety of the workers of Meeker's customer Sound Delivery Service would be promoted by having Sound Delivery unload its railcars at Sound Delivery's own site and newly constructed unloading dock located at the end of the Phase 1 Service Siding. Rather than violating Condition 3 of Order 01 by transporting Sound Delivery's railcars via the spur and Phase 1 Service Siding to the Sound Delivery site, Meeker should have petitioned the Commission for an amendment to

the order (or, better yet, should have completed all work for the proposed spur track and the Phase 1 Service Siding shown on the design drawings before that point in time).

However, as clear-cut (and galling) as Meeker's admitted violation was, close examination of the associated circumstances makes clear that public safety was not compromised by the premature start of the operation of the spur line and Phase 1 Service Siding. As I pointed out in detail on pages 3 to 7, above, under the particular operational circumstances at hand, use of the spur for transit of Sound Delivery's railcars during the period of the violation posed no significant safety risk to motorists or pedestrians at the 134th crossing.[8] Not only was that the case, overall public safety and worker safety were enhanced by the spur's premature use because that use enabled the unloading of Sound Delivery's railcars of big, heavy, lengthy pipe at Meeker's East Puyallup Yard and Shops Facility to cease.

The lack of even short-term public safety risks posed by Meeker's violation (and the lack of any accident having occurred as a result of the violation) is in sharp contrast with the tremendous, long-term risks to public safety posed by Puget's four-year-long failure to have a required drug-testing program as described in the PSE Case. As Commissioner Marilyn Showwalter stressed in her dissenting opinion in that case, the drug and alcohol-testing program requirements are "designed to ensure that the men and women who make *judgments* when burying, repairing, and operating natural gas pipelines--judgments that can have life-or-death consequences long into the future--are not affected by alcohol or drugs." (Emphasis in the original.) No one can know what the ultimate future consequences of Puget's violation will be. In comparison with Meeker's violation, Puget's violation was obviously far, far more serious.

Circumstances of the Violation

Like Puget's violation, Meeker's violation was an isolated event. However, unlike Puget's violation, Meeker's violation sought to and actually did enhance overall public safety and worker safety, while Puget's violation appears to have put both the public safety and worker safety at great risk.

Cooperation and Attitude

Like Puget, Meeker was cooperative following Commission Staff's discovery of the violation in Mr. Cole's December 1, 2010 email to Ms. Hunter. The following chronological summary demonstrates beyond any doubt the tremendous and consistent positive efforts that Meeker has made to cooperate with the Commission, Commission Staff, and Public Works to remedy the violation and bring the crossing modification project to a successful conclusion.

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[8] Further, as I pointed out in detail on pages 8 to 10, above, throughout the entire period of the violation of Order 01, the operation of the spur generally complied with the four operating limitations set forth in what eventually became Exhibit B to Order 03 (and, from and after the January 6, 2011 date of the agreement among Meeker, Public Works, and Commission Staff as to those four operating limitations, the operation of the spur fully complied with all of them). Meeker's compliance with those limitations during the period of the violation evidences the lack of safety risks posed by the limited spur usage during the period of the violation.

At 4:28 PM on December 7, 2010, Kathy Hunter emailed Byron Cole a letter from David W. Danner addressed to him and Meeker, a letter that called for a written response by December 20, 2010. The very next day (December 8, 2010), Mr. Cole and I phoned Ms. Hunter and had a three-way discussion with her concerning Mr. Danner's letter, our ideas for proposed limitations for interim spur-crossing use until the flashing lights signal system is completed, and our suggestion of a site meeting with her to show her firsthand the crossing operations and the safety thereof. She explained that she wanted us to submit a written proposal to her before she decided whether to meet with us. I told her I planned to prepare one and email it to her within the next few days. She then suggested that (a) I speak to you, Ms. Woods, about procedural issues concerning our proposal for approval to deviate from Order 01 and (b) I review portions of WAC 480-07 on DNR procedural rules.

Later in the day on December 8, 2010 (after I had reviewed portions of WAC 480-07), I spoke by phone with you, Ms. Woods, regarding the Commission's authority under WAC 480-07-875 and RCW 81.04.210 to amend orders, regarding procedural issues, regarding your suggestion that I (a) file a Motion to Amend the Order Approving the Petition for the Crossing Modification and (b) serve copies of the Motion on both the Commission and Pierce County Public Works and Utilities, and regarding a plan for me also to send a reply letter to Mr. Danner.

On the morning of Friday, December 10, 2010, I spoke to Pierce County Deputy Prosecuting Attorney John Salmon regarding Mr. Danner's letter, Public Works' concerns, my suggestion of a site meeting with Public Works' engineers Jerry Bryant and Marlene Ford, and Mr. Salmon's suggestion that I phone Mr. Bryant. Later that morning, you, Ms. Woods, were kind enough to send me a detailed email of materials that would aid me in preparation of a motion to amend Order 01. After reviewing it, I emailed you a response still that morning.

On the afternoon of December 10, 2010, I spoke by phone with Mr. Bryant regarding issues Public Works has with portions of the road improvements that have been constructed, regarding our ideas for proposed limitations for interim spur-crossing use until the flashing-lights signal system is completed, and regarding a plan for a site meeting with him and Ms. Ford the next Wednesday (December 15, 2010) to examine things firsthand and discuss those matters. (Mr. Cole and I wanted to have that meeting with the Public Works officials to attempt to resolve concerns that they had before we had further follow-up with Ms. Hunter. Mr. Cole and I wished to seek to achieve consensus with both agencies on outstanding issues as quickly as possible, and we did not want to submit a written proposal to Ms. Hunter until we had a reasonable expectation that it would be acceptable to Public Works.)

On Tuesday, December 14, 2010, Mr. Cole (who had a terrible cold) and I tried to reach Mr. Bryant by phone and eventually that afternoon reached Ms. Ford by phone and requested that the site meeting be postponed a day (i.e., until Thursday, December 16, 2010) due to the seriousness of Mr. Cole's cold. Ms. Ford kindly agreed to a day's postponement and contacted Mr. Bryant who, late the day of December 14, phoned me to confirm that the two of them would meet with me and Mr. Cole at the site at 9:00 AM on December 16.

On Wednesday morning, December 15, 2010, Mr. Cole and I phoned Ms. Hunter and I explained to her my recent contact with Mr. Bryant, the meeting we had originally arranged for that day at the site with Mr. Bryant and Ms. Ford, and our postponement of the meeting until the next day due to Mr. Cole's terrible cold. I then asked Ms. Hunter whether she could meet with Mr. Cole and me on Friday. She said that that she could not do so because she is off on Fridays, so I asked whether she could join us the following morning at the site. She said that she did not have time in her schedule to do so and that she wanted to receive our written response to Mr. Danner's letter first. She then said that she understood from you, Ms. Woods, that we were considering proposing an amendment to Order 01. I confirmed that that was the case and that I expected to get out the response and a motion for such an amendment to Order 01 by Monday, December 20, 2011.

At 9:00 AM on Thursday morning, December 16, 2010, Mr. Cole and I met at the site with Mr. Bryant and Ms. Ford and discussed 134th roadway issues, a ponding issue, and Mr. Cole's interim spur-use proposal. During the course of the meeting, we negotiated a tentative agreement with them concerning those issues and Mr. Cole's interim spur-use proposal. The tentative agreement included, at Ms. Ford's request, having certified flaggers flag the spur crossing for all train movements through 134th along the spur track. We arranged that I would prepare and email Mr. Bryant the next day a summary of the tentative agreement for his review and feedback and that Mr. Bryant and/or Ms. Ford would meet with County Engineer Brian Stacy on Monday, December 20, 2010 (the next day that he was scheduled to be back in his office) to see whether he would go along with it.

In view of the progress we made during our site meeting with Mr. Bryant and Ms. Ford, I phoned Sitts & Hill Engineers' Robert Dahmen, P.E. (Meeker's principal civil engineering consultant for the 134th crossing project) and was able to arrange for him and Sitts & Hill Engineers' Don Davis, P.E. (Meeker's civil design engineering consultant for the 134th crossing project) to meet with Mr. Cole and me at the site while he and I were still there. Shortly thereafter, Mr. Dahmen and Mr. Davis arrived. Mr. Cole and I met with them to go over the site and explain the site meeting we had had that morning with Mr. Bryant and Ms. Ford. We discussed (a) design details relating to the tentative agreement concerning the 134th road issues and resolution of the ponding issue that we had reached with Mr. Bryant and Ms. Ford, (b) arrangements for a Sitts & Hill survey crew to do additional field topographic survey work the next day (to provide data for supplemental and/or revised design drawings), and (c) arrangements for Sitts & Hill to prepare supplemental and/or revised drawing sheets and have them ready by the beginning or middle of the next week.

Early evening the following day (December 17, 2010), I emailed Mr. Bryant for his review the first drafts of Tables 1 and 2 that I had prepared in consultation with my client (the tables that, after numerous revisions, eventually became Exhibits A and B to Order 03). In the late afternoon of that day, I had arranged by phone with Mr. Bryant to email those two tables to him at home and for us to discuss them and work further on them the next day, Saturday, December 18, 2010.

On Saturday, December 18, 2010, Mr. Bryant and I had phone discussions about and exchanged email of and about revised drafts of proposed Tables 1 and 2. At the end of those exchanges, he explained to me that the revised drafts of proposed Tables 1 and 2 were acceptable to him. We agreed that I would then email both him and Ms. Ford the latest version of those two tables for them to print out and present to Mr. Stacy on Monday, December 20, 2010.

On Saturday, Sunday, and Monday (December 18, 19, and 20, 2010), in consultation with my client, I prepared Meeker's Motion to Amend Order 01, as well as a proposed form of Amending Order and a letter to Mr. Danner responding to his December 7, 2010 letter to Mr. Cole. A PDF set of the letter, motion, and proposed form of Amending Order were emailed to Mr. Danner and the Commission's Records Center late the afternoon of Monday, December 20, 2010, and hard copies were hand-delivered to the Records Center first thing the next morning. Copies were also provided to Mr. Bryant and Ms. Ford at Public Works and to Pubic Works' attorney John Salmon.

On December 21, 2010, I phoned Danni Colo, an assistant to Pierce County's Deputy County Executive Kevin Phelps, to arrange the earliest possible conference with Mr. Phelps (January 6, 2011 was the earliest date he was available) to discuss the Public Works issues that are involved. I also discussed with Ms. Colo the possibility of having Mr. Stacy attend that conference.

On December 22, 2010, Sitts & Hill Engineers, Inc. had completed a supplemental civil design drawing sheet and revised version of some of the previous drawing sheets. Sets of those sheets were hand-delivered under a cover letter from me to Ms. Ford late that afternoon, and two sets were overnighted to Ms. Hunter that afternoon as well. I spoke by phone to Mr. Bryant late that afternoon and advised him that a delivery of the sets of drawings was being made to Ms. Ford.

On December 23, 2010, I spoke with you, Ms. Woods, by phone regarding the outcome of a conference call you and Ms. Hunter had that day with Mr. Salmon, Mr. Bryant, and Ms. Ford, regarding your explanation that an administrative law judge would be assigned to this matter, regarding Mr. Danner's December 23, 2010 letter to Mr. Salmon, and regarding my question whether Ms. Hunter had received the civil drawings via FedEx. Ms. Woods, you kindly checked and emailed me to confirm that Ms. Hunter had received the drawings.

On December 30, 2010, I received a copy of a letter from Mr. Stacy to Mr. Danner and began to review it with Mr. Cole.

On January 3, 2011, I spoke by phone with you, Ms. Woods, to confirm a conference call the next day with you and Ms. Hunter and Mr. Cole at 9:30 a.m., to explain that Mr. Cole and I disagree with much of Mr. Stacy's December 30, 2010 letter to Mr. Danner, and to ask whether I could submit a rebuttal to that letter. You, Ms. Woods, explained that I should file a request for

leave to do so if I wanted to submit a rebuttal and further explained that I could file such a request with Mr. Danner.

On January 4, 2011, Mr. Cole and I had a phone conference with you, Ms. Woods, with Ms. Hunter, and with Paul Curl (who joined us a little late). I explained Meeker's contentions concerning portions of Mr. Stacy's letter to Mr. Danner, and Mr. Cole commented on the 134th crossing. We also discussed flagging of the crossing, and we agreed that I would file a request to Mr. Danner by Thursday, January 6, 2011 for leave to submit both (a) a reply to Mr. Stacy's letter and (b) a reply to the response to Meeker's motion that you explained that Commission Staff planned to send out later that day. During that conference call, I also questioned whether the Commission has authority to impose a financial-guarantee requirement and you, Ms. Woods, explained that you were unsure but would email me a citation to the statute concerning cost apportionment. At the end of our call, Mr. Cole invited Commission Staff to visit the site and observe a spur-crossing operation.

Also on January 4, 2011, I received via email from Commission Staff member Betsy DeMarco the Commission Staff's response to Meeker's Motion to Amend Order 01. I discussed it with Mr. Cole later that day by phone and in my office the next day.

On the morning of January 6, 2011, Mr. Cole, Sound Delivery's Terry Lawrence, and I met with Deputy Pierce County Executive Kevin Phelps, Joe Phillips of the County Executive's Office, County Engineer Brian Stacy, Public Works' Jerry Bryant, and Deputy Pierce County Prosecutor John Salmon at Mr. Phelps' office. We discussed right-of-way permit issues, Public Works' plan to consider whether to provide (a) a single right-of-way permit for all work in the right-of-way or (b) a separate right-of-way permit for the signal-system improvements and one for the road improvements, Public Works' willingness to consider our proposed assignment of Meeker's claim against Pierce County Parks and Recreation in lieu of a bond for work in County right-of-way, interim flagging, and Public Works' willingness to have the flagging done only during the portion of the day when the spur was being used.

Also during the afternoon of January 6, 2011, I spoke by phone with Mr. Salmon regarding my explanation of my phone conference with you, Ms. Woods, and with Ms. Hunter and Mr. Curl on Monday, January 4, 2011 about my interest in submitting a reply to Mr. Stacy's letter to Mr. Danner and to the Commission Staff's response to our Motion to Amend Order 01. I explained to Mr. Salmon that in view of (a) the progress we had made during the meeting that morning (January 6, 2011) at Mr. Phelps' office and (b) the progress we were making toward settling the issues it seemed to me that we should propose to Mr. Danner a pause in the Commission's process to give us time for settlement before a reply would be due. Mr. Salmon told me that he would be willing to go along with a 14-day time period. Immediately thereafter, Mr. Salmon and I spoke with you, Ms. Woods, on a three-way call regarding my explanation of the meeting we had had that morning at Mr. Phelps' office and my explanation that Mr. Salmon and I were in agreement about a 14-day period during which I could submit a reply while we continued to negotiate outstanding issues. You, Ms. Woods, then contacted Ms. Hunter about the 14-day period and phoned me back to confirm that it was acceptable if Meeker would agree

to provide the interim reporting to Commission Staff called for in the Commission Staff's response. After you, Ms. Woods, and I left a voice mail message for Mr. Salmon to that effect, I phoned Mr. Cole and confirmed that the interim reporting during the 14-day period would be acceptable to Meeker. You, Ms. Woods, and I then had a three-way phone conference with Mr. Salmon concerning the time frame and Mr. Cole's agreement to have Meeker do the requested reporting, and we agreed that Meeker's reply would be due on Friday, January 21, 2011. I then prepared and sent out a letter to Mr. Danner advising him of the arrangement that the three of us reached on behalf of Meeker, Public Works, and (I had thought) the Commission. (At the January 26, 2011 hearing, Judge Torem clarified that Commission Staff did not have authority to bind the Commission without express authorization by the Commissioners or one of the Commission's administrative law judges to do so.)

During the afternoon of January 7, 2011, I spoke by phone with Mr. Bryant regarding his explanation that he had completed his review of the revised civil drawings and that he was awaiting drawing comments from Ms. Ford, regarding right-of-way permit issues, and regarding financial-guarantee issues.

On the afternoon of January 10, 2011, I sent a letter via email and U.S. Mail to Mr. Bryant, Ms. Ford, Mr. Salmon, Ms. Hunter, and you, Ms. Woods, regarding flagger cards with attachments.

On January 12, 2011, I emailed to Mr. Bryant, Ms. Ford, Mr. Salmon, Ms. Hunter, and you, Ms. Woods, a letter from me along with the first of Meeker's agreed-upon reports (Report #1) concerning compliance with the agreed-upon spur-operating limitations and requirements.

On January 13, 2011, I met with Mr. Bryant at his office to discuss the 1912 Highway Easement and an exhibit drawing that Meeker had Sitts & Hill Engineers, Inc. prepare relating to it, to existing conditions, and to the project design layout. I explained to him that, within the land area encompassed by the 1912 Highway Easement, the County does not have road right-of-way but only easement rights and that a right-of-way permit thus should not be required for the remaining signal-system work (all of which lay outside of County road right-of-way). Mr. Bryant and I also reviewed and discussed Ms. Ford's red-marked comments on Sitts & Hill's revised civil drawings, which I took with me and provided to engineers Robert Dahmen and Don Davis at Sitts & Hill for their review and follow-up work.

On January 14, 2011, Mr. Cole and I had the first of two meetings with Mr. Dahmen and Mr. Davis at Sitts & Hill to review and discuss Ms. Ford's red-marked drawing comments and to discuss follow-up drawing-revision work that Mr. Davis was to do.

On January 18, 2011, Mr. Cole and I had the second of two meetings with Mr. Dahmen and Mr. Davis at Sitts & Hill to continue review of Ms. Ford's red-marked drawing comments and to discuss follow-up drawing-revision work, as well as portions of Ms. Ford's comments that needed to be discussed with her and Mr. Bryant. I phoned Mr. Bryant to arrange a meeting at the Public Works office with Mr. Bryant and Ms. Ford the following afternoon.

On the morning of January 19, 2011, I spoke with Mr. Salmon to introduce to him the right-of-way issue that I had discussed with Mr. Bryant on January 13, 2011 and to explain that I wanted to meet with him about it. Mr. Salmon suggested that he and I both meet with Mr. Bryant about it while I was at the Public Works office that afternoon. Mr. Salmon then phoned Mr. Bryant and phoned me back to confirm that he had made such an arrangement with Mr. Bryant.

On the afternoon of January 19, 2011, Meeker's engineers Mr. Dahmen and Mr. Davis attended a meeting with me at Public Works along with Mr. Bryant and Ms. Ford. (Mr. Salmon arrived in the middle of the meeting.) Mr. Davis brought in sets of further-revised civil drawings and pointed out how those drawings addressed various of Ms. Ford's and Mr. Bryant's revision requests. Also discussed and debated were (a) some of the other drawing revision requests that Ms. Ford made, (b) the appropriateness of some of those requests, and (c) approaches to addressing them. After Mr. Salmon arrived, we discussed the 1912 Highway Easement and the Sitts & Hill map exhibit relating to that easement and to potential prescriptive right-of-way for the portion of the existing 134th roadway lying outside of that easement. I explained that no County right-of-way permit should be required for completion of installation of the signal system because all of the work would be performed outside of the actual County right-of-way, and Mr. Bryant agreed to explain the matter to Mr. Stacy and ask him whether he would agree to not object to that work being done without a right-of-way permit.

Late in the afternoon of January 19, 2011, I received an email message from the Commission's "Document Service Queue" forwarding a "Notice of Hearing and Order to Show Cause Why Meeker Should Not Be Fined for Violating Order 01." I discussed that notice and order briefly with you by phone, Ms. Woods, that afternoon.

On the morning of January 20, 2011, I spoke further by phone with you, Ms. Woods, concerning the Show Cause Order and concerning whether Ms. Hunter had completed her review of the revised civil drawings. I then sent Ms. Hunter an email letter explaining (a) that Public Works had provided us with its review comments on the afternoon of January 13, 2011, (b) that, in response, Meeker's consulting engineers, Sitts & Hill Engineers, Inc., had made several revisions to the drawings and presented a proof set to Mr. Bryant and Ms. Ford on January 19, 2011 at a meeting I attended at the Public Works office in Tacoma, (c) that, during that meeting, consensus had been reached on a few last minor revisions to be made to the drawings, (d) that the drawings had been subsequently made ready for resubmittal to Public Works, and (e) my questions as to whether she (Ms. Hunter) had any comments on the drawing set sent to her on December 22, 2010 and whether I should simply have Sitts & Hill overnight to her the latest set of the drawings for her to review.

Also on the morning of January 20, 2011, Mr. Bryant phoned me regarding his follow-up comments concerning proposed road shoulder bedding, regarding his intention to email me his requested alternative approach, and regarding his explanation that he wants Sitts & Hill Engineers to provide structural calculations concerning the concrete bases for the flashing lights

signal assemblies. I told him that I would ask Sitts & Hill to provide those calculations (which I did and which were submitted to Public Works). Mr. Bryant also explained that he left a voice mail message for Mr. Stacy. In addition, Mr. Bryant told me of his follow-up discussion with Ms. Ford concerning her agreement that the *Engineering Review and Evaluation (Third Revised Version dated December 31, 2009)* for the crossing contemplates multiple customers (which was contrary to the position that Public Works had taken in Mr. Stacy's December 30, 2010 letter to Mr. Danner). Mr. Bryant tentatively arranged with me to have a follow-up call with me and Ms. Ford around 3:00 or 3:30 that afternoon to discuss a remaining outstanding question that Ms. Ford had concerning the potential for back-and-forth train movements along the spur through the 134th crossing associated with the planned future Phase 2 Service Siding.

On the afternoon of January 20, 2011, I received a reply email message from you, Ms. Woods, regarding Ms. Hunter's revision request concerning the revised civil drawings. I forwarded that message to Mr. Dahmen and Mr. Davis at Sitts & Hill Engineers (as well as to Mr. Cole) and they made the requested revision to the drawings.

Also on the afternoon of January 20, 2011, I received an email message from Mr. Bryant to confirm a time that afternoon for the planned phone call with him and Ms. Ford. I emailed him back to advise him that three paper sets of the updated civil drawings should arrive that afternoon at his office between 3:30 and 3:45. (They were delivered to Mr. Bryant along with the structural calculations he had requested.)

In addition, on the afternoon of January 20, 2011, I spoke with you, Ms. Woods, by phone regarding the Commission Staff's response to our Motion to Amend Order 01 and regarding Meeker's willingness to amend the [Proposed] Order Amending Order 01 in view of it. During our discussion, you also explained to me that the Show Cause Order that was sent to us a few days before not only involved a hearing on January 26, 2011 on the issue of a potential civil penalty but also a hearing on our Motion to Amend Order 01. I explained to you that I would like to reach agreement with Commission Staff and Public Works on all remaining issues before the hearing, if possible, and I proposed a three-way call with you, Ms. Woods, and Mr. Salmon the next day. You explained that you would be off work the next day but in on Monday, January 24, 2011. Accordingly, I explained that I would try to arrange a three-way phone conference with you and Mr. Salmon for that Monday afternoon.

Further on the afternoon of January 20, 2011, I spoke with Mr. Bryant and Ms. Ford by phone regarding Ms. Ford's explanation of her concern about potential back-and-forth train movements over the crossing during switching between the Phase 1 and Phase 2 Service Sidings, regarding my suggestion of a concept for an operating condition that would address her concern, and regarding my plan to prepare and email her a draft for her review and approval.

On the morning of January 21, 2011, I phoned Mr. Bryant regarding the January 26, 2011 hearing and explained that it would be helpful to have the revised civil drawings signed off by Public Works before then. He told me that he did not see any reason why they could not be

signed off by then and that he would review the updated revised drawings and the returned mark-ups of the previous set that day (January 21).

Also on the morning of January 21, 2011, I phoned Mr. Salmon regarding my phone conference the previous afternoon with you, Ms. Woods. I explained to him that the January 26, 2011 hearing is on our Motion to Amend Order 01, as well as on the Show Cause matter, and I requested a three-way phone conference with him and you, Ms. Woods, on Monday, January 24, 2011. Mr. Salmon responded by telling me that he would not be available on that Monday. Accordingly, he and I tentatively planned for 9:30 a.m. three-way phone conference with you, Ms. Woods, on the following Tuesday (January 25, 2011). I also explained to him that (a) I would be working on a revised draft [Proposed] Order that day (January 21, 2011) to reflect the issues that had been resolved through negotiation and (b) I would email it to him and Mr. Bryant as soon as possible.

During the afternoon of January 21, 2011, I prepared and emailed to Mr. Salmon and Mr. Bryant for their review (a) a redlined revised draft 2a of Meeker's [Proposed] Order Amending Order 01, (b) a redlined revised Exhibit A attachment to the [Proposed] Order, and (c) Meeker's previously proposed Exhibit B to the [Proposed] Order (for reference). I spoke briefly by phone with Mr. Salmon shortly thereafter and he told me that he could squeeze in a call with me at 9:00 a.m. on Monday, January 24, 2011 after all and that he would phone Mr. Bryant to see whether he could join us on the call then.

Also on the afternoon of January 21, 2011, Mr. Cole met at the City of Puyallup with Dan Handa, P.E., a civil engineer with City of Puyallup Development Services, to discuss getting a City of Puyallup right-of-way permit for the installation of the flashing-lights signal assembly on the south side of the spur track planned to be located slightly within the City's 134th Avenue East right-of-way. Mr. Cole left Mr. Handa a set of the civil design drawings to further review in that regard.

Late in the afternoon of and throughout the night of Friday, January 21, 2011 and until 3:24 a.m. on Saturday, January 22, 2011, I worked (in phone consultation with Mr. Cole) on preparation of (a) a reply to Public Works and Commission Staff responses to Meeker's Motion to Amend Order 01, (b) two more redlined, revised drafts (drafts 2b and 2c) of Meeker's [Proposed] Order Amending Order 01, as well as a clean draft 2c, (c) redlined and clean revised versions 2b of Exhibit A, (d) redlined and clean revised versions 2 of Exhibit B, (e) a letter to Mr. Danner and Judge Torem, and (f) an email letter to Mr. Danner, Judge Torem, and the Commission's Records Center forwarding all the documents (with copies to Mr. Cole; Ms. Hunter; you, Ms. Woods; Mr. Salmon; Mr. Stacy; Mr. Bryant; Ms. Ford; and Sound Delivery's Terry Lawrence). My legal assistant hand-delivered hard copies of the documents to the Commission's Records Center early on Monday morning, January 24, 2011.

On Monday morning, January 24, 2011, I had a speakerphone conference with Mr. Salmon, Mr. Bryant, and Ms. Ford regarding the documents I emailed out during the wee hours of Saturday morning and regarding Meeker's proposed assignment of Meeker's claim against

Pierce County Parks and Recreation for moneys owed on another matter (an assignment that Meeker proposed as an alternative to Public Works' insistence on a performance bond for the remaining roadway work).

Later on Monday morning, January 24, 2011, I had a phone discussion with you, Ms. Woods, regarding a plan for us to have a 10:00 a.m. three-way conference call the next day with Mr. Salmon, regarding your explanation to me that you planned to meet with Commission Staff at 8:00 a.m. the next day concerning this matter, and regarding your explanation that from your reading of the revised materials I send out you had no objections to them. I emailed Mr. Salmon to advise him of the planned three-way call.

During the afternoon of January 24, 2011, at the request of Mr. Cole, I prepared draft 3a of Condition 4 of the [Proposed] Order and emailed it to Ms. Ford for her review (because it addressed the future possible back-and-forth train movements she had expressed concerns about). I then discussed it with her by phone, and she told me that it was acceptable to her. I then sent her a confirming email.

Later on January 24, 2011, I prepared a redlined revised draft 3a of the [Proposed] Order and a redlined revised version 3 of Exhibit B to that order.

Late in the evening of January 24, 2011, I prepared an initial draft of the Assignment [to Public Works] for Security of the Claim for Reimbursement and a draft Exhibit A (Table 1) to that proposed assignment.

After phone consultation with Mr. Cole, on the morning of January 25, 2011, I emailed Mr. Salmon and Ms. Woods Meeker's proposed redlined revised draft 3a of the [Proposed] Order and redlined revised proposed version 3 of Exhibit B to it. I also left a voice mail message for Mr. Bryant asking him about the status of Public Works' review of the latest submittal of the drawings.

Also, after phone consultation with Mr. Cole, on the morning of January 25, 2011, I emailed Mr. Salmon a draft of the proposed Assignment [to Public Works] for Security of the Claim for Reimbursement and a draft Exhibit A (Table 1) to it. I also left a voice mail message for Ms. Ford asking about the status of the approval of the civil drawings and explaining a change that I planned to make to paragraph 5 of the draft [Proposed] Order.

In addition, on the morning of January 25, 2011, I had a three-way call with Mr. Salmon and you, Ms. Woods, regarding (1) your revision requests to draft 3a of the [Proposed] Order, (2) discussion of the preference that all three of us had to deal with our Motion first at the next day's hearing, (3) my plan to have civil engineer Robert Dahmen, P.E. attend that hearing ready to provide testimony in case the judge wanted to hear such testimony, and (4) the Show Cause portion of the hearing.

Late in the morning of January 25, 2011, I spoke by phone with Ms. Ford regarding Public Works' progress on the review of the civil drawings, and she explained that they would have their review of the revised civil drawings completed by noon with minimal comments and that we could (a) pick up their mark-up of those drawings with their comments, (b) have Sitts & Hill make the final requested revisions, and (c) have Sitts & Hill submit mylars of the drawings to Public Works for approval signatures that afternoon. I made arrangements for the pickup and for Sitts & Hill to make the final requested revisions and submittal of the mylars of the drawings to Public Works. County Engineer Stacy signed the approval block on each mylar drawing later that afternoon.

During the afternoon of January 25, 2011, I spoke further with Ms. Ford concerning her maximum-train-length issue. I then prepared a redlined revised draft 3b of the [Proposed] Order and also prepared a redlined revised version 3b of Exhibit B to the [Proposed] Order and then emailed them to you, Ms. Woods, along with my comments and my explanation that the revised civil drawings had been signed off by Public Works (with a copy of the email also being sent to Mr. Salmon).

On the morning of January 26, 2011, Mr. Cole and I participated in the hearing before Judge Torem. During the recess, we were able to successfully negotiate with Public Works and Commission Staff final language for a mutually agreed-upon [Proposed] Order to present to Judge Torem following the recess, an order that he signed before the end of the hearing with just one minor additional (agreed-upon) revision. (The judge marked it as Order 03.)

During the afternoon of January 26, 2011, Mr. Salmon and I reached agreement on the final form of the Assignment [to Public Works] for Security of the Claim for Reimbursement, which Mr. Cole then signed on behalf of Meeker and gave to Mr. Salmon for countersignature on behalf of Public Works.

Late in the afternoon of January 26, 2011, you, Ms. Woods, phoned me and explained that you would like to schedule a February 1, 2011 call with me that you as well as Ms. Hunter, Mr. Curl, and you, Ms. Young, would all participate in concerning getting records from Meeker of train movements (especially commercial train movements to Sound Delivery). I agreed to have that call at 1:00 p.m. on February 1.

On January 27, 2011, Meeker asked me to assist in securing a City of Puyallup right-of-way permit for the installation of the flashing-lights signal assembly planned in the City of Puyallup's 134th Avenue East right-of-way. That afternoon, after reviewing Puyallup's code provisions concerning right-of-way permits, I spoke by phone with Dan Handa, P.E., a civil engineer with City of Puyallup Development Services, regarding my explanation of the right-of-way permit that Meeker needs, the Public Works-approved revised civil drawings, and Order 03. He explained that he had previously met with Mr. Cole and had reviewed a set of the drawings that Mr. Cole had provided him. Mr. Handa told me that the proposed location of the flashing-lights signal assembly is not a problem with the City's traffic engineer but that he (Mr. Handa) has consulted with City Attorney Cheryl Carlson and she had advised him that, in order to secure

a right-of-way permit, an agreement between Meeker and the City concerning the installation of the flashing-lights signal assembly in City right-of-way will be required.

After doing further research in Puyallup's municipal code, I phoned City Attorney Carlson later in the afternoon of January 27, 2011 and explained my phone conference with Mr. Handa. She acknowledged that Mr. Handa had spoken to her about Meeker's right-of-way permit request and that she had been holding things up. She explained that before making a decision about what would need to be done, she wanted information about Meeker's rail corridor property rights. During our discussion, I gave her an explanation of the history of the rail corridor, the railroad easement that BNSF conveyed to BTRC, and the railroad easement for the spur track that the County conveyed to BTRC. She requested copies of the easement instruments and I promised to email them to her by the next day. I also explained that there is a WUTC Order requiring signal-system completion operation by March 18, 2011 and, in light of it, I requested her cooperation in expediting the right-of-way permit's issuance. She requested a copy of Meeker's crossing petition to the Commission, and I promised to email her a copy of it. Our phone discussion was cordial.

During the evening of January 27, 2011, I prepared and sent an email letter to Ms. Carlson forwarding a completed right-of-way-permit application and corresponding map exhibits, the November 2000 Easement from BNSF to BTRC, the Agreement Regarding Easements for Railroad and Slope Purposes between the County and BTRC, Meeker's Petition to the WUTC to Modify the Grade Crossing, my 1/4/10 letter to the Commission's Executive Director David Danner that forwarded that petition to the Commission, Order 01 approving the Petition on January 12, 2010, Order 03 (amending Order 01), and the January 25, 2011 six-sheet set of the revised, Public Works-approved civil design drawings along with my comments. (I copied Mr. Cole and Mr. and Handa on that email).

On the morning of Monday, January 28, 2011, I received a reply email message from Ms. Carlson acknowledging receipt of my email letter and the attached documents. I left her a voice mail message requesting a call back to discuss whether she by then had enough information and was ready to release the "hold" she had put on the proposed right-of-way permit.

A little later on the morning of Monday, January 28, 2011, I spoke by phone with Mr. Handa. I explained my phone discussion with Ms. Carlson the previous afternoon and that she had promised to review the matter further. I then asked him questions concerning the completed application form that I had emailed to Ms. Carlson (and copied him on) the night before, and we discussed details of some additional materials that the signal-system contractor would need to submit to the City in relation to the proposed right of way permit before it would be issued.

On the morning of January 31, 2011, I left an additional voice mail message for Ms. Carlson asking whether she was by then satisfied and would take the "hold" off of the proposed City of Puyallup right-of-way permit.

On Monday, January 31, 2011, in compliance with item 4 of Exhibit A (Table 1) to Order 03, Meeker had a contractor create some crushed-rock temporary roadway shoulders along portions of the edges of 134th Avenue East near the crossing. [Note that in view of item 9 of Exhibit A (Table 1) to Order 03,[9] neither a permit to work within the Pierce County road right-of-way nor a preconstruction conference with Pierce County Public Works was required for that temporary shoulder work, work that took only about half a day to complete.]

On January 31, 2011, I emailed to Mr. Danner, Judge Torem, and the Commission's Records Center PDFs of a letter from me addressed to Mr. Danner and Judge Torem along with Meeker's Report #2 concerning compliance with the spur-operating limitations and requirements set forth in Exhibit B (Table 2) attached to Order 03 (and I copied on that email Mr. Cole; James Forgette; Ms. Hunter; you, Ms. Woods; Mr. Salmon; Mr. Stacy; Mr. Bryant; and Ms. Ford). Five sets of hard copies of the items attached to the email were also mailed to Mr. Danner and Judge Torem in care of the Records Center.

Early in the afternoon of February 1, 2011, I emailed to you, Ms. Woods, and Ms. Hunter an Excel spreadsheet concerning spur trips to Sound Delivery from 10/17/10 through 12/18/10 that Meeker's Operations Manager, James Forgette, emailed me on 1/26/11. Immediately thereafter, I participated in the scheduled speakerphone conference with you, Ms. Woods, and with Ms. Hunter, Mr. Curl, Ms. Young, and the Commission's Assistant Director of Transportation Safety David Pratt regarding the Excel spreadsheet that I had just sent. During that call, I explained that Meeker creates month-by-month spreadsheet logs of all freight railcars that Meeker handles, and a request was made that I provide copies of those logs for the months of October 2010 through January 2011, which I agreed to provide to them. Also during the call, Ms. Hunter requested that by February 15, 2011 Meeker provide a report for the time period of October 17, 2010 through December 18, 2011 similar to Reports #1 and #2 (which I agreed to ask Meeker to create), and Mr. Pratt suggested that I prepare a memorandum setting forth mitigating circumstances (which I said I would provide but not by February 15, 2011 because of other pressing matters that I needed to attend to).

On the afternoon of February 7, 2011, I phoned Mr. Handa and asked him whether Ms. Carlson had told him yet whether or not an agreement between Meeker and the City would be required. He explained that she had not yet done so. Mr. Handa added that per a request from Mr. Cole, he (Mr. Handa) had phoned Ms. Ford to let her know that Meeker was seeking a right-of-way permit from Puyallup.

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[9] The first paragraph of item 9 of Exhibit A (Table 1) to Order 03 states:

> Prior to Meeker commencing any work associated with ***items 6, 7 and 8***, above, a permit to work within the Pierce County road right-of-way will be obtained from Pierce County Public Works and a preconstruction conference will be held.

(Emphasis added.)

Following my phone discussion with Mr. Handa, that same afternoon of February 7, 2011, I left a voice mail message for Ms. Carlson and sent an email message to her as well requesting a call back to discuss this matter.

On the afternoon of February 8, 2011, I left another voice mail message for Ms. Carlson, reminding her that it had by then been nearly two weeks since I had spoken to her and emailed her the documents she had requested and that I badly needed feedback from her. I again requested a call back.

On the morning of February 9, 2011, I attempted to reach Ms. Carlson by phone and, when my call was about to go to her voice mail, I spoke to a receptionist in the Puyallup City Attorney's office who said Ms. Carlson was in that day but was not available. I asked the receptionist to ask her to please call back. I then sent an email message to Ms. Carlson requesting that she propose a time for a scheduled call. Shortly thereafter, I received a call back from Ms. Carlson's paralegal, Frieda Cramer. She apologized on Ms. Carlson's behalf for not getting back to me sooner and explained that Ms. Carlson had been "snowed" with meetings and meeting preparations the last two weeks but was planning to try to phone me that afternoon. (When, shortly after 5:00 p.m., I still had not received a call from Ms. Carlson, I sent her an email message thanking her for having her legal assistant phone me that morning, explaining that I would be working into the evening, and requesting that she phone me that evening if she could.)

On the afternoon of February 10, 2011, I tried phoning Ms. Carlson again and, when I did not reach her, I spoke again to Ms. Cramer, who explained that Ms. Carlson was out of the office right then. I told Ms. Cramer that Ms. Carlson still has not phoned me and that, because of time pressure my client was under, I was desperate to speak with her. Ms. Cramer assured me that she would urge Ms. Carlson to phone me. Right afterwards, I left an additional voice mail message to Ms. Carlson.

On the morning of February 11, 2011, I sent an additional email message to Ms. Carlson, reiterating my need to speak with her and asking her to squeeze a call out to me.

On February 15, 2011, I emailed to Mr. Danner, Judge Torem, and the Commission's Records Center PDFs of a letter from me addressed to Mr. Danner and Judge Torem, along with Meeker's Report #3 concerning compliance with the spur-operating limitations and requirements set forth in Exhibit B (Table 2) attached to Order 03 (and I copied on that email Mr. Cole; Mr. Forgette; Ms. Hunter; you, Ms. Woods; Mr. Salmon; Mr. Stacy; Mr. Bryant; and Ms. Ford). Five sets of hard copies of the items attached to the email were also mailed to Mr. Danner and Judge Torem in care of the Records Center.

Between February 11 and February 15, 2011, Meeker worked on response materials to Mr. Pratt's February 2, 2011 letter to me. I phoned Ms. Young on the afternoon of February 15, 2011 and explained that the response was nearing completion but that we would appreciate being able to email it after 5:00 PM that day to provide us with a little more time to complete the

response. She agreed, and we exchanged confirming emails that afternoon. I emailed out to her during the wee hours of the morning of February 16, 2011 Meeker's response to Mr. Pratt's letter. Hard copies were mailed out to her later in the day on February 16.

On the afternoon of February 16, 2011, I finally spoke again by phone with Ms. Carlson, who was again cordial. After apologizing for not getting back to me sooner because of her recent crazy schedule, she explained that the City of Puyallup would require Meeker to enter into a license agreement with the City for the installation of the flashing-lights signal assembly in City right-of-way and that a proposed form of such an agreement would require City Council approval. She went on to explain that she would be leaving the following day to travel with her daughter to look at colleges back east and that she would prepare a draft agreement as soon as she got back (maybe even during her trip) and email it to me so that I could review it with Meeker. I asked her how soon the license agreement can be before the City Council for approval and she said March 15, 2011. She added that the agreement should be fairly simple. I reminded her of the March 18, 2011 deadline that Meeker is facing under Order 03 regarding completion and commencement of operation of the signal system. I then requested that she email me a bullet-points list concerning this matter before she left on her trip so I could use it to help me seek Commission Staff and Public Works approval of a time extension of the signal-system completion deadline. She sent me such an email a short while later that afternoon.

On the afternoon of February 17, 2011, I spoke with you, Ms. Woods regarding my explanation of (a) Mr. Cole's contact with the City of Puyallup to arrange to get a right-of-way permit for the flashing-lights signal-system assembly within City, (b) the feedback he received from Mr. Handa at the City to the effect that Ms. Carlson was raising a question as to whether some sort of agreement would have to be entered into with the City as a prerequisite to issuance of a right-of-way permit for the installation, and (c) that on January 27, 2011 Mr. Cole had requested that I contact Ms. Carlson and assess whether or not an agreement would actually be required and, if so, assist in the negotiation of such an agreement. I explained my friendly phone conference with Ms. Carlson on January 27, 2011, my emailing her numerous documents that same night in follow-up to our discussion, and the numerous voice mails and emails I had sent to her seeking feedback and stressing the urgency of the matter. I added that late the previous afternoon, I finally received a call back from Ms. Carlson, and I explained to you the gist of what she told me. I also forwarded to you Ms. Carlson's February 16 email message to me. I then explained to you that, in view of the process of working through the City Council on the license agreement, it would be impossible for Meeker to meet the March 18, 2011 deadline for completion and operation of the crossing signal system and, accordingly, Meeker would need a time extension. You responded that you viewed the circumstances as warranting a time extension. I added that Meeker had held up further work on the signal system awaiting resolution of the Puyallup matter because the extent of the remaining overall signal-system work is relatively modest and should be done as a single continuous effort. I requested that you discuss this with Commission Staff, and I told you that I would prepare a written request to Commission Staff and Public Works.

On February, 24, 2011, Meeker's roadway contractor for the remaining 134th roadway improvement work, Asphalt Patch Systems, Inc., took out a right-of-way permit from Pierce County Public Works concerning the remaining 134th road improvements. (A copy of that permit and an attached copy of Pierce County's receipt for the permit fee that was paid are attached to this letter as Exhibit 3.)

In sum, these extensive, consistent efforts by Meeker and Meeker's team members following Meeker's receipt of Mr. Danner's December 7, 2010 letter concerning the violation demonstrate positive cooperation with the Commission, Commission Staff, and Public Works to (a) amend the approval order, (b) bring the project into complete compliance with the amended order, and (c) bring the crossing modification project to a successful conclusion.

Gaining Compliance; Likelihood of Recurrence.

With Judge Torem's grant of Meeker's Motion to Amend Order 01 following Meeker's negotiation of the [Proposed] Order, Meeker came into full compliance with the approval order as amended by Order 03. Meeker met the January 31, 2011 deadline for completion of interim shoulder work and timely submitted the interim crossings operations reports that were due on February 15, 2011, both of which demonstrate full compliance with Exhibit B (Table 2) of Order 03.

As I explained to you, Ms. Woods, by phone on February 17, 2011, Meeker is facing a delay in getting approval of a right-of-way permit from the City of Puyallup for the installation of the flashing-lights signal assembly planned in the City's 134th Avenue East right-of-way. As noted on pages 26 to 29, above, I have been in consultation with Puyallup's City Attorney, Cheryl Carlson, concerning Meeker entering into a license agreement that she is insisting is a prerequisite to getting the right-of-way permit. Ms. Carlson has been friendly and cooperative but her schedule has been very busy, which has kept this from moving forward as quickly as I would have hoped. I do anticipate that Meeker will be able to negotiate the license agreement and get the right-of-way permit. As I explained to you on February 17, in view of (a) the delay with the City of Puyallup, (b) the practical need to install the remainder of the crossing signal system as a single, continuous effort (due to the relatively small scope of the remaining signal-system work), and (c) the corresponding need to commence the remainder of the signal-system work after execution of the license agreement and the City's issuance of the right-of-way permit, Meeker requests that both Commission Staff and Public Works agree to an extension of the March 18, 2011 completion deadline for installation and making operational the remainder of the crossing signal system for the 134th crossing and corresponding traffic control signs. As I reminded you during our February 17, 2011 phone discussion, Commission Staff and Public Works have authority to approve such an extension under amended approval Condition 3 of Order 03.[10]

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[10] Paragraph 28 of Order 03 states as follows:

> Approval Condition 3 of Order 01 is hereby amended to state:

With approval by Commission Staff and Public Works for a time extension that would provide five weeks beyond the date of issuance of the City's right-of-way permit for installation and making operational the remainder of the crossing signal system for the 134th crossing and corresponding traffic control signs, Meeker should be able to stay in full compliance with the approval order as amended by Order 03.

Effect of a Penalty

In considering whether or not Commission Staff should recommend that the Commission impose a penalty, several factors should be kept in mind in view of the Commission's PSE Case Opinion relating to the effect of a penalty.

First of all, note that in working with Public Works officials during mid-December 2010 to determine the extent of 134th Avenue East roadway improvements that ought to be completed, instead of merely making a slight adjustment to the roadway slope south of the spur track and extending south the paving work on an extension of that adjusted slope roughly another 20 feet beyond the south end of the repaved roadway section that Meeker's contractor had built during October 2007 (i.e., slope adjustment and extended paving work that would have fully met the roadway design specified on the originally approved civil drawings), Meeker promptly agreed with Public Works and with Commission Staff to regrade and repave 134th to the north of the

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(3) All work for the proposed spur track and the Phase 1 Service Siding (except for approximately the east 300 feet of the siding, which may be completed at any time after the commencement of operation of the remainder of the automatic flashing lights crossing signal system) shown on the design drawings shall be completed (a) in a timeframe consistent with the time schedule set forth in Table 1 attached to this amending Order as Exhibit A (unless otherwise approved by both Commission Staff and Public Works) and (b) to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff ~~prior to the Petitioner starting operation of the spur line and Phase 1 Service Siding~~; PROVIDED, HOWEVER, that (i) Petitioner may immediately operate the spur line and Phase 1 Service Siding subject to the Special Requirements and Restrictions set forth in Table 2 attached to this Amending Order as Exhibit B and (ii) following installation and commencement of operation of the remainder of the automatic flashing lights crossing signal system for the crossing and of corresponding traffic control signs **(which must occur by March 18, 2011 *unless otherwise approved by both Commission Staff and Public Works*)**, Petitioner must thereafter operate the spur line and Phase 1 Service Siding with the automatic flashing lights crossing signal system in operation.

(Boldfacing and italics added for emphasis.)

main line track about 60 feet because doing so will provide a better roadway at the crossing.[11] That roadway work to the north of the main line track, the design of which is now reflected on

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[11] Paragraphs 9 through 12 of Order 03 state:

> *9* Because the spur track is on the south side of the main line track, the Original Design Drawings only required pavement work extending 4 feet north along 134th from the main line track's centerline.
>
> *10* Sheet C1.1 of the Original Design Drawings contemplated paving work extending south of the spur track's centerline approximately 40 feet along 134th's centerline to achieve a roadway surface slope of 1 percent along 134th's centerline. The roadway pavement work that has been performed only extends along 134th's centerline about 19 feet south of the spur track's centerline, resulting in a roadway surface slope of approximately 3.16 percent along 134th's centerline.
>
> *11* On December 16, 2010, representatives of the Petitioner met at the 134th crossing site with Jerry P. Bryant, P.E., Field Engineering Manager of the Pierce County Public Works & Utilities Department's Office of the County Engineer, and with Marlene Ford, P.E., P.T.O.E., Associate County Traffic Engineer of the Pierce County Public Works & Utilities Department's Traffic Engineering Division, to examine the paving work that has been completed to date and consider whether to (a) have further pavement work done on the south side of the crossing to comport with Sheet C1.1 of the Original Design Drawings or (b) instead have some further roadway surface regrading done on the north side of the crossing (where the existing, historic roadway surface slope is much steeper than it is on the south side—up to approximately 6.8 percent along 134th's centerline pavement starting about 10 feet north of the main line track's centerline and up to approximately 10.7 percent along a low portion of the west edge of 134th's westerly lane before 134th flattens out to the north into a sag vertical curve). A proposal by Meeker to regrade and repave 134th to the north to a point approximately 50 lineal feet north of the main line track's centerline was set forth in the Motion and was acceptable to Public Works as an alternative to regrading 134th further to the south of the spur track than has already been done (provided that the Original Design Drawings were first supplemented and/or revised to reflect the proposed design of the 134th regrading and repaving and were approved by Public Works).
>
> *12* Thereafter, Petitioner enhanced its proposal so as to regrade and repave 134th to the north to a point approximately 60 lineal feet north of the main line track's centerline. The design of such regrading and repaving is embodied in a four-sheet set of supplemental and revised civil engineering design drawings prepared by Sitts & Hill Engineers, Inc. and approved on January 25, 2011 on behalf of the Pierce County Public Works Director (the "Revised Design Drawings"). The Revised Design Drawings consist of a supplemental sheet labeled C4.0 and revised Sheets C1.0, C1.1, and C2.0. (Sheets C1.2 and C1.3 of the Original Design Drawings are unchanged and remain in effect.) Commission Staff has reviewed the Revised Design Drawings and has no objections to them. (The now-proposed regrading and repaving of 134th to the north of the main line track is planned to reduce 134th's maximum longitudinal slope to approximately 4.27 percent.)

the revised civil drawings that Public Works approved on January 25, 2011 with the agreement of Commission Staff, will correct a longstanding roadway edge sag problem along the west edge of the roadway a short distance to the north of the existing main line track. Meeker had no legal duty to correct that problem and could not constitutionally have been compelled to correct it in connection with Meeker's addition of the spur track because the spur track lies to the south of the main line track rather than to the north of it [and therefore the spur track did not exacerbate the problem to the north, leaving no "nexus" between the roadway's existing problem to the north and installation of the spur track to the south—see *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987)]. By agreeing in mid-December to do that roadway work to the north of the main line track rather than merely make a slight adjustment to the roadway slope south of the spur track and extend south the paving work on an extension of that adjusted slope roughly another 20 feet, Meeker (a) has already incurred a cost of approximately $10,000 in topographic surveying and civil engineering design fees from Sitts & Hill Engineers and (b) estimates an additional construction cost of approximately $12,600 beyond the approximately $3,500 that it would have cost to extend the paving to the south approximately another 20 feet to comply with the originally approved civil drawings.[12] That combined $22,600 surveying, engineering, and construction expense incurred by Meeker in good faith for the safety and benefit of the general motoring public should be viewed as the functional equivalent of a civil penalty. The Commission should not impose a civil penalty on top of that expense.

The second factor that should be kept in mind in relation to the effect of imposition of any penalty on Meeker is that the above-noted $22,600 functional equivalent of a civil penalty that Meeker has already incurred is a tremendously greater expense for tiny short line railroad company Meeker than the $106,000 total amount of the $50,000 civil penalty and $56,000 cost to implement an anti-drug and alcohol misuse awareness-training program for Puget's employees was for utility giant Puget in the PSE case. Meeker is one of three operating divisions of Ballard

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Note that had the 134th pavement work been performed precisely in accordance with the originally approved civil design drawings, the total longitudinal slope differential on both sides of the crossing would have been approximately 7.8 percent along 134th's centerline and approximately 11.7 percent along the low portion of the west edge of 134th's westerly lane. In contrast, with 134th's existing approximately 3.16-percent longitudinal slope south of the crossing and now proposed maximum 4.27-percent longitudinal slope north of the crossing, the total longitudinal slope differential on both sides of the crossing will be approximately 7.4 percent [namely, (a) about 0.4 percent less along the centerline than would have been the case if the road had been constructed precisely as contemplated by the original civil design drawings, and (b) about 3.3 percent less in relation to the slope along the existing low portion of the west edge of 134th's westerly lane than would have been the case if the road had been constructed precisely as contemplated by those original drawings].

[12] See the copy of a February 24, 2011 "Proposal and Contract" from road contractor Asphalt Patch Systems, Inc. attached to this letter as Exhibit 4, which indicates a cost of $14,723 plus tax for the paving work. Assuming a sales tax rate of approximately 9.5 percent, the total construction cost of that remaining paving work is approximately $16,100. Note that on February 24, 2011, I asked Jay Looker, one of the owners of Asphalt Patch Systems, Inc., to provide me an estimate of what it would cost to do the approximately 20 feet of additional pavement work to the south of the crossing instead of the pavement work to the north. He sent me an email (see attached Exhibit 5) indicating $3,500. The construction cost difference to Meeker for the roadway work to the north will thus be approximately $12,600.

Terminal Railroad Company L.L.C. ("BTRC"). (The other two are BTRC's Ballard Terminal division and Eastside Rail division.) Mr. Cole has advised me that the total income that BTRC *earned* (not received) by all three of those divisions during the entirety of 2010 was only $664,064. In contrast, Puget's January 2011 online Fact Sheet reports annual revenues of $3.32 billion—see my attached mark up of that Fact Sheet, Exhibit 6. That means that *Puget's annual revenues are almost exactly 5,000 times greater than BTRC's gross earnings.*

In proportion to each company's annual earnings, the total $106,000 that Puget had to pay in the Commission-approved settlement of the PSE case would be like BTRC/Meeker only having to pay $21 in total. Imposition of any civil penalty upon Meeker when Meeker is already bearing a $22,600 functional equivalent of a civil penalty would be manifestly unjust and unfair. That is all the more evident when contrasting (a) the Commission's finding in the PSE Case Opinion that Puget's "*lack of the required [drug and alcohol] testing program [may have] allowed an impaired person to make critical judgments that will contribute to a future incident,*" which the Commission stated "*is a very serious matter and warrants substantial action,*" with (b) the following two facts:

(i) As I pointed out in detail on pages 3 to 7, above, under the particular operational circumstances in Meeker's case, use of the spur track for transit of Sound Delivery's railcars during the period of the violation posed no significant safety risk to motorists or pedestrians at the 134th crossing; and

(ii) As explained in detail on page 3 above in relation to Terry Lawrence's hearing testimony, overall public safety and worker safety were enhanced by the spur's premature use because that use enabled the unloading of 25 of the 27 railcar loads of the 6-foot diameter, 80- to 85-foot-long, up to 33-ton pipe segments to shift from Meeker's East Puyallup team track (where the unloaded pipe had to be loaded onto trucks and driven to the Sound Delivery site for unloading there) to Sound Delivery's new loading dock at the Sound Delivery site (where the unloading to the Sound Delivery site was made directly onto Sound Delivery's loading dock, which was much better suited for the unloading operation).

The third factor that should be kept in mind (a factor that is related to the first two) is that the $22,600 functional equivalent of a civil penalty is already more than large enough to connote the significance of Meeker's violation. The addition of any direct civil penalty imposed by the Commission to that already very large functional equivalent of a penalty would make the total very excessive in view of the PSE Case Opinion. That is extremely clear in view of both (a) the great degree of cooperation and correction that Meeker has exhibited as I have demonstrated on pages 16 through 30, above (cooperation that, unlike the lack of an admission by Puget of a violation in the PSE Case involved a straightforward admission of a violation by Meeker in the subject case), and (b) the above-explained relative sizes of the Commission-approved PSE

$106,000 settlement amount and the BTRC/Meeker $22,600 functional equivalent of a civil penalty in relation to the 5,000-times-greater revenue that PSE has than BTRC has.

For all of the above reasons, the Commission should not impose a civil penalty on Meeker. Please let me know if you have any questions.

Sincerely,

HALINEN LAW OFFICES, P.S.

David L. Halinen

Enclosures (Exhibits 1 through 6 as noted above)

cc: Meeker Southern Railroad
Attn: Byron Cole, General Manager (via email and first class mail, with copies of enclosures)

Meeker Southern Railroad
Attn: James Forgette, Operations Manager (via email, with copies of enclosures)

David Pratt, Assistant Director of Transportation Safety, WUTC (via email and Priority Mail, with copies of enclosures)

Kathy Hunter, Deputy Assistant Director, Transportation Safety, WUTC (via email and Priority Mail, with copies of enclosures)

Paul Curl, Transportation Safety, WUTC (via email and Priority Mail, with copies of enclosures)

H...WAY EASI...ENT. NO. 25874 ...W. 12. 10-11 50...

THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation under the laws of Wisconsin, in consideration of one dollar and the agreements herein contained grants unto

Pierce County,

of the State of **Washington**, the right to use for the purpose of a public street or road, but for no other purposes whatsoever, portions of the right of way of the Railway Company described as follows, to-wit:

Those portions of the Railway Company's right of way in sections 25, 26 and 36 in Twp. 20 North, Range 4 East, W.M., as shown colored in red upon the attached blue print plat which is made a part hereof.

80th St East

The privilege hereby granted is effective from the **1st** day of **November,** 191**2**, until terminated as provided in this agreement or otherwise.

This grant is made upon the following terms:

1. The street or road shall be constructed and maintained in a good and workmanlike manner and made and kept as safe for public travel as possible. The expense of construction and maintenance thereof shall be borne by the grantee; and the Railway Company shall not be liable for or assessed for any of the expense of construction or maintenance.

2. Should the right of way, the right to use which is hereby granted, or any portion thereof, be required for the construction of tracks, buildings, including public and private warehouses, or for other railroad purposes, the grantee shall change the location of said street or road and vacate the said right of way, or such portion thereof as the Railway Company shall request; and the entire expense of such change shall be borne by the grantee.

3. The Railway Company may upon **ninety** days' notice in writing revoke this permit, and the grantee hereby agrees in that event to peacefully and promptly surrender possession of the premises unto the Railway Company.

IN WITNESS WHEREOF, the parties hereto have executed these presents in duplicate originals this **1st** day of **November,** 191**2.**

NORTHERN PACIFIC RAILWAY COMPANY,

By J. L. Watson
Principal Right-of-Way Agent.

ATTEST: **W. A. Stewart,**
County Auditor
J. H. Weisbach
Deputy Clerk.

~~PIERCE COUNTY,~~

~~By~~ M. Mellmartin

J. F. Lisby

#25874

07/10/06 MON 14:49 [TX/RX NO 5520]

EXHIBIT 1

HIGHWAY EASEMENT. COPY NO. 25874 R.W.12 2-15 50.

THE NORTHERN PACIFIC RAILWAY COMPANY, a corporation under the laws of Wisconsin, in consideration of one dollar and the agreements herein contained grants unto

Pierce County

of the State of Washington, the right to use for the purpose of a public street or road, but for no other purposes whatsoever, portions of the right of way of the Railway Company described as follows, to-wit:

Those portions of the Railway Company's right of way in sections 25,26 and 36 in Twp. 20 North, Range 4 East, W.M., as shown colored in red upon the attached blue print plat which is made a part hereof.

80th St East

S T A M P:

THIS REPLACES LEASE NO. 20923
FAVOR A. GARDELLA
DATED 12/1/08 TERM INDEF. YEARS.

The privilege hereby granted is effective from the 1st day of November, 1912, until terminated as provided in this agreement or otherwise.

This grant is made upon the following terms:

1. The street or road shall be constructed and maintained in a good and workmanlike manner and made and kept as safe for public travel as possible. The expense of construction and maintenance thereof shall be borne by the grantee; and the Railway Company shall not be liable for or assessed for any of the expense of construction or maintenance.

2. Should the right of way, the right to use which is hereby granted, or any portion thereof, be required for the construction of tracks, buildings, including public and private warehouses, or for other railroad purposes, the grantee shall change the location of said street or road and vacate the said right of way, or such portion thereof as the Railway Company shall request; and the entire expense of such change shall be borne by the grantee.

3. The Railway Company may upon ninety days' notice in writing revoke this permit, and the grantee hereby agrees in that event to peacefully and promptly surrender possession of the premises unto the Railway Company.

IN WITNESS WHEREOF, the parties hereto have executed these presents in duplicate originals this 1st day of November, 1912.

NORTHERN PACIFIC RAILWAY COMPANY,

By J. L. Watson
Principal Right-of-Way Agent.

ATTEST:

A. J. Wiesbach
Clerk.

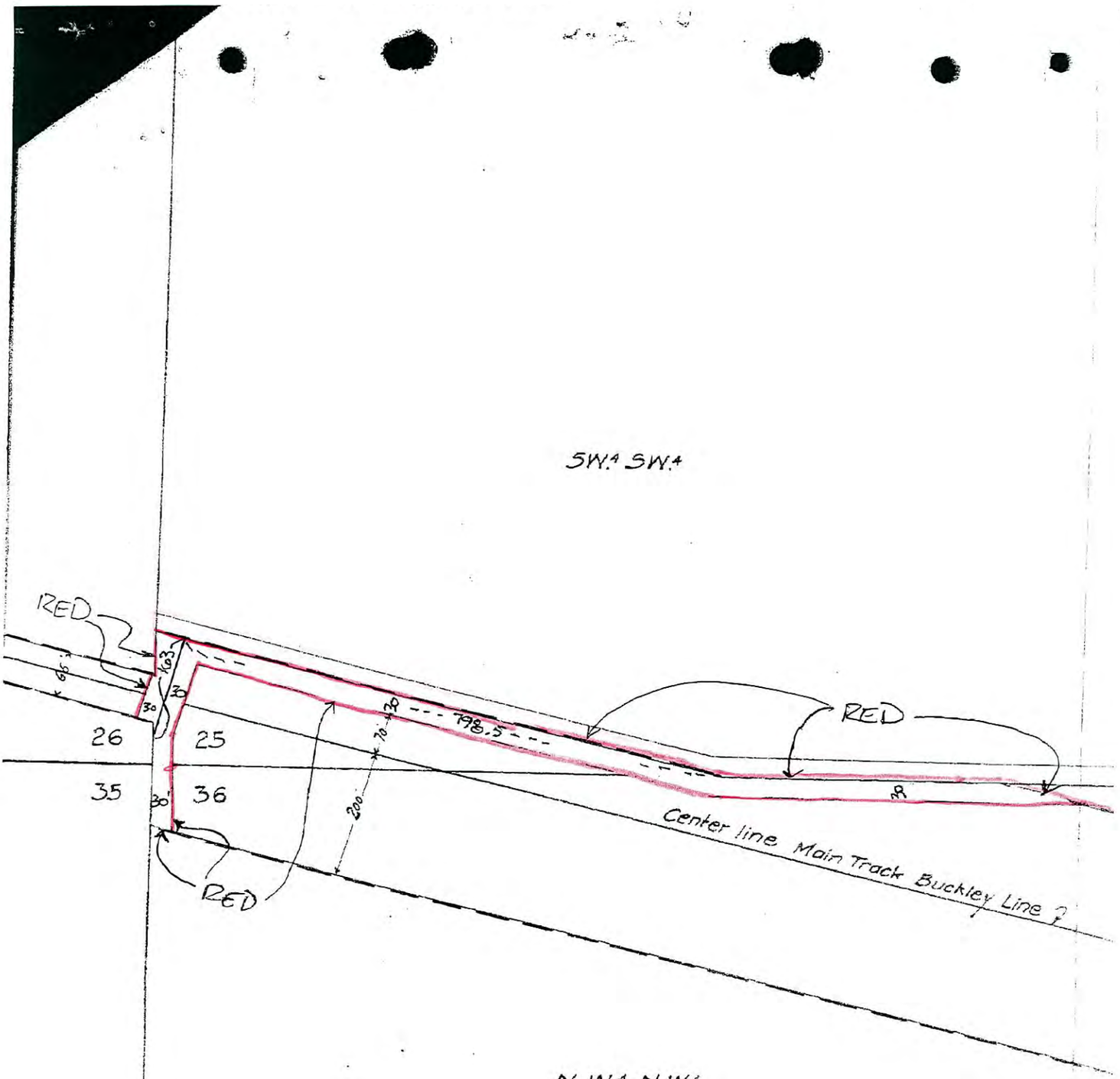
PIERCE COUNTY

By H. C. Martin

J. F. Libby

#25874

07/10/06 MON 14:49 [TX/RX NO 5520]



80 ST E

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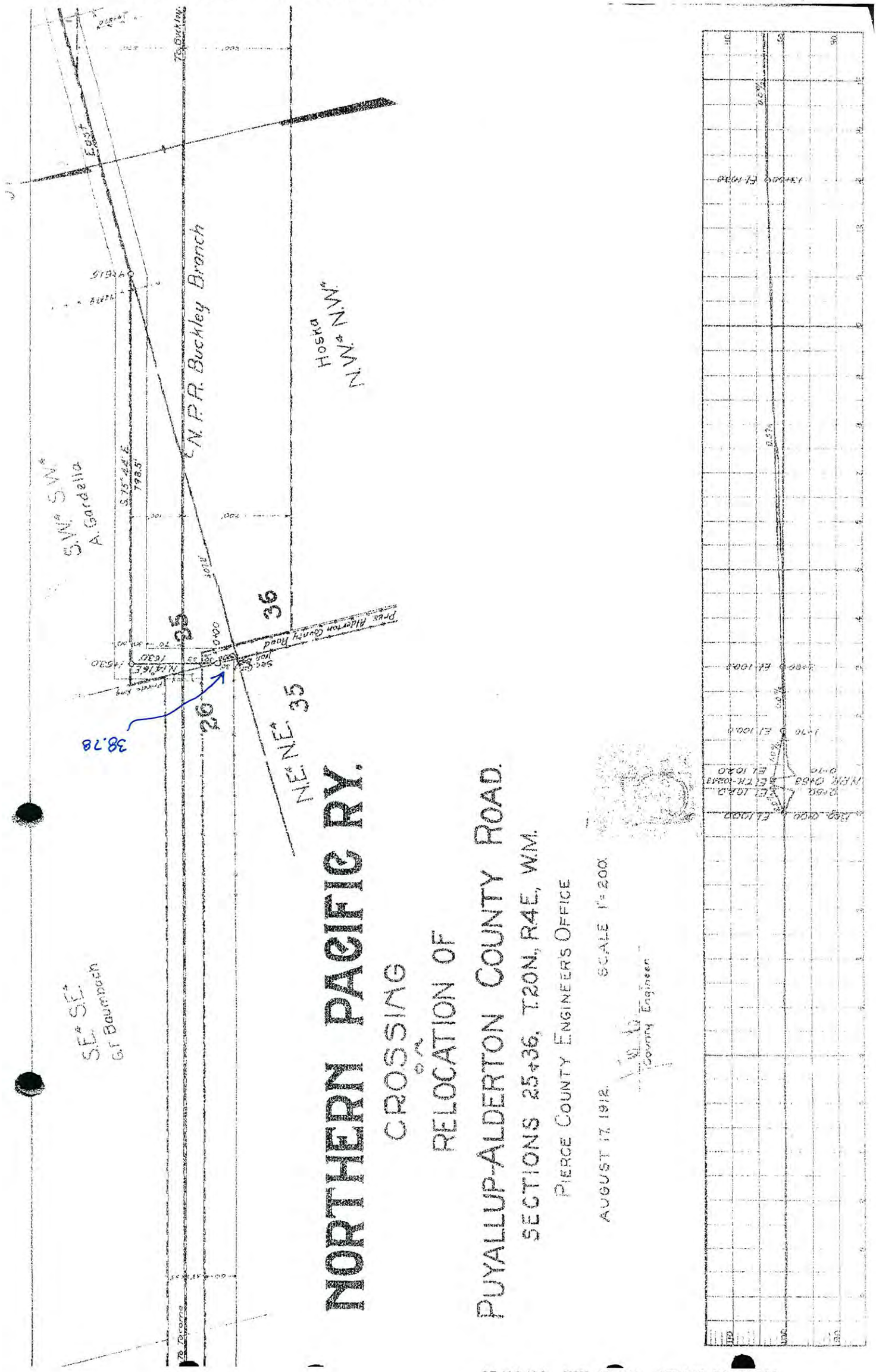
NORTHERN PACIFIC RY.
CROSSING
OF
RELOCATION OF
PUYALLUP-ALDERTON COUNTY ROAD.
SECTIONS 25+36, T.20N., R4E., W.M.
PIERCE COUNTY ENGINEERS OFFICE
AUGUST 17, 1918.
SCALE 1" = 200'
County Engineer
N.P.R. Buckley Branch
East
S.W.¼ S.W.¼
A. Garabella
S.E.¼ S.E.¼
G.F. Baumbach
N.E.¼ N.E.¼ 35
Hoska
N.W.¼ N.W.¼
Pres. Alderton County Road
25
36
26
38.78

EXHIBIT 2
(11 pages)

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant,
v. PUGET SOUND ENERGY, INC., Respondent.

DOCKET NO. UG-001116

Washington Utilities and Transportation Commission

2002 Wash. UTC LEXIS 235

July 25, 2002

CORE TERMS: settlement agreement, pipeline, settlement, staff, regulator, violator, alcohol, regulated, natural gas, gravity, audit, regulation, cooperation, enforcing, anti-drug, covered employees, drug testing, prevention, omissions, testing, message, misuse, foster, signals, testing program, annual report, straightforward, cooperating, seriousness, deterrence

PANEL: [*1] RICHARD HEMSTAD, Commissioner; PATRICK J. OSHIE, Commissioner

OPINION: COMMISSION ORDER ACCEPTING SETTLEMENT

SYNOPSIS: *The Commission issued a complaint alleging that Puget Sound Energy, Inc. (PSE), Respondent, allowed its anti-drug and alcohol misuse prevention program to lapse during the period 1997 to 2000, contrary to Commission rules. The Commission simultaneously accepts a proposal by Commission Staff and the Respondent to settle the complaint without hearing by payment of penalties in the amount of $ 50,000 and by investment of $ 56,000 in process improvements. Chairwoman Marilyn Showalter dissents.*

I. SUMMARY

PROCEEDINGS: The Washington Utilities and Transportation Commission's Pipeline Safety Staff conducted an inspection of Puget Sound Energy, Inc.'s, anti-drug and alcohol misuse prevention program on July 12, 2000. On July 10, 2002, the Commission issued a Complaint alleging that Puget violated WAC 480-93-010, which adopts and incorporates Title 49 of the Code of Federal Regulations ("CFR"), Part 199, by failing to maintain an anti-drug and alcohol misuse prevention plan for its covered gas pipeline employees during the years 1997 through 2000.

SETTLEMENT [*2] **AGREEMENT:** On July 10, 2002, the Commission Staff and Puget ("Parties") filed a Settlement Agreement that proposes to resolve all issues raised in the Complaint.

II. MEMORANDUM

On July 12, 2000, Commission Pipeline Safety Staff conducted a drug and alcohol program inspection of Puget. On July 10, 2002, the Commission issued a Complaint alleging violations of WAC 480-93-010, which adopts the provisions of 49 CFR Part 199. The Parties have reached agreement on the resolution of the issues raised by the Complaint and voluntarily entered into the attached Settlement Agreement. The Settlement Agreement reflects the Parties' proposal to the Commission for resolution of all outstanding issues alleged in the Complaint and constitutes a Settlement Agreement within the meaning of WAC 480-09-466.

In summary, the Settlement Agreement provides for the following actions to be taken by Puget to resolve the outstanding Complaint:

(1) Puget will pay the Commission penalties totaling $ 50,000 for apparent violations of WAC 480-93-010 (Compliance with certain federal standards required), which adopts and incorporates 49 CFR, Part 199. Puget will continue to act in compliance with [*3] the substance abuse plan for covered employees that it instituted in March 2001 (the "2001 Plan"), including random drug testing at a rate equal to or

greater than the required minimum level. The 2001 Plan complies with WAC 480-93-010 and 49 CFR, Part 199.

(2) Puget will spend an amount totaling approximately $ 56,000 to implement an anti-drug and alcohol misuse awareness-training program for all of its employees. This additional training will consist of a 30-minute mandatory training session for all employees covering Puget's "Substance Abuse Plan for Covered Employees" and Puget's "Substance Abuse Plan for Non-Covered Employees." The cost of this program shall be paid for with shareholder funds, and will not be recovered through rates.

The Company failed to meet the drug testing requirements of WAC 480-93-010 and 49 CFR, part 199, during a four year period and had no such testing program for a considerable portion of that time. The Company acknowledges the existence of facts from which the Commission could conclude that it had violated the rule, and proposes along with Commission Staff that the Commission simultaneously issue a complaint against it and accept a settlement [*4] between the parties that provides for payment of a penalty but no formal acknowledgment of existence of a violation.

The circumstances of this event are of grave concern to the Commission. There is a clear link between substance abuse impairment of key personnel and risk of hazard in the transportation of natural gas. The questions that we face in this docket are how to respond to those circumstances.

We recognize that the primary function of penalties is to gain compliance. The direct concern of any penalty is compliance by an accused violator. An additional concern is the demonstration to other regulated entities and the public that the while the Commission encourages compliance, it will take appropriate action, including the assessment of penalties, when it discovers violations.

In accepting a settlement that proposes a penalty, the Commission will look to see whether the proposal is proportioned to the gravity of the apparent violations and to assure against future violations. n1 In setting the amount of a penalty, it is appropriate to consider many factors. These include the seriousness of the violations; the circumstances of the violation, including whether the violation [*5] is intentional; the cooperation of the respondent and its willingness and achievements in rectifying violations; the frequency of violations, and cooperation in investigations; whether or not the violation has been corrected; and the possibility of recurrence.

n1 *Order M.V. No. 136510, In re Joe Sicilia, Inc., app. No. H-4969 (Sept., 1967).*

Here, we are satisfied that both the agreed sanctions and the process are appropriate.

Seriousness of the violation. Unquestionably, this is a serious violation. We may never know whether lack of the required testing program allowed an impaired person to make critical judgments that will contribute to a future incident. It is a very serious matter and warrants substantial action.

Circumstances of the violation. The program was allowed to lapse in the period after Puget Power merged with Washington Natural Gas to become PSE. The circumstances are by no means excusable, but they appear to be an isolated -- albeit serious -- event.

Cooperation and attitude. [*6] The Company appears to have been cooperative following discovery of the problem. It did not delay progress toward rectifying the problem, and it has taken appropriate corrective action by bringing the testing program into complete compliance. Its attitude, particularly under new corporate leadership, has been positive.

Gaining compliance; likelihood of recurrence. Commission Staff is satisfied, as are we, that the company remains in full compliance and that the likelihood of recurrence of this violation is nil.

Effect of a penalty. A penalty should send a message, both to companies who violate the law and to others who are watching. The message must be clear, however, and it must be thoughtfully applied. An appropriate penalty must strike

the right balance and send the right message. It must be large enough to connote the significance of the violation, yet appropriately scaled to recognize the degree of cooperation and correction obtained from the respondent. Here, a substantially larger penalty could discourage this or other regulated companies from disclosing problems that they discover and could impair their willingness to cooperate in correcting them. The sanctions [*7] imposed in this order include a penalty and also include program enhancements at shareholder expense that might not be otherwise obtainable. We are satisfied that an acceptable balance has been struck.

Value of settlement and appropriateness of the settlement process. The process by which this matter comes to the Commission is satisfactory and appropriate. By cooperating in a settlement process, the Company shares responsibility and ownership of the process and the result. While adjudications are an appropriate means of dispute resolution, they are not the only means. We believe that a less adversarial process is more likely to achieve a global resolution of issues and less likely than litigation to encourage hiding of relevant facts.

The state's Administrative Procedure Act encourages settlements, *RCW 34.05.060*, as does the Commission's procedural rule, WAC 480-09-466. The Commission has the full authority and the responsibility to inquire into and make an independent decision about a settlement proposal and its practical and policy implications. The Commission has full authority to accept or reject a proposed settlement and to [*8] enter into an adjudication.

Here, we are satisfied that the process was appropriate, that we have had a sufficient opportunity to review the underlying facts and circumstances, that the sanctions are sufficiently large to connote the seriousness of the Company's failures, and that the penalty is not so large as to discourage regulated companies from promptly correcting violations and from cooperating with the Commission while exercising its regulatory responsibilities.

We accept the settlement proposed jointly by the Company and Commission Staff, and adopt it as our own in this order.

III. FINDINGS OF FACT

The Washington Utilities and Transportation Commission is an agency of the State of Washington, vested by statute with authority to regulate in the public interest the rates, services, facilities, and practices of all persons engaging within this state in the business of supplying any utility service or commodity to the public for compensation, and related activities, including gas companies.

(1) Puget Sound Energy, Inc., is a privately owned company that engages in the business of providing electric and natural gas services for profit within the State of Washington.
[*9]
(2) On July 10, 2002, the Commission issued a Complaint in which it alleged that Puget had violated Commission rules that adopt and incorporate federal regulatory standards relating to maintaining anti-drug and alcohol abuse prevention activities.

(3) On July 10, 2002, Staff and Puget filed a Settlement Agreement to resolve the alleged violations cited in the Commission's Complaint.

IV. CONCLUSIONS OF LAW

The Washington Utilities and Transportation Commission has jurisdiction over the subject matter and the parties. Chapters 80.04 and 80.28 RCW.

(1) The Settlement Agreement, which is attached to this Order as Appendix A, is consistent with the public interest.

(2) The Settlement Agreement fully and fairly resolves the issues pending in Docket No. UG-001116. The terms of the Settlement Agreement should be accepted and adopted as the Commission's own as though set out herein.

(3) The Commission retains jurisdiction to effectuate the provisions of this order.

V. ORDER

THE COMMISSION ORDERS THAT The terms of the Settlement Agreement, as signed by representatives for the Parties and as set out in the attachment to this order, are hereby accepted and adopted by the [*10] Commission as its own for purposes of this proceeding. In doing so,

THE COMMISSION DISMISSES The Complaint, subject to PSE's payment of penalties specified in the Settlement Agreement no later than seven days following the date of this Order.

DATED at Olympia, Washington, and effective this day of July, 2002.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

RICHARD HEMSTAD, Commissioner

PATRICK J. OSHIE, Commissioner

DISSENTBY: SHOWALTER

MARILYN SHOWALTER, Dissenting:

With the approval of this Settlement Agreement, both the Commission and Puget Sound Energy fail to live up to their responsibilities for pipeline safety. For *four years*, PSE had virtually no drug-testing program to speak of, much less one that meets numerous state and federal requirements. These requirements are designed to ensure that the men and women who make *judgments* when burying, repairing, and operating natural gas pipelines--judgments that can have life-or-death consequences long into the future--are not affected by alcohol or drugs. The gaping breadth and gravity of PSE's abdication cannot be squared with the Settlement Agreement in which PSE expressly denies it committed any violation. If PSE [*11] will not admit a violation, the Commission should proceed to hearing, and, if a violation is found, impose an appropriate penalty.

I begin with general observations, in Part A, on the subject of enforcing public safety rules, including settlement of enforcement actions, after which I will turn, in Part B, to the particulars of the Settlement Agreement itself.

A. GENERAL CONSIDERATIONS IN ENFORCING PUBLIC SAFETY RULES

1. Principles

Safety standards, including pipeline safety rules, exist to protect us from danger and injury. Cars, trucks, boats, airplanes, trains, and electrical appliances, and pipelines--just to name a few--are subject to rules that cover both how these items are manufactured and how they are operated. Most of the regulations are relatively objective: the speed limit is 60 mph, the pipeline thickness must be so many millimeters, blood alcohol level may not exceed .08, etc. Other rules may be less precise, but compared to economic regulation, which requires navigating complex economic, financial, and technological dynamics among multiple parties, safety regulation is relatively straightforward.

Enforcement of safety regulations is an exercise of [*12] police power, that is, of the authority of the government to impose restrictions for the sake of public welfare, order, and security. Violation of these regulations is subject to civil penalties (or, in the case of criminal laws, to criminal penalties). Usually the regulator, who has the job of enforcing the regulations, enjoys some degree of discretion in pursuing and punishing violations. The regulator exercises prosecutorial discretion in deciding whether to investigate a violation, and in deciding whether to bring a complaint or charge. The regulator enjoys judicial discretion in deciding what kind of fine or other sanction may be appropriate.

The general considerations in determining an appropriate enforcement response to a violation include:

a) Specific deterrence

The response should deter the violator from offending again.

b) Rehabilitation

It may be appropriate to require the violator to undertake steps to correct the condition which led to the violation.

c) General deterrence

The response should send appropriate signals to other violators, would-be violators, non-violators, and the general public. These signals should foster adherence to the [*13] law.

d) Justice

Justice operates both as a minimum and maximum constraint. The response should be appropriate to the gravity of the offense. If the response is too harsh or over-reaching, it will be perceived as unfair to the violator or as an abuse of government power. If the response is too lenient, it will be seen as preferential and lax. There may, of course, exist individual mitigating circumstances, which justice (and mercy) may accommodate when warranted. Regulators should work toward fair and even-handed responses that uphold their responsibility to protect the public and inspire public trust in them to do so.

These principles are not always easy to balance, and different decision-makers will balance them differently. But regulators should be balancing *all* of these principles, not ignoring some of them. As I will discuss later, I think that the principles of general deterrence and justice have gotten short shrift in the Settlement Agreement.

2. Settlement Considerations

In a settlement agreement, the litigating parties present to the regulator a proposed resolution of the dispute. In the case of pipeline safety regulation, Commission Staff acts in [*14] an investigative and prosecutorial role, and the Commission acts in a quasi-judicial role. Unlike settlements of price-regulation cases, which typically involve many murky issues disputed by multiple parties, settlements of safety-regulation disputes typically involve two parties--the Staff and the regulated company--and determine a) whether a violation (or multiple violations) occurred and b) the appropriate response.

In evaluating how to respond to a violation of a safety rule, the Commission should weigh all of the principles discussed above. In the case of settlement agreements (as distinct from fully adjudicated cases), there may be some additional considerations.

a) Conservation of Resources

Fully litigating a contested case costs the time and money of the Commission and of the parties. In a world where the demand for government and corporate resources always exceeds the supply, it is surely a benefit to avoid these costs. This potential benefit, however, should be measured realistically. First, is the cost really being avoided? That is, if the parties do not reach a particular settlement, will the case actually go to a full adjudication before the Commission? [*15] In a contested rate case, there is no alternative. With respect to many safety violations, however, the Staff already has expended considerable resources thoroughly investigating the violation, with the result that the real dispute focuses not so much on the fact of a violation as on the consequences of it. In this situation, the parties negotiate over the penalty or other consequences, but if they fail to reach agreement, the regulated company will not necessarily want to proceed to a full-blown hearing. If the case does go to hearing, the considerable resources already expended in the investigation stage, in which the Staff and the company generally have become very familiar with the facts and issues, reduce the incremental costs of the hearing itself.

Second, the costs *and time* of trying to negotiate a settlement may be greater than simply going to hearing. Especially in cases where the underlying facts of a violation are not really contested--only the consequences are--the costs of lawyers and managers engaged in rounds of settlement discussions may well exceed the costs of filing complaint, calling for an answer, and promptly proceeding to hearing, in the event a hearing [*16] actually is requested. A straightforward and prompt finding of violation and imposition of a penalty (or mitigation of penalty) may save everyone time and money. Indeed, this is how many violations of our transportation regulations are handled, and they are handled successfully and efficiently.

Third, and most important, the benefit of avoiding the costs of litigation must be weighed against the substantive provisions of the settlement agreement. If the alleged violation is grave but the proposed penalty is inappropriate, the settlement should be rejected and the costs of litigation endured. It is only by being willing to back up a serious charge with a full adjudication that the integrity of any enforcement system is maintained.

b) The Value of Reaching a Consensus

When parties can reach an agreement on the fair disposition of a contested case, their common sense of achievement, of reaching a meeting of the minds, and of cooperating together are thought to help form relationships that foster cooperation and understanding in addressing subsequent difficult issues, which continually arise in the regulatory environment. Further, just the fact that two or more "opposing" [*17] parties have found their way to agreement gives confidence that a fair result has been reached.

This theory has its limits, however, and even has a dark side. The close focus that parties give a particular case can cause them to lose the broader perspective of where the case fits in the scheme of things. The natural desire to resolve a conflict, the closed universe of a negotiation, and the interpersonal sympathies and pressures that develop in regulatory relationships can disorient one's enforcement compass and obscure one's general sense of direction. When this misorientation becomes chronic, critics will charge that a regulatory agency has been "captured" by those it regulates, and that a cooperative relationship is no more than a "cozy" relationship. At this time, for example, there are national charges that corporate officers, their supposedly independent accountants, and relevant regulators all have failed in their responsibilities, out of excessive and self-interested concern for the short term and a lack of long-term perspective (and moral backbone). This dynamic points out that reaching a consensus has little value if the consensus is not faithful to the fundamental principles [*18] that should be guiding those achieving it. An important function of the Commissioners--who are not part of the negotiations that lead to the consensus among parties--is to act as an independent check, a fresh set of eyes, on the settlement agreement to ensure that the parties have not lost sight of any important principles.

c) Concessions and Conditions

Proposed settlements commonly contain concessions, which reduce the sanctions that potentially could have been imposed. These might include a finding of only one or two violations, when several were originally alleged; penalty amounts that are lower than what might have been imposed; partial or full suspension of penalty amounts; and even, as is the case here, an agreement not to find violation at all. Settlements also may contain conditions, which the violator agrees to perform. Failure to perform often brings the prospect of further sanctions.

In evaluating a proposed settlement containing concessions and conditions, it is useful to compare it to the straightforward application of the penalty statute that governs the proceeding. The basic sequence contemplated by most penalty statutes is: complaint alleging violations; admission [*19] of the violation or hearing to determine if there has been one; finding of a violation; penalty. Settlements that deviate from or this basic sequence should be justified in light of the general principles discussed above.

Of all things that might be conceded, the one that matters most is whether there is a finding of a violation. Without such a finding, there is no official record that a violation of a rule or law has occurred. Officially, *it did not happen*. Without such a finding, other jurisdictions have no official knowledge of misbehavior. Without such a finding, it is questionable, in my view, whether "penalties" may even lawfully be imposed (though some kind of payment, as a condition of avoiding a finding, might be proper). There may well be times when leniency, in the form of making no finding of a violation, is appropriate. Factors to consider, always in relation to the principles above, include: if the alleged behavior is slight, if the rule at issue is new or confusing, if the alleged violator has no history of misconduct, if no real harm has been done, if the alleged violator took affirmative steps quickly to remedy the situation, and any particular mitigating [*20] circumstances surrounding the conduct in question.

Of all things that most tempt regulators, it is the imposition of many conditions, designed to ensure that the regulated company performs up to standard--and sometimes beyond otherwise applicable general standards. In prosecuting and punishing violations, regulators have significant leverage over regulated companies. Regulators should be careful to exercise this power wisely and judiciously. They should not use the threat of a violation as a hammer to extract conditions that exceed the scope and gravity of the underlying violation. They should not abuse their power. Further, they should consider the resources it will take to monitor the conditions and their willingness to impose further sanctions if

the conditions are not met--as distinct from simply imposing an immediate penalty and concluding the matter. Regulators generally have ongoing regulatory oversight over the companies they regulate, including the ability to ask for information, perform an audit, and so on. If a violator violates again the regulator, when imposing the second sanction, can take into account the prior violation.

With these general considerations in mind, [*21] I now turn to the particular context and terms of the proposed Settlement Agreement in this case.

B. EVALUATION OF THE PROPOSED SETTLEMENT AGREEMENT

1. Facts

Since 1990, federal rules (which the Commission has adopted as state rules) have required operators of natural gas pipelines to have drug and alcohol testing programs for "covered" employees. Covered employees include those who perform operations, maintenance, or an emergency-response function. The term does not include clerks, office workers, etc. It does include employees of private contractors as well as direct employees of a pipeline operator. Among other things, the rules require random testing of covered employees, follow-up on those who test positive, prohibitions against allowing employees to work on pipelines if they test above certain thresholds, referral to treatment programs, and full reporting annually of compliance with numerous requirements of the rules. The rules are fairly detailed and take up 20 or so pages. In general, they are designed to prevent employees from performing safety-related functions if they are under the influence of alcohol or drugs.

It appears that prior to its merger with [*22] PSE, Washington Natural Gas had an ongoing, compliant drug and alcohol program. Then, after the merger, PSE simply dropped the ball. PSE has some 700 "covered" employees. It was required to provide updated lists of current employees to its tester (Virginia Mason Clinic) in order to allow the tester to administer a random-selection method and randomly test, throughout the year, at least 25% of covered employees annually. Instead, the actual percentages were 20% in 1997, 0.4% in 1998, **0%** in 1999, and **0%** in 2000.

PSE also was required to submit an annual report to the federal Office of Pipeline Safety providing details of its program (including results of testing, which are used to establish future years' required testing percentages for the industry), and to keep records of its actions under the program. Puget submitted ***no*** annual report for the years 1997, 1998, or 1999. Nor did it (nor could it) keep adequate records, because it did not perform the functions the records were supposed to document.

These and other deficiencies were uncovered in an audit performed by Commission Staff in July of 2000.

2. Settlement Agreement

Under the terms of the Settlement [*23] Agreement, Puget agrees to pay a $ 50,000 "penalty" and agrees to spend $ 56,000 on training supervisors to recognize symptoms of drug or alcohol use. There is no admission by Puget, and no finding by the Commission, that Puget violated any rule. To the contrary, the Agreement provides, in paragraph 16 that

> No action taken or statement made by a Party in connection with the compromise reflected in this Agreement shall be deemed or construed to be an admission of the truth or falsity of any matter pertaining to any claim, demand, or cause of action referred to herein or relating to the subject matter of this Agreement, or any acknowledgment by such Party of any fault or liability to the other Party or to any other person or entity.

Thus, although Puget has written a letter to the Commission in which it "acknowledges that certain deficiencies existed in the execution of its drug plans during the audit years," and further acknowledges the key specific acts and omissions that Staff found to be "apparent" violations, Puget expressly refuses to admit to violating any rule. The majority, by adopting the Settlement Agreement, joins Puget and the Staff, in expressly not finding a [*24] violation.

3. Application of Principles and Other Factors

a) Specific Deterrence

I think it probable that Puget will operate an adequate program for the foreseeable future and will not re-offend, at least not on the scale of the past. Within a year after the audit, it had re-established a program that generally satisfies Staff. I would be more confident, however, had the Commission found a violation, as such a finding would convey our firm resolve to treat serious violations seriously, which approval of the Settlement Agreement does not.

b) Rehabilitation

Puget has demonstrated to Staff's satisfaction that it has "cured" its problem.

c) General Deterrence

The Settlement Agreement, and the Commission's approval of the Settlement Agreement, utterly fail to send the appropriate signals to other violators, would-be violators, and non-violators. They send the wrong signals. Puget had no drug or alcohol program to speak of for a period of *four years!* Puget failed to file any annual report at all for three years. These gross omissions undermine the integrity and trustworthiness in the safety of Puget's natural gas pipelines, which can fail (fatally) [*25] years after improper installment or repair. It is difficult to imagine a more gaping lapse of a serious safety responsibility. The message that is sent is: "Puget got off easy." That is a terrible message to send to any pipeline operator. Those who might be tempted to cut corners will take heart. Those who spent money for well-administered programs those four years justifiably may feel dismayed.

These were "umbrella" offenses, in the sense that they obscure numerous other, more specific, potential deficiencies. If one fails to file one's income tax forms, the IRS cannot evaluate any of numerous criteria in order to determine if appropriate taxes have been paid. That is why failure to file is a serious offense. The IRS does not say, "Pay a small fee, and as long as you are now current, we'll forget about the past." Further, the integrity of taxing system and the federal budget depend on everyone filing (and on the IRS enforcing). So, too, here, it is impossible to carry out or to enforce the specific provisions of the drug and alcohol rules if the Company has no program to begin with, keeps no records, and files no documentation of its compliance (or non-compliance). For example, [*26] as mentioned, the information on random drug testing that is required in the annual reports is used to establish the percentage of employees that must be tested in the industry in future years. The integrity of that aspect of the national pipeline safety program depends on *all* pipeline operators filing their annual reports. All pipeline operators--and their regulators--must do their part in carrying out and enforcing these requirements.

d) Justice

The Settlement Agreement is neither fair nor just. Its leniency--particularly the absence of any finding of a violation--is grossly disproportionate to gravity of the offending conduct. If failure to have any meaningful program for a period of four years does not warrant a finding of violation, how can Staff or the Commission justify finding violations for any number of particular deficiencies of pipeline operators who *do* have on-going programs? If extended omissions in an area as inherently dangerous as pipelines do not qualify for a finding of violation, how can Staff or the Commission justify enforcing myriad consumer, service-quality, and reporting rules that, while important, generally do not have life-or-death consequences?
[*27]
The penalty of $ 50,000 is also paltry, considering the gravity and breadth of Puget's omissions, and considering Puget is the largest pipeline operator in the state, with total company revenues of $ 3.4 billion. Determining the "right" amount of a penalty is not an exact science, but a penalty of $ 50,000, especially when coupled with no finding of a violation, is feather-light.

e) Avoiding Costs of Litigation

This mantra sounds particularly off-key here. The Staff completed a thorough investigation and report. Puget has acknowledged the essential facts; it just hasn't admitted a legal violation. If the Settlement Agreement were rejected, I doubt a hearing, if in fact one were requested, would be very complicated or involve the expenditure of significant additional resources.

Meanwhile, how much time and money have been spent trying to negotiate the Settlement? The Staff audit was conducted *two years ago*. The Staff report was completed more than one year ago. Suppose the Staff, immediately following the audit, simply had sought, and the Commission had filed, a complaint alleging that Puget failed to meet its percentages for random drug testing for four years, and [*28] failed to file annual reports for three years. Whether Puget admitted the violations or requested a hearing, the case, including imposition of appropriate (and timely) sanctions, could have been concluded within a few months. I think it likely that less money and less time would have been expended under that scenario, with no difference in expected future behavior.

f) The Value of Reaching a Consensus

When opposing parties in a dispute come to a meeting of the minds, the effect can be constructive, and the result can be balanced. Here, I think the parties somehow lost perspective, and elevated the goal of reaching an agreement above the principles that should inform the agreement.

g) Pending Federal Enforcement Action

At the Open Meeting, Puget intimated that it did not want to admit to a violation, because it faces similar charges at the federal level, which are not yet resolved. Since the state and federal rules are identical, and the required programs are under dual jurisdiction, Puget either violated both or neither rules. In general, I have no objection to coordinating the timing of two proceedings, within reason, but the result at the state level still [*29] needs to be appropriate, which in this case it is not. Perhaps the amount of the penalty should take into account the possibility of penalty amounts that might be imposed by another jurisdiction, but the same rationale does not apply to whether there should be a *finding* in our jurisdiction. Moreover, the entire matter has dragged on far too long. After a certain point in time, deference to another jurisdiction's process becomes an unjustified excuse.

h) Labor Relations Confusion

Puget explained that after its merger with Washington Natural Gas, it had difficulty dealing with various labor unions, including over the issue of drug-testing. While a few months of confusion might be understandable, years of neglect is inexcusable, and suggests much more than a labor-relations problem. In any event, it is the Company's legal responsibility to meet requirements at issue.

CONCLUSION

Puget Sound Energy carries a heavy responsibility, both legal and moral, to ensure the integrity and safety of its natural gas pipelines. An important aspect of this responsibility is the administration of drug and alcohol testing programs for employees whose work can affect the safety of pipelines [*30] years into the future. If Puget failed for four years to administer such a program, it should be required to own up to that fact, take its lumps, and move on.

This Commission carries a heavy responsibility, both legal and moral, to enforce laws and rules that protect the public from death and danger. The excellent work of our pipeline safety staff in investigating and bringing to light Puget's failures demands a corresponding commitment from Staff and this Commission to follow through with appropriate sanctions. Unfortunately, the Settlement Agreement and this Commission's approval of it fail to convey such a commitment. The majority proclaims this to be "a very serious matter" that "warrants substantial action." But their lenient action rings louder than their words.

In a time when many eyes are critically focused on corporate misbehavior and on regulators' ability to correct it, both Puget and this Commission should live up to their responsibilities. Over the long run, that is how to foster trust between a regulated company and its regulator, and that is how to foster trust by the public in corporate and governmental institutions.

This matter should be set for hearing to [*31] determine whether violations occurred, and if so, to further determine appropriate sanctions.

For the foregoing reasons, I dissent.

MARILYN SHOWALTER, Chairwoman

Legal Topics:

For related research and practice materials, see the following legal topics:
Communications LawU.S. Federal Communications CommissionJurisdictionEnergy & Utilities LawTransportation & PipelinesNatural Gas TransportationEnergy & Utilities LawTransportation & PipelinesPipelinesGeneral Overview

********** Print Completed **********

Time of Request: Wednesday, January 26, 2011 00:53:01 EST

Print Number: 1841:264990384
Number of Lines: 399
Number of Pages:

Send To: SANTELLI, DEBBIE
HALINEN LAW OFFICES, P.S.
1019 REGENTS BLVD STE 202
TACOMA, WA 98466-6037

PIERCE COUNTY PUBLIC WORKS AND UTILITIES DEPARTMENT
2702 South 42nd Street, Suite 201, Tacoma, Washington 98409-7322
Jerry West: (253) 798-3687 Greg Dussault: (253) 798-2243

Permit # 012611-B

Date Issued 2-24-11

EXHIBIT 3

RIGHT-OF-WAY PERMIT

PERMIT FOR:

[ ] Culvert in Right-of-Way
[ ] Tree/Vegetation Removal from Right-of-Way
[ ] Test Holes in Right-of-Way
[ ] Storm water Disposal Project
[X] Other Right-of-Way Request WORK IN RIGHT OF WAY OF 134TH AVE E TO REBUILD BOTH LANES FOR 60 FT NORTH OF MAIN TRACK XING.

Applicants Name: MEEKER SOUTHERN RAILROAD Telephone: 206-782-1447

Applicants Address: 4725 BALLARD AVE NW SEATTLE, WA 98107

Contractor to Perform work: ASPHALT PATCH SYSTEMS Telephone: 253-535-2746

LIC #: ASPHAPS099BP Bond: SA3230

Project Address: 134TH AVE E AT 80TH STE E

Reason for Request: ROAD GRADE IS TOO STEEP APPROACHING RR TRACKS FROM THE NORTH.

Sec. 25&26 Twp. 20N Rng. 4E W.M.

I certify that the above information is correct and that the application regulations and ordinances relating to this work will be complied with. The work will be constructed as directed by the County Engineer or his authorized representative and all conditions as stated below will be complied with.

Proof of Insurance & Bonding is Required Before Permits are Issued

Signature of Contractor
(All Information Above Must Be Filled Out)

Site Development Permit Needed? Yes / No	400 SF New Impervious Area 50 CY of Material Moved Environmental Studies

72 Hours Prior to Work Notify: JERRY BRYANT **Telephone No.:** 798-3682

For Final Inspection Call: _____ **Telephone No.:** _____

Engineer's Instructions and Conditions: CONSTRUCT AS PER APPROVED PLANS SIGNED & DATED BY BRIAN STACY, 1-25-11. WORK SHALL BE PROVIDED IN ACCORDANCE W/ ORDER 03 ASSOCIATED WITH DOCKET NO TR-100036 WITH THE WSUTC. THE ABOVE APPOVED PLANS SHALL BE ON SITE AT ALL TIMES DURING CONSTRUCTION.

- All work and materials shall conform to Pierce County standards and specifications.
- Repair to any and all damage to road infrastructure, private property, landscaping and /or utilities shall be the responsibility of the applicant / contractor and shall be approved by all affected agencies.
- All traffic control shall conform to MUTCD standards and specifications.
- Call before you dig for utility locates (1-800-424-5555).

Permit Approved By: _____ Date: 1-27-11

Work is hereby Inspected and accepted By: _____ Date: _____

See Right-of-Way Permit guidelines as per Chapter 17B.10 of Pierce County Code
This Right-of-Way Permit is good for 90 days from the date it was approved, per Chapter 17B.10.105 of PCC

Original-White-Customer Copy **When** approved/disapproved by County Engineer
Duplicate-Canary-District Copy
Triplicate-Pink-Pierce County Office Copy

PIERCE COUNTY
DEPARTMENTAL CASH RECEIPT

NO. 588557

RECEIVED FROM Asphalt Patch Systems

ADDRESS

DOLLARS $ 75.00

FOR General R/W Permit 134th Ave E
R/R Crossing

ACCOUNT			HOW PAID	
AMOUNT OF ACCOUNT			CASH	
AMOUNT PAID			CHECK	✓
BALANCE DUE				

DATE 2-24 20 11

BY JMEST FUND/DEPT. NO.

EXHIBIT 4

PROPOSAL and CONTRACT

ASPHALT PATCH SYSTEMS

8812 CANYON ROAD EAST • PUYALLUP, WA 98371
Telephone (253) 535-2590 • Fax (253) 535-2746 • www.asphaltpatchsystems.com

Attention	Byron	Fax	(206)782-7724	Email	
Contracting Party	Meeker Southern Railroad	Telephone	(206)782-1447	Date	2/24/11
Address	4725 Ballard Ave. NW	Job Name	Asphalt Work		
City, State, & Zip	Seattle. Wash. 98107	Job Location	Crossing at 134th Ave E		

We hereby submit specifications and estimates for:

Grind meet lines to area 40' x 55'. Grade sidewalk 80' x 6'.
Clean, haul away all spoils. Apply tack, apply class ½ HMA.
Seal edges with AR 4000. APS will handle all traffic control.

Job cost. $ 14,723.00 plus tax

Thank you, Jay Looker

NOT AN INVOICE (SEE INVOICE FOR PAYMENT TERMS)

* All prices are based on 2" depth, unless otherwise specified.
* Job to be remeasured upon completion.
* Prices subject to change upon remeasurement.

The contract price is only good for 30 days and is subject to renegotiation and change if construction does not begin within 30 days of the date of the construction agreement due to delays which are not the fault or responsibility of the contractor.

ACCEPTANCE OF PROPOSAL: I have read and understand the Terms and Conditions on the back of this Proposal and Contract, as well as the Notice to Customer. The prices, specifications, terms, and conditions are satisfactory and are hereby accepted. You are authorized to do work as specified.

Asphalt Patch Systems, Inc., Representative

Approved Customer Signature

Date of Approval

READ NOTICE ON BACK.

EXHIBIT 5

David Halinen

From: Jay Looker [Jay@asphaltpatchsystems.com]
Sent: Thursday, February 24, 2011 11:02 AM
To: David Halinen
Subject: RE: Asphalt proposal

David, Pave additional area to the south, approx. 20' x 25' would have cost Meeker $ 3500.00 Thanks Jay

-----Original Message-----
From: David Halinen [mailto:DavidHalinen@halinenlaw.com]
Sent: Thursday, February 24, 2011 10:55 AM
To: Jay Looker
Subject: RE: Asphalt proposal

Thanks, Jay!

Dave Halinen
Halinen Law Offices, P.S.
1019 Regents Blvd, Suite 202
Fircrest, Washington 98466-6037
(206) 443-4684 Seattle
(253) 627-6680 Tacoma
(253) 272-9876 FAX
davidhalinen@halinenlaw.com

-----Original Message-----
From: Jay Looker [mailto:Jay@asphaltpatchsystems.com]
Sent: Thursday, February 24, 2011 10:54 AM
To: David Halinen
Subject: FW: Asphalt proposal

About Puget Sound Energy

Washington's oldest local energy utility

Fact Sheet
PSE.com

EXHIBIT 6

Company Overview

Puget Sound Energy is Washington state's oldest local energy utility, providing electric and natural gas service to customers primarily in the vibrant Puget Sound area.

The region has experienced dramatic change during PSE's century-plus history, but one thing has remained constant: PSE's focus on safe, reliable and affordable energy service. Our commitment to serving communities and to helping make them better places to live and work is as steadfast as ever.

PSE's service area is home to some of America's most recognized and respected businesses, including Boeing, Microsoft, Amazon.com, Weyerhaeuser, Starbucks, Costco and Nordstrom.

PSE's parent company, Puget Energy, merged in 2009 with Puget Holdings, a group of long-term infrastructure investors.

Combined electric and natural gas service
Electric service
Natural has service

Headquarters: Bellevue, Wash.

Revenues: $3.32 billion

Assets: $8.81 billion

Employees: 2,900

Customers:

- More than 1 million electric
- Nearly 750,000 natural gas

Service area: 6,000+ square miles, primarily in Puget Sound region of Western Washington

Service-area population:
Approximately 4 million

Counties served:

- Island (electric)
- Jefferson (electric)
- King (combined)
- Kitsap (electric)
- Kittitas (combined)
- Lewis (natural gas)
- Pierce (combined)
- Skagit (electric)
- Snohomish (natural gas)
- Thurston (combined)
- Whatcom (electric)

Energy sales (2009):

- 26.3 million megawatt hours
- 1.135 billion therms (1 therm = 100,000 Btu or about 100 cubic feet of natural gas)

Average residential rate (Jan. 1, 2011):

- 9.8¢ per kWh (based on average household usage of 1,000 kWh)
- $1.22 per therm (based on average household usage of 68 therms)

PUGET SOUND ENERGY