TR-981102

STATE OF WASHINGTON

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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James H. Slakey, Director
WSDOT – Public Transportation
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Transportation Building
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Olympia, WA 98504-7300

January 2, 2001

Dear Mr. Slakey:

The Washington Utilities and Transportation Commission is in receipt of your comments regarding the proposed revisions to Chapter 480-62 WAC. Thank you for the time and effort you spent to review the various drafts of the rules, and for the suggested revisions that you sent us. All of the comments that we have received have been instrumental in developing the proposed rules in a manner that considers stakeholder concerns.

As you are aware, staff has made every attempt to achieve consensus with stakeholders. For the most part this goal was realized, however, there are areas where staff did not incorporate stakeholder comments. It is the intention of this letter to explain the reasons for not including your suggested revisions to WAC 480-62-155, Procedure to set train speed limits.

Your comments argue that "the entire field of railroad speeds has been subsumed by federal regulation," and that the proposed rule is not in accordance with the tenants of the Federal Railroad Safety Act. The stated objections rely primarily on remarks made by the Federal Railroad Administration (FRA) (titled "supplementary information") when that agency adopted amendments to its track safety standards at 49 C.F.R § 213 in 1998. 63 FR 34029 (1998).

As an initial matter, staff would agree that the FRSA has changed the nature of train speed proceedings and has established a presumption that speed increases that are consistent with federal speed limits should be granted. This is because in addition to weighing the benefits of a proposed speed increase against the increased risk to safety, the Commission must also consider whether any alleged hazard qualifies as an essentially local one. See, e.g., In re National Railroad Passenger Corp., Docket No. TR-2248 at page 8 (July 1990). If the commission is persuaded to deny a railroad's petition for an increase, or to grant the increase on the condition of certain safety improvements, it may only do so on the ground that the hazard presented is an essentially local one not adequately taken into account by federal standards. See In re Washington State Department of Transportation, Burlington Northern Railroad Company, and the National Railroad Passenger Corporation [Ferndale speed limits], Docket No. TR-940308 (April 1995) (Commission will not condition approval of an increase in train speeds on building

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a fence when trespassing danger in the area is not so great as to constitute a local safety hazard not generally found in other areas).

For this reason, staff is working to modify the language within the section to clarify the intention that no burden other than filing a letter requesting a speed increase is placed on the railroad. Upon filing, the burden immediately shifts to the Commission staff or the road authority to show the existence of an essentially local safety condition. The revised rule, including this new language will be provided prior to the adoption hearing.

While the FRA's explanations for its 1998 rule amendments (to which you cite in your letter) certainly set forth persuasive safety policy reasons for a presumption against too many localized train speed regulations, we do not believe that the agency's comments are properly interpreted as foreclosing State regulation of train speeds when it is shown to be necessary. There are two reasons. First, staff believes that federal agency's comments should be interpreted as addressing what the FRA perceives as the danger of *local* government, *not state* government regulation of train speeds.[1] Second, interpreting the FRA's comments on its 1998 rule amendments otherwise (and equating "local" with "State") brings the agency's explanation of its rule amendments into conflict with the plain words of the rules themselves as well as the clear limitation that Congress placed on the FRA's authority to preempt any given area of safety regulation under the FRSA. The FRA acknowledges this fact in its comments when it states: "the courts ultimately determine preemption in any particular factual context." 63 FR 33992 at 3400 (June 22, 1998).

The Minnesota Court of appeals recently reached this conclusion in In re: Speed Limit for Union Pacific RR through City of Shakopee, 610 N.W.2d 677 (Minn. Ct. App. May 16, 2000):

> Union Pacific argues that the commissioner [i.e., the State agency authorized by Minnesota statute to regulate train speeds] is "negatively preempted" from imposing a train speed limit in Shakopee. We disagree. . . . Accepting Union Pacific's argument would require that we ignore the express terms of the second provision of the savings clause, which permits state regulation if the three-part test is met, even if the FRA has chosen to regulate that area of railroad safety. See 49 U.S.C. § 20106. Moreover, the FRA itself does not consider its maximum train speed limits to be appropriate in every situation. To the contrary, the regulation indicates that the maximum speed limits represent minimal safety standards, "applicable to specific track conditions existing in isolation," and that a combination of conditions may require railroads to take additional remedial action to ensure safe operations over a particular track. 49 C.F.R. § 213.1 (1999). The regulation also indicates that, its preemptive effect notwithstanding, states may regulate track safety standards where necessary to address an "essentially local safety hazard." 49 C.F.R. 213.2 (1999).

To summarize, Staff is not convinced that the federal/state regulatory balance that was struck with the enactment of the FRSA in 1970 has changed since Congress first unambiguously set out that standard in the Act's state regulation savings clause. 49 U.S.C. § 20106. Neither the portion

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[1] The FRA states: "It would be poor public policy to allow local governments to attempt to lower their risk by raising everyone's risk and by clogging the transportation system [emphasis added]." 63 FR 33992 at 33999.

of Supreme Court's 1993 CSX v. Easterwood decision, 507 U.S. 658, that discusses state common law causes of action for negligence[2] nor the "supplemental information" issued by the FRA in connection with its 1998 track safety standard rule amendments have altered the plain intention of the savings clause.

WSDOT also objects to the fact that "Proposed WAC 480-62-155 §(2)(a)(i) apparently would bind the railroad to petition for a speed increase whenever the existing speed limit has previously been set by the Commission. That proviso would appear to cover any locality with a Commission-set speed limit whether or not essentially local safety hazards had been considered in relation to that prior proceeding." In earlier comments the class 1 railroads expressed their objection to staff's position that the speed limits set by *pre-FRSA (i.e., pre-1970)* orders of this commission are still "good law." We assume this is the same concern you express here, since the speed limit changes granted over the last decade have consistently made reference to "essentially local safety hazards" in accordance with federal law.

Staff's view is that pre-FRA orders remain in effect under the provision of the FRSA savings clause which indicates "A State may . . . *continue in force* an additional or more stringent law, regulation or order related to railroad safety" when "necessary to eliminate or reduce an essentially local safety hazard." It is clear that pre-FRSA speed limit orders were arrived at based on an assessment of the degree of hazard presented at a particular location versus the commercial advantage in permitting a given rate of speed through cities and towns.[3] The standard is set out in RCW 80.48.070: "rates of speed shall be commensurate with the hazard presented and the practical operation of the trains." Whether the hazards taken into account by

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[2] In July of 2000, the Federal District Court for the Northern District of California commented as follows on the significance of Easterwood: "While the Supreme Court briefly refers to "unique local conditions" in CSX [v. Easterwood], it was intended simply as a contrast to the State's common law of negligence which was clearly not a rule directed at a local hazard in any sense of the term: 'The common law of negligence provides a general rule to address all hazards caused by lack of due care, not just those owing to unique local conditions.'" (quoting from the Easterwood decision itself) 109 F.Supp.2d 1186, 1204, fn. 20. The Minnesota court of appeals similarly states: "Contrary to Union Pacific's argument, the Court [in Easterwood] did not find that the FRSA broadly proscribed all state regulation of train speed, even for essentially local safety hazards. Rather, it concluded that the common-law negligence rule did not meet the requirements of the savings clause because it was not tailored to address a specific essentially local safety hazard." 610 N.W.2d at 684 (July 2000).

[3] The statute vesting the authority to set speed limits in the Department of Public Service was enacted in 1943. In 1952, the Public Service Commission (successor to the Department of Public Service and predecessor to the WUTC reported to the Governor:

> Before final action is taken to place a limit on the speed at which trains may travel, a careful study of each railroad crossing in the community is made. The factors considered in these studies include the type and volume of rail and motor vehicle traffic and the physical characteristics of the crossing such as grades, type of surface, sight distances from road to tracks, obstructions to clear view such as buildings, trees, etc., and the extent to which the crossing is protected by means of signs, signals, etc. In addition, the commission's representative always confers with officials of the local governing body and of the railroads operating trains within the boundaries of the city or town under their jurisdiction. This procedure has been adopted as the most practical method of assembling all the factual data that should be considered in arriving at a fair and soundly conceived decision as to how fast trains should be allowed to travel through any municipality. Since none of the 151 orders fixing train speeds have been reviewed it is reasonable to assume that the speed limits imposed by said orders were established with proper regard to the interests of everyone directly or indirectly concerned with the problem.

Second Report of the Washington Public Service Commission to the Hon. Arthur B. Langlie, Governor, at page 29-30 (1952).

the Commission at the time it adopted those orders would pass through the additional filter of the FRSA's "essentially local hazard" test is not clear, but it is certainly not a foregone conclusion that they would not.

Therefore, staff does not consider it unreasonable to require the railroads (consistent with their own practice in numerous cases within the past decade) to request an increase in such existing limits. The railroads have petitioned for and the Commission has granted many speed increases within the limits of many cities and towns in the past ten years, with significant batches in 1990, 1995, and 1997. This rule does nothing to alter the procedures applied in those cases.

I would like to thank you once again for your review of the proposed rules and the comments that you have submitted. The Commission will consider the proposed rules for adoption at its regular open meeting, on January 11, 2001 at 9:30 at the Commission's headquarters, located at:

1300 S. Evergreen Park Drive SW
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If you would like to further discuss any of the comments that you have submitted or have any questions regarding the status of the current railroad operations rulemaking, please contact me at (360) 664-1345.

Sincerely,

Ahmer Nizam
Washington Utilities and Transportation Commission

cc: Frederick C. Ohly
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Attachment