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STATE OF WASHINGTON

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

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David M. Reeve
Kroschel, Gibson, Kinerk, Reeve, L.L.P.
110 110th Ave. NE, Suite 607
Bellevue, WA 98004

January 3, 2001

Dear Mr. Reeve:

The Washington Utilities and Transportation Commission is in receipt of your comments regarding the proposed revisions to Chapter 480-62 WAC. Thank you for your time and effort in reviewing the various drafts of the rules, and for the suggested revisions that you have 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. Comments from the Union Pacific and Burlington Northern Santa Fe Railroad Companies have been especially valuable throughout the process.

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 some of your suggested revisions to WAC 480-62-155, Procedure to set train speed limits, WAC 480-62-305, Community notice requirements, and WAC 480-62-315(2), Miscellaneous reporting requirements.

WAC 480-62-155, Procedure to set train speed limits

Your comments regarding WAC 480-62-155 argue that the requirements of the proposed rule exceed the Commission's authority in regulating trains speeds, and that further modifications are necessary for reasons concerning federal preemption of train speed regulation.

Staff does not agree that federal law has preempted the State's role in train speed regulation to the extent that your analysis suggests. While the FRA's explanations for its 1998 rule amendments 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*

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government regulation of train speeds.[1] Second, interpreting the FRA's comments on its 1998 rule amendments to prohibit State regulation (by 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 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.

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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.

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).

In earlier comments you expressed your clients' 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." Staff's view is that these 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 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. Staff is, however, 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 rules containing the new language will be provided prior to the adoption hearing.

WAC 480-62-305, Community notice requirements

Your previous comments have explained that, since actions at crossings, such as maintenance, rarely coincide with planned schedules, the draft rule should be revised to include the phrase "best estimate of the start and completion date" for an action. This language, in addition to the

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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).

sentence, "This rule is not intended to include immediate safety hazards or emergencies" were added in the interest of allowing flexibility regarding this requirement. The comments that you have most recently filed expresses concern that the rule, as written, still does not allow for flexibility for "non-emergency" repairs. The proposed rule requires railroad companies to notify local jurisdictions and the Commission "at least 10 days prior to taking any *planned* action that may have a significant impact on a community."

Staff's position is that the flexibility that you are requesting is already present in the proposed rule, as the operative phrase in the rule is "planned action." Since the maintenance practices such as replacing broken planks when "the opportunity presents itself" are not planned and present likely safety hazards, advance notice would not be required to carry out those actions.

WAC 480-62-315(2), Miscellaneous reporting requirements

Other comments express concern that the requirement within WAC 480-62-315(2) exceeds staff's stated intent, and that the rule, as written, could conceivably require a system-wide notice of operations over all crossings in the State. In response to this concern, Staff modified the rule to exclude the requirement for "each" grade crossing to "specific" grade crossings." It was further suggested in your comments that the rule should "require railroad companies to cooperate in a reasonable manner to respond to reasonable data requests."

The Rail Section is responsible for keeping an inventory of all public highway-rail grade crossings in the State. The inventory is used to keep track of each crossing, including the type and volume of daily highway traffic, physical characteristics of each crossing, the type of warning devices used at crossings, the maximum allowable speeds of trains and vehicles through crossings, and the daily train operations through each crossing. All of the information in the Commission's inventory is critical for prioritizing crossings for allocation of federal funding for crossing upgrades, the employment of accident prediction analysis, and providing accurate data for Commission Orders. Updating this data and generally having accurate information is important for the Commission's Rail Section staff to keep an inventory that reflects the actual characteristics of each crossing. In addition, the Federal Railroad Administration relies on the Commission's inventory to maintain a national inventory which contains identical information. It is for this reason that staff periodically needs updates to train operations concerning specific areas or crossings.

Up to this point, staff has successfully worked with both UP and BNSF in attaining this information to the extent needed by the Commission's Rail Section. It is not staff's intention to ever require this information on a system-wide basis, and therefore it is not necessary to assume that "unreasonable" requests would be made.

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
Olympia, WA 98501

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

Attachment