2/11/01

CHAIRWOMAN SHOWALTER: 3)B.

MR. NAZIM: Good morning, Madam Chairwoman, Commissioner Hemstad. This is Ahmer Nizam from the Commission's rail section staff, and I'm here to present Item 3)B requesting the Commission's consideration to direct staff to prepare an order adopting the proposal in TR-981102 for filing with the Code Reviser. This rulemaking was among those that was initiated as a result of Executive Order 9702. The proposed rules are a combination of now what is almost two years of work reviewing the existing rules for clarity and determining whether additional rules are appropriate. Staff has held several stakeholder workshops and has received many comments that have been instrumental in the development of the rules. Consensus has been achieved for most sections, although remaining areas that may elicit further comments are those related to train speeds, miscellaneous reporting requirements, and community notice requirements.

Beginning with train speeds. The Commission's authority to regulate train speeds is limited through the Federal Railroad Safety Act to situations where an essentially local safety hazard would necessitate a reduction in train speeds in order to eliminate or reduce those hazards. The rules' intent is to provide communities, railroads, and the Commission staff with a clear understanding of the limits of Commission authority as well as to establish an objective procedure for the Commission to review requests for changes and train speeds within those limits. The Burlington, Northern, and Santa Fe and Union Pacific railway companies along with the Washington State Department of Transportation's rail office have objected to the rule, arguing that the rule exceeds Commission authority due to federal preemption of train-speed regulation. Specifically, the railroads object to a provision in the rule that would require any person, including railroad companies, to file petitions with the Commission when seeking to increase train speed limits. This is primarily because they don't believe it is their burden to demonstrate that a train speed is justified if that train speed is within the Federal Railroad Administration's standards.

Staff believes that such petitions are appropriate for a number of reasons. Since the Federal Railroad Safety Act passed in 1970, the Commission has only set limits where essentially local safety hazards have been found. Prior to that time, the Commission set limits based on a detailed consideration of safety hazards, some of which

might constitute essentially local safety hazards within the definition of a Federal Railroad Safety Act. Staff feels that allowing speed increases without notice would be to ignore the fact that safety hazards have previously been found in areas where speed increases are being sought. This would also presume that Commission orders are invalid without review and would deny interested parties from seeking a finding of an essentially local safety hazard that would allow the Commission to maintain reduced speeds as allowed by the Federal Railroad Safety Act. Petitions for speed increases by the railroad companies provide the Commission with notification as well as serve as a means to notify local jurisdictions about the proposed changes. Furthermore, railroad companies only need to file petitions where limits have previously been ordered by the Commission. Finally, no burden other than filing is placed on the railroad company. This has been clarified in a recent revision, which is on page six of the rules, which is also part of the open meeting memorandum which specifies that after a petition is filed, the burden immediately shifts to Commission staff or an interested party to demonstrate that an essentially local safety hazard exists.

The next section for which consensus has now been reached is proposed WAC WAC 480-62-305 Railroad community notice requirements, located on page 16 and 17. When a railroad company plans an action at a crossing that significantly impacts traffic flow through that crossing, the rule requires that they provide the community where the crossing is located with at least 10 days' notice in order for the community to properly plan for possible disruptions. The requirement serves to reduce delays for emergency responders and generally prepares the community for closure of a route. Comments state that the rule does not allow for flexibility regarding routine maintenance. The rule is worded to apply to planned actions only that have a significant impact on a community. Staff recognizes that there are instances where 10 days' notice is not possible; however, the rule also states that it is not intended to cover immediate safety hazards or emergencies. Therefore, routine maintenance that is not likely to pose significant impact on a community or non-planned maintenance in the interest of safety, are not covered by the rule.

CHAIRWOMAN SHOWALTER: So, in other words, if somebody was out in the field doing routine maintenance and noticed something that needed to be done right away, that could be done right away.

MR. NIZAM: That's correct.

CHAIRMAN SHOWALTER: Thank you.

MR. NIZAM: The final section for which consensus has not been achieved is proposed WAC 480-62-315 Section 2 Miscellaneous reporting requirements. The rule would require that upon request, railroad companies must submit to the Commission the average number of daytime and nighttime through trains as well as switching movements over specific grate crossings in its control. Comments by the Burlington Northern, Santa Fe and Union Pacific Railroad Company have stated that the rule as written would impose unreasonable burden on railroad companies because the requested information is not ordinarily maintained by the companies.

The Commission's rail section staff is responsible for maintaining an inventory of all public highway rail grate crossings in the state. The inventory includes information such as volume of train and vehicular traffic, speeds, warning devices, site distances, accident histories, and similar information. The information from the inventory is used for various staff duties including the employment of accident prediction analysis and other means for prioritizing crossings for safety upgrades and also for providing information for staff investigations. In order to make any decisions based on this inventory, it's important that the inventory be accurate and is updated periodically to reflect changes; for example, to typical training operations through crossings. It's not staff's intention, nor is it necessary to ever require this information on a scale that would impose any unreasonable burden on railroad companies, and I would also like to mention that staff has worked with railroad companies and successfully obtained this information up until this point.

In conclusion, I would like to thank all the stakeholders for their participation and their input and recommend that the Commission direct staff to prepare an order adopting the proposal in Docket TR-981102 for filing with the Code Reviser, and I'm available for questions.

CHAIRWOMAN SHOWALTER: Any questions at this time? Thank you very much.

MR. NIZAM: Thank you.

CHAIRWOMAN SHOWALTER: Carolyn Larson?

MS. LARSON: Good morning, Chairwoman Showalter and Commissioner Hemstad. I'm Carolyn Larson, an attorney for the Union Pacific Railroad Company. I would urge that the rules in their current form not be adopted for some of the reasons which Ahmer Nizam has summarized, but I would like to go specifically into the three rules in question.

As to train speeds, the principal problem that the railroads have with the rule as written is that if a previously imposed train speed restriction order from the WUTC exists, the mere allegation by a city, for example, that an essentially local hazard now exists that should restrict speeds will, in fact, delay any implementation of a train speed increase until the WUTC affirmatively rules otherwise. What this means, for example, is in stretches of track where high speed rail funds are being used to upgrade track so that Amtrack speeds can increase, and the track improvements have been made that under the federal standards for train speeds allow speeds to increase for Amtrack and for freight trains, that the railroad would nonetheless be required to come into the Commission and petition for the train speed increase, and if any city along the route decided that they thought that there was some local hazard involved that that could hold it up through the entire hearing process.

CHAIRWOMAN SHOWALTER: What do you do if, let's say that we have issued an order two months ago that's presumptively valid and it wasn't challenged, what does it mean to change the speeds relative to that order if you don't have some kind of proceeding to determine whether an order should be modified? In other words, what is the finality of an order if it can be changed without a proceeding?

MS. LARSON: I would distinguish between train speed orders where an essentially local safety hazard has been found and a determination has been made under the standards set in the Federal Railroad Safety Act for state action to take place. In other words, that there is the essentially local safety hazard that other methods are not available to mitigate that danger that a train speed restriction is consistent with federal law and that it doesn't unreasonably burden interstate commerce. If those burdens had been met in the order that was issued two months ago, then I would agree with you that that's something we

would have to come back and challenge. But although it was stated that every order since 1970 has found an essentially local safety hazard, I don't recall that to be true. Unfortunately, I wasn't able to refresh my memory completely, but I do remember in the early '70s that Union Pacific came to the Commission when it wanted to increase train speeds through some of the cities between Tacoma and Seattle, and what we were doing was upgrading the signals at crossings, making sure there were no longer any un-gated crossings through the areas where we wanted train speed increases, but I don't remember ever using the term, essentially local safety hazard, or considering that. We were simply trying to get speeds above, say, previous 30-mile-an-hour levels up to, say, 50 because of the fact that we had gated all the crossings. But the terminology, essentially local safety hazard, and all of the preemption standards that have, in the ensuing 20 years or so, have become words that we all understand. We weren't thinking in those terms back when those changes were being made. But I would distinguish between your orders where that is found and ones where that was not even under consideration.

CHAIRWOMAN SHOWALTER: So you're agreeing that if we do have orders out that state that this is thus speed that is consistent with local safety conditions, that in that case, anyway, the speed should not be changed without some change in the order.

MS. LARSON: If it met all those – the three prongs of the Federal Railroad Safety Act.

CHAIRWOMAN SHOWALTER: Right.

MS. LARSON: As for the community notice requirement, and miscellaneous reporting requirements, you know, essentially I don't think that the railroads have any problem with the rules in the manner in which the staff report says that they would be enforced or interpreted. The problem that I see is that I do not, when I read those rules, make those assumptions. For instance, if the –

CHAIRWOMAN SHOWALTER: Will you point us to the language that you're looking at?

MS. LARSON: Okay. For instance, in community notice – that's WAC 480-62-305, which talks about giving notice of planned actions. If I were a road master who knew that there were crossings that needed some maintenance, I might plan to do it some time. I mean, planned, can mean various things to various people and I might, then, if I were that road master, think that I could not, if I had a free afternoon and were in the area, that

I could not go ahead and change out a plank, do some normal maintenance in a crossing because I hadn't given the 10-day notice. If the language that were in the staff's report about this not being intended to apply in that situation were either made a sub-section of this rule or a note at the end of the rule, I wouldn't have any problem with that. I just – it's helpful for me to have seen the staff's position. You know, if I ever were aware of a situation where a road master was thinking he couldn't repair a crossing because he didn't have 10-day's notice to do so, he had an opportunity that particular day to do it, but he hadn't contacted me, the attorney for the railroad, to ask if he could go ahead and do it. You know, I guess – I think that's a danger. I'd like to have everybody know what the rule requires whether they have a copy of this staff report or not.

CHAIRWOMAN SHOWALTER: Well, just stop you right there because you've raised a question in my mind, and I don't know whether it's been thought through or not, but as I read the language, it simply requires 10 days' advance notice; it doesn't actually – the rules does not require notice of what date it is going to be done. And so the situation that you just mentioned, if there's something that needs to be done sometime in the next six months, it seems to me that our rule requires notice of that, but not notice that it's going to be done on January 28th.

MS. LARSON: Well it does say in (3)(d) that we're supposed to give an estimation of the start and completion date.

CHAIRWOMAN SHOWALTER: Oh, okay. Maybe that's what I didn't notice. Where was that?

MS. LARSON: Sub-section (3)(d).

CHAIRWOMAN SHOWALTER: I see, I see. So it does. All right, so it's back to your issue – that if you know you need to do something sometime, but don't want to pin yourself down.

COMMISSIONER HEMSTAD: Well, you know, I guess there's a balancing of interests here. On the one hand, the railroad wants to be able to operate efficiently and for your track supervisor to be able to schedule his work and repair operations and the like. On the other hand, it is not unreasonable to expect the railroad to notify a community when there's going to be a significant impact on a railroad crossing and the flow of the community across that intersection. It just strikes me that this rule tries to balance that.

It seems to me there's a lot of flexibility in how this rule is written, and basically, a lot of discretion given to your local operating people. I suppose if you're the local operating personnel and want to be rigid about it, then it's going to adversely influence their ability to get their work done, but it seems to me essentially the discretion was given to the railroad, but it is largely hoardatory to – that you ought to tell a community what you're doing when you're able to do that. If you're not able to do it, or that there's an immediate problem, you fix it. I think that's a rather reasonable balancing of the equities here.

MS. LARSON: Well, I understand for the planned events if there's – if a railroad plans to go through and replace ties through a 20-mile stretch of track where they know it's going to disrupt crossings – they've planned that in advance; they know about that activity – and, clearly, if it's an emergency, we're allowed to go ahead and do the work. It's that work that falls in between those extremes where I see the problem here, and I don't see a problem with the way that Ahmer Nizam said that he was interpreting this rule. I just would like to see that word in this rule, so that it would be clear to anybody else, other than me who's reading it, that it is acceptable to replace a plank if you have two hours free at the end of the day and you're in that area – even though you weren't able to give 10 day's notice.

CHAIRWOMAN SHOWALTER: But the rule also only relates to action with a significant impact. I guess I don't know how significant replacing a plank in two hours is, but it seems to me that there's also discretion given to the railroad company to decide what's significant and what isn't.

MS. LARSON: There was an example, I thought, in here of what was considered significant. Disrupting the use of a crossing for maintenance is considered a significant action, so that sounded to me like it was actually kind of a too restrictive a definition because obviously it disrupts use of a crossing if you have to close one lane at a time to be able to replace a plank, but I guess I wouldn't consider that to be significant, but actually under the definition, it's given as an example.

CHAIRWOMAN SHOWALTER: Right, well, I guess I can see the desire of the railroad to want to have total flexibility in how it repairs the railroad. And if its efficiency were the only question, then there wouldn't be a rule. But you're positing a situation where

it's known that the work needs to be done in advance, so the question is what kind of burden is it on the railroad to give the advance notice relative to the inconvenience of the community and the inefficiency of their not knowing. If you don't know that the crossing's going to be closed, then other entities who would use the crossing, including emergency, don't have the ability to plan. And so it's essentially a request that if you know in advance, then do a little planning – a little bit of planning – 10 days planning, I guess.

MS. LARSON: Well, I still will find it problematical, though, if this is interpreted by people who are trying to apply the rules as meaning that they should not go ahead and repair a crossing that a community has been clamoring to have repaired when they have time to do it because they are interpreting this as restricting them from doing that because it would temporarily disrupt a crossing. I still would like to have language in this rule that would allow the railroad to give whatever notice is reasonable and, under the circumstance, if we're talking about something that's one of these routine maintenance items. It's not the planned event where we know in advance. It's not the emergency where everyone agrees we have to do it right now, but it's like all those other items on your desk. You've got hearings that are set; you have certain items that you know are going to take place at a certain time, but if you were asked for every item on your desk what day are you going to take care of this piece of correspondence, it would be really impossible. So what I'm saying is that for a road master with all the kinds of work that they know needs to be done, too, the planned events and the emergencies are one situation, but the others – the routine maintenance – should better be treated as something where we give whatever notice is reasonable under the circumstance, but not leave this rule written so it look like you have to give 10 days.

CHAIRWOMAN SHOWALTER: Would you agree that a rule that says just whatever is reasonable is really so flexible, is it really anything more than saying before you begin, let the community know?

MS. LARSON: I guess in . . .

[Tape turns]

MS. LARSON: . . . what is where necessarily addressing here in, because what I'm told is that the people who maintain crossings do go to the public works department of the city

and tell them we're going to be working on such and such a crossing – do you want to put up some cones? – or, they already do make some coordinating efforts, but it isn't necessarily 10 days in advance.

CHAIRWOMAN SHOWALTER: Okay, anything else?

MS. LARSON: My final comment would have to do with the miscellaneous reporting requirements. And again, this is simply that I would like the rules to be written in a way that the people who are reading them who don't have staff's comments will not be alarmed. And when I circulated the miscellaneous reporting requirements for review by Union Pacific, I was told, you know, we do not keep records of how many switching movements there are across crossings, so to be asked that is asking us information we don't have, and we understand from the staff that what they plan to do is to go out and ask the train master for the area about activities over that crossing and get that kind of information, but I still would like to see language that makes it clear to anybody who reads the rule that you're only asking for kinds of information that is reasonably available to us and not requiring, for instance, that some sort of meters be set up that would keep track of these train movements when we don't have that currently.

COMMISSIONER HEMSTAD: What rule is that?

MS. LARSON: That is WAC 480-62-315, sub-section 2

Pause.

CHAIRWOMAN SHOWALTER: Well, is the issue that on its face, this could call for information that companies don't otherwise keep at all, or that there are some officials within the company who don't keep it that way, but some other official might?

MS. LARSON: In terms of switching movements, I don't think anybody keeps that in any written form, but there could be people who are familiar enough with the railroad operations and knowing how long their trains are, and so they understand how often it might be that they might be switching across a crossing. But it's not something where there would be any official record kept of that. It would just be somebody who had the experience from working through the area who might have a good estimate of that. As for the daytime and nighttime moves, well, we do keep records of the trains that are moving through an area. Whether they're daytime or nighttime, though, is going to be varying day by day because they aren't, for the most part, on any schedule.

CHARIWOMAN SHOWALTER: Well then I'm just going to ask a question on it. This isn't really a suggestion. I'll ask staff about it later, but if instead of saying it must report to the Commission and it goes on to say whatever it is, the average number, what if it said, you know, "then-available information on" the average whatever. Would that satisfy you?

MS. LARSON: That's fine.

CHAIRWOMAN SHOWALTER: I don't know that – that may undermine other purposes of the rule, but what – you're not objecting to having to relay then-available information; it's that you don't want to produce and make a record just for this purpose.

MS. LARSON: Right. That's right. I think that was what was setting off alarms when I circulated this language because people said, well, we don't keep records of that. But if we limit it to what's then available, then those alarm bells don't go off and the staff is still able to get the information that they want from the people on the ground who they know do have that information.

CHAIRWOMAN SHOWALTER: Well, I'll raise that later with the staff.

COMMISSIONER HEMSTAD: Well, I guess there are two kinds of circumstances. There's the historical circumstance of what has been the case of traffic, and then there's the circumstance, call it forward-looking, where they are trying to determine what is the traffic and what additional burden, then, would be placed on the railroad to find out. If it's the latter, then you could – then it's not a matter of saying, well, we don't keep that information; it's a matter of then getting that information. Are you suggesting in the latter circumstance that that's an unreasonable request?

MS. LARSON: Well, I know that the reason why the WTC staff wants that information now is they do want to know about existing movements so they can prioritize crossings for signalization. (Pause) If you're asking me whether I am – we would object to making projections about what's to happen in the future?

COMMISSIONER HEMSTAD: Well, not projections of it. If you were to get a request, if you don't have the information now, you get a – upon request, you're asked for information about traffic at a crossing, you could then surely start monitoring that to determine what it is. That's not unreasonable, is it?

MS. LARSON: Well, I guess it would depend upon how many you're asking for at once, because if it's statewide and you're wanting to actually know exactly how many switching movements per day. I mean, I think at this point the WTC staff is satisfied with someone who's in the area who's knowledgeable about it and giving their best estimate, not actually putting out a counter to measure the switching movements, but to get an idea of just how active that crossing is. I believe that once you get down to the various highest priority crossings that are candidates for some improvement, that more detailed information is gathered on those, specifically, because we know that those are in the grouping that may qualify for the use of funds for gates or other improvements.

CHAIRWOMAN SHOWALTER: Thank you. I think I'll call on the others before we hear a response from staff so that you can respond to everything that's going to be raised. Dan Kinerk.

MR. KINERK: Good morning, Chairwoman Showalter and Commissioner Hemstad. I'm Daniel Kinerk, counsel for the Burlington Northern-Santa Fe Railway Company. Fortunately, some of the other attorneys in my firm have had the privilege of working with the staff on some of these rules. I have not. Unfortunately, they were unavailable today and so I am coming here. I've had a chance to review that and want to pass on some of the remarks that they want to share with the Commission. I think principally and the one proposed rule that I'd like to just address – some brief remarks – is the WAC 480-62-155 Train speeds. I think it is the position of the Union Pacific-the Burlington Northern-Santa Fe Railway Company and the Washington Department of Transportation that to allow the Commission to regulate essentially local safety hazards by controlling speed limits is preemptive. And, I think it's interesting in looking at section 1 under – 155, that there is reference to the Federal Railroad Safety Act of 1970. I think that it's clear that that, both from the staff and the interaction with the railroads, that Congress enacted that statute or that act for the purpose of implementing national uniformity when it comes to railroad safety, and that makes complete sense given that you have an industry that is traveling both intrastate and interstate. In that particular act, Congress gave to the Secretary of Transportation broad powers with regards to railroad safety. What I think is most interesting is that since that act has been passed and in use, there has actually, we've had the privilege, I guess, or the advantage of having the United States

Supreme Court in CSX v. Easterwood look at the broad effects of the Federal Railroad Safety Act relative to train speeds – and that's what we have in that particular case in which, basically, the holding of the court was that federal regulations cover the subject of train speeds and they preempt state regulations with regards to train speeds – and in that particular act, there is a savings clause dealing with states, but it is very limited one, and Ms. Larson made reference to that when – in response to one of the questions dealing with an essentially local safety hazard. Basically, what it indicates is that states can adopt or continue to enforce more stringent rules, laws or regulations if it is necessary to eliminate or reduce an essentially local safety hazard, if it is not incompatible with the law of regulation or order of the United States Government, and it does not unreasonably burden interstate commerce.

It's interesting in looking at this particular proposed rule, that it seemingly is silent, or I would suggest to the Commission, basically ignores the whole concept of the FRSA in the sense that I believe this rule as it stands is incompatible with the law. I also think it, from a practical standpoint, would result in an unreasonable burden upon interstate commerce by implementing a series of prohibitions with regards to train speed on railroads, and I think it's in conflict with that, and as such should not be adopted by this court – excuse me – by this Commission. I think that perhaps the best way to do that, and I think also with regards to the other two proposed rules, I think that there is still some give and take here and I'm not sure that when I hear the staff's counsel indicate to the court that with regards to the rule, with regards to miscellaneous reporting that they have a good relationship with the railroads and can get that information, my initial response is why, then, is there a necessity for such a rule? And I guess that I view this particular rules – these three rules – in their particular form is not in a finalized fashion, although I understand there has been significant interaction and work by both the staff and the railroads. I would suggest that perhaps a CR102 is necessary again to do some additional comments and written work relative to all three of these rules, but I would certainly strongly take the position on behalf of the railroads, and I think which is supported by the Washington Department of Transportation, that the WAC 480-62-155 is preempted. Thank you.

CHAIRWOMAN SHOWALTER: Thank you.

COMMISSIONER HEMSTAD: Well –

CHAIRWOMAN SHOWALTER: Oh, question.

MR. KINERK: I'm sorry. I have to say – not to interrupt you – I haven't seen you since you taught me in law school and so I'm so used to the Socratic Method I didn't expect that you would even ask me a question.

CHAIRWOMAN SHOWALTER: Well, you referred to us as court, you should have said professor.

COMMISSIONER HEMSTAD: There's a bit of conundrum here, isn't there? The federal statute acknowledges there's an exception for local safety standards, so the issue is presented, on the one hand, if the railroads argue that the matter is preempted, there is surely the question of then how the issue of a local safety standard is teed up and addressed. I'm sure you're not suggesting that every local safety standard issue will be addressed by the federal board; it will be addressed in the local environment, isn't that true?

MR. KINERK: It will be addressed in the local environment as long as it – there is compliance with the three requirements set forth –

COMMISSIONER HEMSTAD: I understand that, but I'm just talking about process now. So there has to be some mechanism in the local environment to address it.

MR. KINERK: I'm not sure that the mechanism should come in the form of the Commission regulating train speeds or setting train speeds in order to effectuate that process.

COMMISSIONER HEMSTAD: So you're saying that the preemption is dealing with train speed, and we would have to have a rule that would somehow tee up local safety standards irrespective of train speed.

MR. KINERK: I think so.

COMMISSIONER HEMSTAD: And has the railroad proposed anything along that line?

MR. KINERK: Since I didn't participate in the staff meetings with the railroad, I don't know the answer to that. I'm unaware of any.

COMMISSIONER HEMSTAD: We've had, now, because of this issue, rather extended discussion with the – our attorney general staff as to the interplay between our state law

and what it says, and the issue of the preemption of the federal statute. We have a state law; we have a state statute and what this is –

MR. KINERK: Are you talking about WAC 81-48-030 _____?

COMMISSIONER HEMSTAD: Well I don't have the –

MR. KINERK: I think both of those statutes are preempted.

COMMISSIONER HEMSTAD: And, well, I guess I would ask Mr. Goltz for his comment on the relationship between the federal and state law here.

CHAIRWOMAN SHOWALTER: I think we're going to hear from Mr. Thompson on that question in just a minute.

MR. KINERK: Thank you very much.

CHAIRWOMAN SHOWALTER: Thanks. But let's hear from Jeff Schultz of the DOT before we hear from Mr. Thompson.

MR. SCHULTZ: Good morning. My name is Jeff Schultz and I'm the rail operations and technical expert, and I represent the Washington State Department of Transportation Rail Office here in Olympia. And I'm authorized to present these comments on behalf of the Washington State Department of Transportation. I understand the Commission's received our comments from James [Slakey], director of the Public Transportation and Rail Division at DOT already, so I'll not waste the Commission's time by – by going over those detailed comments. What I would like to do is comment upon Mr. Nizam's letter from January 2nd to us – to Mr. [Slakey], and some of the recent changes – the wording of the rule by UTC staff regarding TR-981102.

First of all, I've not had the opportunity to – to study these recent changes to the rule. To my knowledge they weren't published or informally circulated without specific request by the stakeholders for when I received these yesterday by FAX from UTC staff. DOT would like to work together with the UTC staff and the railroads to discuss these proposed changes prior to any formal action by the Commission. However, if the Commission desires to address the merits of the changes, I guess I'd like to add comments as follows. First off, the changes really do nothing to solve the preemption defects that we see here. All they do is state the obvious – that the burden is upon the staff or the local jurisdictions to prove that there's an essentially local safety hazard that exists. Secondly, --

COMMISSIONER HEMSTAD: Let me stop you there. Again, if the burden is on the staff or the community to prove that there is a local safety standard, how is that – why is that preempted by federal law since the federal law contains a specific exception for a local safety standard?

Pause.

MR. SCHULTZ: I think the element of – there's a three-prong component to this is important.

COMMISSIONER HEMSTAD: And I've heard that. Let me jump. What would the Department of Transportation then say about how a local safety standard issue should be addressed? Or are you saying that it is simply preempted and it won't be addressed?

MR. SCHULTZ: I'm not sure if I follow your question, Commissioner Hemstad.

COMMISSIONER HEMSTAD: How should the issue of a local safety standard procedurally be addressed? (Pause) Does the Department of Transportation have a position on that?

MR. SCHULTZ: Our position is that, in terms of the preemption, that the Commission is preempted.

COMMISSIOENR HEMSTAD: And there's no way to address the issue of the local safety standard when there is a dispute between, say, a community and the railroad?

MR. SCHULTZ: Probably the best way to answer that is that there should be some type of mechanism that assists the community in doing that. The issue is, I think, --

COMMISSIONER HEMSTAD: Well what do you mean assist. I mean, ultimately, it's a legal issue, isn't it? (Pause) It's a mixed question of fact and law.

MR. SCHULTZ: There's a number of facts that need to be ascertained by people to make the determination, is it something essentially local?

COMMISSIONER HEMSTAD: And there has to be some kind of a process to address that.

MR. SCHULTZ: Some type of process.

COMMISSIONER HEMSTAD: And did you have a recommendation as to what that should be – if you're here saying that we are preempted?

MR. SCHULTZ: I don't have an answer to your question today, sir.

Pause.

Secondly, the changes that we've seen don't alter the fact that the rule continues to elevate past speed increases. You can increase findings by the UTC to some kind of relevant and binding status. In fact, past speed increase orders related to past events are irrelevant to future speed increases within federally prescribed levels. In other words, future speed increases up to federal standards are preempted by those federal standards notwithstanding prior UTC activities in that locale.

One final comment. The new version of the rule ignores our comments and concerns about the content of sub-section (3) in part 155 that attempts to identify evidence prohibitive to the essential local safety hazard adjudication. DOT believes that those elements of the proposed rule ignore the requirement of demonstrating that the situation is unique and completely ignores the required elements of federal law that have already been discussed – that the regulation cannot be incompatible with federal law and cannot unreasonably burden interstate commerce.

CHAIRWOMAN SHOWALTER: I mean – are you saying that we have a substantive standard in these rules that's different from the correct standard or just that we don't outline the correct standard; we just outline a process?

MR. SCHULTZ: I think the best way to describe that is that these go beyond what's already prescribed in federal law and set a stake out there for people to see and there's a number of court cases that have dealt with this, various issues, and that to have something here in the WAC is problematic.

CHAIRWOMAN SHOWALTER: What are you referring to; specifically, where is it that our standard is incorrect?

MR. SCHULTZ: Well, I think going beyond the threefold standard set out in the United States Code – what sets uniformity of the regulations. Here, we've got – we're going beyond that in setting out these –

CHAIRWOMAN SHOWATLER: But how? I don't – I'm just trying to get what is it that we're requiring in this rule that does go beyond those standards?

MR. SCHULTZ: Well, each of these particular parts here in section (3) where we go beyond – where it's set forth. I think that's what we're objecting to is that it doesn't need to be that specific or set forth out there – that what's in the federal law is adequate and should suffice.

CHAIRWOMAN SHOWALTER: As I read section (3), it's getting at what evidence will be considered in determining whether there's a standard – a local safety hazard. It doesn't seem to me that it is changing the standard. Now, it is saying what evidence might be relevant to the standard. (Pause) I mean, it's saying such – for example, we'll consider the history of accidents and potential for accidents at the location. That isn't the standard; it's what evidence will be considered in evaluating the standard, I think. It would only be if (a),(b),(c),(d) are irrelevant to the correct standard that this would – that it would be incorrect to have put them here. If they would always be irrelevant to the correct standard, that it would be wrong to have them in the rule, I would think.

MR. SCHULTZ: Well, our point is, Chairman Showalter, is that the WAC should exclude this attempt to try to define factual situations that could subject this evolving federal standards and that should just limit it to the conditions set forth in the United States Code.

CHAIRWOMAN SHOWALTER: Well, off hand, it seems to me that you're confusing this – the legal standard with what evidence might be relevant – what factual evidence might be relevant to determining whether that standard has been met or not, and the factual evidence that might be relevant is far broader and doesn't dictate whether the facts do or don't support the standard. I mean, if you look at – for example, looking at the history of accidents, it may be that the Commission would look at the history of accidents and find that it's not really relevant to – it doesn't add weight or not to the particular situation we're looking at. On the other hand, it might be very relevant – anyway.

COMMISSIONER HEMSTAD: Do you, or the Department of Transportation see any usefulness in having a rule that puts the local community on notice of the difficult burden that is presented when they wish to object to increase in train speeds in the quite limited environment of determining that there is a local safety hazard?

MR. SCHULTZ: I believe a notice would be appropriate to inform the community that perhaps that's different than actually a petition in terms of that. So there's a notice letting the community know what's going on by the railroad. I'm not sure if the railroads would object to that or not. It seems a reasonable thing to do – to a notice. Perhaps it's a different term than a petition, legally, I don't know. I'm not a lawyer. I apologize.

CHAIRWOMAN SHOWALTER: One of the things Commissioner Hemstad is raising here, which is a very good one, is that it's often assumed by the community out there that we have total discretion to set train speeds because there's some role that we do play, I think, under the federal act and our own statute; that therefore, we can decide this question, and the reality is our discretion is extremely narrow. And so part of the value of this rule is to lay out that very proposition to the people who would ask us to take action – that there is a high burden and the whole – our discretion is quite constrained.

Anything else?

MR. SCHULTZ: Those are all my comments.

CHAIRWOMAN SHOWALTER: All right. Thanks.

MR. SCHULTZ: Thank you very much.

CHAIRWOMAN SHOWALTER: Let's hear, first, from Mr. Thompson on a legal response.

MR. THOMPSON: Actually, I prefer to sit down if I may just because – to avoid stooping.

CHAIRWOMAN SHOWALTER: All right.

MR. THOMPSON: I guess the question is just generally for a overview of the relationship between the federal law and speed – rates of speed and what the state statute says. The state statute on speed regulation dates back to 1943, and it – the Federal Railroad Safety Act was passed in 1970, and as you've noted, has that savings clause in it which states that, first, that if the Federal Railroad Administration has not not enacted a safety rule or promulgated a safety rule on a subject, this state may continue to regulate that. Once the FRA has done so, has acted to regulate an area of railroad safety, the state is permitted to continue regulating, you know, if it finds that there is an essentially local safety hazard, that it's not unduly burdensome to interstate commerce, and that there's no – no actual conflict between what the state's trying to do and what the federal regulation calls for.

There have been numerous train speed cases before the Commission that I was able to find, that at least since 1989, and really, what this rule does is simply to codify, I think, what the procedure has been in those cases. The – I think what the railroads are relying on for the notion that the Commission is generally preempted in this area is two

things: one is the 1993 U.S. Supreme Court case which is CSX v. Easterwood which Mr. Kinert mentioned, but that case makes – it was a tort case – a negligence case – in which someone was killed or injured at a railroad crossing, and part of the allegations in the tort case was that the train speed was excessive and that the U.S. Supreme Court said essentially that state tort law was, you know, basically causes of actions alleging excessive speed, actually, that are below the federal standard are, in fact, preempted.

It's our view, however, that that does not mean that state, you know, actual Commission regulation of train speeds that is specifically tailored to that savings clause, and where there is a finding of essentially local hazards are also preempted. We don't think that follows from the Easterwood case. The other thing that the railroads have brought up is some explanatory material that came out with amendments to the FRA's rules on track safety standards which do address speeds in 1998, and there is sort of a policy statement in there indicating that the FRA specifically did not provide for local governments to adjust train speeds, and I guess our view is that that – certainly the FRA – can take the position that local governments as opposed to state governments are – that the savings clause does not extend to local governments and allow them regulatory authority, but I believe that even if the FRA wanted to preempt in this area, it has no authority to do so because Congress has specifically reserved that authority to states to act when there is an essentially local hazard. So that's sort of an overview.

CHAIRWOMAN SHOWALTER: What about the issue that Ms. Larson raised? Are there two categories of train speed orders that we've issued or is there only one category in that there is at least the category of train speeds in orders in which we did find a local hazard or have included that wording in the order, and is there another category?

MR. THOMPSON: Well, the cases that I've looked at specifically – what the Commission said – are those really since about 1989, and I wasn't – my research didn't go back any further than that, but the issue certainly does come up. I mean, there was an awareness of the preemptive effect of federal law and an attempt to address that in those cases. It's a more – I think the point that she's making – that Ms. Larson was making – is a more subtle point than you are, you're entirely preempted. The question is are orders maybe that preceded the 1970 FRSA and that didn't have to take into account this essentially local safety hazard finding, should the railroads still be required to petition to

change those old speed limits, and our position is that it's not unreasonable, and certainly it's consistent with the railroad's practice up until now, and also that those orders were certainly based on consideration of local safety hazards, whether they would qualify as essentially local under the federal law, may not be clear, but certainly the railroads should be required to petition for review whether those should continue in effect. And it would then be up to the – it would then be the burden of anybody requesting a lower speed limit to make the case for that.

CHAIRWOMAN SHOWALTER: So that if there were an old order – pre-'70 – what's required here for the railroad is simply to file the petition, but that even in that case, or in that case, they've met the burden as soon as they've filed, and it would be up to somebody else to come in and say no, let's keep the speed limit right where it is and here's why, and the burden is then on them to do – to meet the federal test.

MR. THOMPSON: That's right. And that's something that we just recently drafted into the proposed rule in response to these concerns to clarify that really the only burden on the railroad is to show that it would be allowed to travel at a given rate of speed under federal regulations. And then the burden shifts to anybody who wants a lower speed limit opposed by this Commission to make a case for it.

CHAIRWOMAN SHOWALTER: And what – if a petition is filed and there is no response of any kind, what is the default effect – what happens then and after how long?

MR. THOMPSON: Well, I don't that – I don't have the rule in front of me.

MR. GOLTZ: I think the answer is – the rule allows – this is at the bottom of page 5, the last sections in (2)(a). It says the Commission will set the matter for consideration at a regularly-scheduled or special open meeting or in its discretion for a formal adjudicatory proceeding under Chapter 34.05. So Ms. Larson's concern that this requirement of filing a petition could delay some Amtrack train – new service or something – the rules contemplates, you know, a two-week timetable for a regularly-scheduled meeting and even contemplates if its something that needs to be done quicker, you know, a 24-hour process. Or, if there is a controversy, and a legitimate issue of a unique local safety hazard, then you could set it for a adjudication.

CHAIRWOMAN SHOWALTER: So, if there is no response from the community, or anyone else, within a quite short period of time, the train speed would be approved, presumably.

MR. GOLTZ: It could be approved, yeah, right.

CHAIRWOMAN SHOWALTER: Okay. Now, I raised an issue in either Mr. Thompson or Mr. Ahmer might – Mr. Nizam – sorry – you might want to answer it, but on the question of the reporting requirements, is this – am I changing things by suggesting this language of then-available?

MR. NIZAM: No. Within the miscellaneous reporting requirements, what we had just discussed and agreed upon was in response to Ms. Larson's concern. If section, sorry, sub-section 2 of the miscellaneous group reporting requirements read –

CHAIRWOMAN SHOWALTER: Let's get the page number.

MR. NIZAM: Oh, 18.

CHAIRWOMAN SHOWALTER: Page 18.

MR. NIZAM: M-hm.

CHAIRWOMAN SHOWALTER: And what?

MR. NIZAM: Sub-section 2 – oh –

CHAIRWOMAN SHOWALTER: Upon request?

MR. NIZAM: Yes.

CHAIRWOMAN SHOWALTER: Yes, okay.

MR. NIZAM: Upon request, every railroad company and railroad company official must report to the Commission the available information on the average number et cetera.

Pause.

CHAIRWOMAN SHOWALTER: Well, would it be wrong to say it's then available? Just to make it clear?

MR. NIZAM: On its –

CHAIRWOMAN SHOWALTER: Its then hyphen available information on?

MR NIZAM: It's then-available.

CHAIRWOMAN SHOWALTER: It must report to the Commission, and you scratched the word 'the,' and say its then hyphen available information on the – oh, I see, all that goes before the 'the,' so it would read must report to the Commission its then-available

information on the average number et cetera, et cetera. That seems to answer the question?

UNIDENTIFIED VOICE: Inaudible.

CHAIRWOMAN SHOWALTER: Okay. I don't think that would be a material change to this rule requiring any new procedure.

MR. NIZAM: Staff agrees.

CHAIRWOMAN SHOWALTER: All right. Well, that's good.

MR. NIZAM: The other requirement which was the miscellaneous reporting – I'm sorry – the railroad community notice requirement.

CHAIRWOMAN SHOWALTER: Put us on the right page.

MR. NIZAM: Sure. Page 16 and 17.

Pause.

CHAIRWOMAN SHOWALTER: Yes, yes.

MR. NIZAM: Staff is not opposed to including a note at the end of the rule that would say maintenance practices – and incidentally, this is pretty much right out of the open meeting memo.

CHAIRWOMAN SHOWALTER: Okay.

MR. NIZAM: Maintenance practices such as replacement of broken planks when the opportunity presents itself are not considered to be planned actions and would likely present safety hazards. In such situations, advance notice would not be required.

CHAIRWOMAN SHOWALTER: Would that offer a little clarification?

MS. LARSON: Yes.

CHAIRWOMAN SHOWALTER: Okay, good. Well, that sounds like a good plan, then. Thanks. I think that's enough.

MR. NIZAM: Thank you.

CHAIRWOMAN SHOWALTER: Well, I appreciate the parties coming today and its seem at least we resolved a couple of issues. I think the fundamental one is preemption, and there may just be some different opinions here on whether we are or aren't preempted. Obviously, if we are preempted, we just can forget this rule. And if its challenged, and we're preempted then we are, but I appreciate Mr. Thompson's research, and this is not the first time we've looked into this – the questions of where we do and

where we don't have any authority, but I feel we do have a good legal opinion to rely on, and in addition, we have to remember we also do operate under a state statute and so we are not going to, on our own, decide that that's been preempted unless it's really crystal clear. If there are valid arguments on both sides, I think we have some obligation to implement our own law, but in addition, Commissioner Hemstad and Mr. Thompson have articulated the actual exemption in the federal law and we seem fit quite well within it. At bottom, I think what we're doing here is no more than setting up some kind of minimal process to trigger the ability to implement or carry out our law under the federal exemption, and the petition that's required isn't much more than a notice by the railroad because it quickly – the burden of proof switches, and the obligation is on anybody else to come in and challenge that petition. So, yes, again, it requires the railroad to do something, but it is a fairly minimal obligation that will be resolved very quickly if there is no challenge, and if there is a challenge, the burden is quite high on the challenger to meet the test under the law.

COMMISSIONER HEMSTAD: I concur on those comments. Pursuing it a bit further, it seems to me that as our – as Mr. Thompson has done here, our duty is to address the question if there is an appropriate way to read together the federal law and the state law, it would suggest that the concern raised here is with the bite of state law. We can't change that. If the railroads want to change state law, then they ought to go to the state legislature to do that. Our duty is to see if it is appropriate to read them together, and I think that's what we are doing here.

The burden on the companies are minimal. I think there is actually an advantage here of putting the local communities on notice of the very limited environment within which this exception applies, and it seems to me that can be looked at as a benefit to the railroad – not the other way around. Finally, we've done the series of train speed hearings over the last two or three years. I understand the railroads may have thought that that process was, well, if not unnecessary, was preempted and therefore should not have occurred, but the reality of those hearings was that certain adjustments were made that ultimately the railroads were prepared to accept and the communities were prepared to accept. The process worked in such a way, it seemed to me to allow the new technologies and the new train speeds to proceed with a far better understanding from the

communities as to the justification for that. So both as a matter of law and as a matter of policy, it seems to me what we're doing here is appropriate.

I'd make a final comment. We have discussed this extensively with the attorney general's office. I am, frankly, a bit distressed if the Department of Transportation staff, whether it has done a similar review with the attorney general's office, which is the same office that represents them and represents us. And we are frankly relying on our attorney general to advise us as to what is the law.

CHAIRWOMAN SHOWLATER: One last comment on the request for a new CR102. I [from 39.0 to 39.3 the tape is silent] I'm ready to support a motion.

COMMISSIONER HEMSTAD: In Docket TR-981102, with the modifications that have been proposed here today, as presented by Mr. Nizam and accepted by the Commission, I move that the Commission direct the staff to prepare an order adopting the revised proposal in this docket for filing with the Code Reviser.

CHAIRWOMAN SHOWALTER: And I'll second the motion, so the motion carries.

Is there any more business to discuss today? I'm going to recess.

Transcriber's Note: As requested by UTC staff, this transcription does not include the ahs, false starts, or stuttering; otherwise, the transcription is verbatim. If a certified copy is needed for a court hearing, this transcription will need to be returned to include those omitted items.