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June 30, 2016

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

Re: Rulemaking to Consider Possible Corrections and Changes in Rules in WAC 480-07, Relating to Procedures Rules
Docket A-130355
Our File No.: UNI45-1

Dear Sir or Madam:

The referenced proposal would make material revisions to rules governing information that regulated entities submit to the commission. On behalf of Union Pacific Railroad Company, we submit the following comments thereon.

Proposed revised WAC 480-07-160 seeks to better distinguish the information submitted by regulated entities that the commission may not divulge, as opposed to the submitted information that it may divulge. The proposal leaves the scope of this distinction unclear, however.

Proposed revised WAC 480-07-160 recognizes that the Washington Administrative Code is governed by state statute. Indeed, it appears that the purpose of revising that section is to recognize two specific statutes, RCW 80.04.095 and RCW 81.77.210.

Provisions of law other than the two cited statutes limit the commission's authority to divulge information, however. By not recognizing these other laws, the Commission would tend to leave the incorrect inference that those two statutes constitute the only legal restrictions on that authority.

For example, under the Washington Public Records Act (WPRA), RCW §42.56.001, *et seq.*, "information relating to security" is exempt from disclosure. See RCW §42.56.420(1):

> Those portions of records assembled, prepared or maintained to prevent, mitigate or respond to criminal terrorist acts, . . . the public disclosure of which would have a substantial likelihood of threatening public safety, consisting of:
>
> (a) Specific and unique vulnerability assessments or specific and unique response or deployment plans, including compiled underlying data collected in preparation of or essential to the assessments, or to the response or deployment plans; and
>
> (b) Records not subject to public disclosure under federal law that are shared by federal or international agencies . . . .

As described in *Northwest Gas Ass'n v. WUTC*, 141 Wash. App. 98 (2007), this exemption is quite broad.

Furthermore, railroad operations are generally subject to the authority of the federal government, *see* 49 U.S.C. § 10101, *et seq.*, much of which is preemptive in effect. *See, e.g.*, *City of Auburn v. United States,* 154 F.3d 1025, 1031 (9th Cir. 1998) (describing the preemptive effect that § 10521(b)(2) confers over operation of rail lines).

Federal law specifically limits public disclosure of information submitted by railroads. For example, 49 U.S.C. § 11904 prohibits railroads from disclosing information "about the nature, kind, quantity, destination, consignee, or routing" of individual shipments.

The current proposed revisions to WAC 480-07-160 institute a category of "highly confidential" information, and adopt regulations specific to their disclosure. We are not familiar with this term as a class of information exempt from public disclosure. Furthermore, we fail to see the efficacy of creating tiers of confidential information.

The only description offered of "highly confidential" information is as follows:

> Highly confidential information is confidential information to which even more restricted access is necessary to ensure the information is not disclosed to the detriment of the provider (or the party designating the information as confidential, if not the provider).

This sentence is so vague as to lack practical meaning. As an initial matter, it fails to explain the effect of "even more restricted access." Our understanding is that information is either exempt from disclosure or not. We are not aware of a scheme for conditional disclosure.

Even if we assume that the distinction between confidential and highly confidential information has some practical effect, the proposed rule provides no guidance as to the characteristics that make information subject to "even more restricted access."

Proposed WAC 480-07-160 also perpetuates the concept of "value" as a threshold, *viz.*, that only "valuable information" may be considered confidential. The rules fail to define the term "valuable" as used in this section. Thus, we are left to wonder just what value the commission seeks that makes the information confidential.

We assume that it is not monetary value. Furthermore, value (in any context) seems to depend on context, *i.e.*, time, place and circumstance. Perhaps, the Commission means to institute a materiality standard, *i.e.*, whether information is to be held exempt depends on its materiality to some legal standard. If so, then the rules would be more effective if they described that materiality standard.

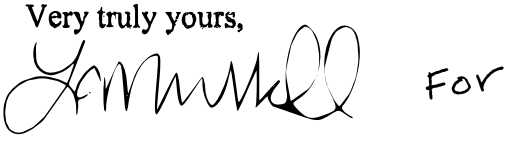
We also assume the Commission itself makes the determination of whether information is "valuable," as the context of WAC 480-07-160 suggests but does not state explicitly. This presents an additional question of how the Commission may make that determination non-arbitrarily.

Proposed WAC 480-07-175 would mandate that regulated entities provide the Commission access to all of their documents "at any and all times." Such a rule would be wildly and impracticably overbroad. It should be noted that these rules may not circumvent other laws that provide protection for attorney-client communications, attorney work product, trade secrets, and other proprietary information.

Typically, administrative warrant to search private documents requires some demonstration of cause and is subject to reasonable time, place, and manner restrictions that do not unduly disrupt the entities' business operations. We see no basis on which the Commission may avoid these restrictions.

Thank you for this opportunity to comment.

Very truly yours,



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