**Ty K. Wyman**
Admitted in
Oregon and Washington
twyman@dunncarney.com
**Direct** 503.417.5478

**January 13, 2017**

**Via Web Portal at www.utc.wa.gov/e-filing**

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

Re: Rulemaking to Make Corrections and Changes in Rules in WAC 480-07, Relating to Procedural Rules
Docket A-130355
Our File No.: UNI 45-1

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.

On June 30, 2016, UP submitted comments regarding the proposed revised WAC 480-07-160 as of June 1, 2016. UP hereby incorporates those comments, a copy of which are enclosed with this letter, in regard to the December 2016 proposed revised WAC 480-07-160.

UP reiterates its concerns that the proposed revised WAC 480-07-160 remains vague and confusing as to its scope and purpose. The current rule already seems to serve the state's legitimate interest in handling confidential information in a way that appears consistent with the existing statutory scheme. UP is unclear as to why the Commission appears to be departing from that scheme.

UP also remains puzzled and concerned as to why the Commission is attempting to create and impose its own definitions of "confidential" information, including a new tier of confidential documents entitled "highly confidential" information, when the current process is already well articulated by the statutory framework. Furthermore, while the December proposed revision now acknowledges that the rule does not apply to information submitted to the Commission that is exempt from public disclosure under the Washington Public Records Act, it still fails to recognize other provisions of law that limit the Commission's authority to divulge information, including – in the case of railroad operations specifically – federal law. *See* 49 U.S.C. § 11904 (prohibiting railroads from

disclosing information "about the nature, kind, quantity, destination, consignee, or routing" of individual shipments.)

Finally, as UP noted in its June 30 comment letter, proposed WAC 480-07-175 – which would mandate that regulated entities provide the Commission access to all of their documents "at any and all times" – remains wildly and impractically overbroad. UP reiterates that the Commission may not attempt to use this draft rule to circumvent other laws that provide protection for attorney-client communications and work product, trade secrets, and proprietary information. Nor may it seek to avoid the administrative warrant restrictions requiring a showing of cause to search private documents, subject to reasonable time, place, and manner restrictions that do not unduly disrupt an entity's business operations.

In sum, UP remains opposed to the proposed revisions to WAC 480-07-160 and proposed WAC 480-07-175 in their current form.

Thank you for this opportunity to comment.

Very truly yours,

Ty K. Wyman

TKW:car
Enclosure

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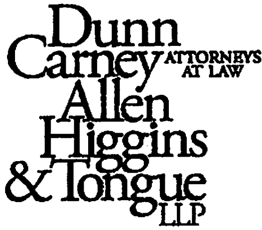

June 30, 2016

TY K. WYMAN
Admitted in
Oregon

DIRECT DIAL
503-417-5478

E-MAIL
twyman@
dunncarney.com

ADDRESS
Suite 1500
851 S.W. Sixth Avenue
Portland, Oregon
97204-1357

Phone 503.224.6440
Fax 503.224.7324

INTERNET
www.dunncarney.com

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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.

Member

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.

For

Ty K. Wyman

TKW:car:scs
cc: David Pickett, UPRR (via email)
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