BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, Complainant, v. MEEKER SOUTHERN RAILROAD, Respondent.	DOCKET NO. TR-110221 MEEKER'S STATUS REPORT ON SETTLEMENT NEGOTIATIONS AND THE COMMISSION STAFF'S PENALTY RECOMMENDATION

1 Respondent Meeker Southern Railroad ("Meeker"), by and through its undersigned attorney, David Halinen, has had a number of telephone discussions with Assistant Attorney General Fronda Woods seeking to negotiate a mutually acceptable settlement of the subject civil penalty case. About noon today, Meeker's attorney received via email a copy of the Commission Staff's Report on Settlement Negotiations and Penalty Recommendation that was filed with the Commission under the above-stated docket number. He forwarded that copy to Meeker's General Manager, Byron Cole, for review and discussion. Mr. Cole has reviewed it and discussed it with Meeker's attorney.

2 The $10,640 civil penalty that Commission Staff recommends to the Commission is a very significant sum for Meeker under its current financial circumstances. Meeker is only a small short line railroad company, one of three operating divisions of Ballard Terminal Railroad Company L.L.C. ("BTRC"). (The other two are BTRC's Ballard Terminal and

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Eastside Rail divisions.) As noted on page 34 of my February 28, 2011 letter to Ms. Woods and Betty Young, Compliance Investigator for the Commission's Transportation Safety Enforcement Division (a copy of which letter is attached as Attachment 2 to Meeker's previously filed April 21, 2011 ANSWER TO THE COMMISSION'S COMPLAINT FOR CIVIL PENALTY), Mr. Cole has advised Meeker's attorney that the total income that BTRC *earned* (not received) by all three of those divisions during the entirety of 2010 was only $664,064. Mr. Cole has also advised Meeker's attorney today that (a) the overall cost to Meeker of the 134th Avenue East highway-rail crossing project ballooned from the approximately $500,000 amount originally estimated to approximately $650,000, (b) Meeker has approximately $300,000 in unpaid bills owing in regard to that project, and (c) Meeker and the Ballard Terminal divisions of BTRC currently have approximately $120,000 in unpaid overdue loan payments due to the State of Washington.

3 In regard to Complaint ¶13, Meeker admitted that Staff's investigation asserts that Meeker Southern violated Order 01 in Docket TR-100036 each of 50 times that Meeker Southern had a train cross over 134th Avenue East on the spur track for the purposes of delivering or picking up freight cars from Sound Delivery Service between October 17, 2010 and December 20, 2010. However, because (a) Condition 3 of Order 01 required that "[a]ll work . . . be completed to the reasonable satisfaction of Commission Staff and Pierce County Public Works and Utilities Staff *prior to the Petitioner **starting** operation of the spur line and Phase 1 Service Siding*"[1] (emphasis added) and (b) ***starting*** *operation of the spur line and Phase 1 Service Siding* only occurred once (during October 2010), in paragraph 13

[1] As noted in footnote 1 of Meeker's Answer, the phrase "prior to starting operation of the spur line" in Condition 3 of Order 01 of Docket TR-100036 is not synonymous with a phrase like "prior to any crossing of 134th along the spur line," a phrase that Staff appears to be reading into Condition 3.

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of Meeker's Answer Meeker (i) only admitted to a single violation of Order 01 and (ii) denied that the other 49 crossings of 134th along the spur line were (i) "starts" of *the operation of the spur line and Phase 1 Service Siding* and (ii) violations of Order 01 in Docket TR-100036. With only a single violation as Meeker alleged, under RCW 81.04.380 the maximum penalty amount would be limited to $1,000. In Meeker's Answer, Meeker asserted this as its first affirmative defense.

4 Meeker's Answer also raised in the alternative four other affirmative defenses.[2]

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[2] Quoting from Meeker's Answer, Meeker's Affirmative Defenses 2 through 5 were as follows:

a. **Affirmative Defense 2: That a Single Violation Occurred Only on Each Day that Crossings Occurred.** Each separate crossing of 134th along the spur line on each day that crossings occurred cannot possibly be construed to be Meeker Southern ***starting*** *operation of the spur line and Phase 1 Service Siding.* While Meeker contends that there was only one start of operation of the spur line and Phase 1 Service Siding (see Affirmative Defense 1, above) assuming, *arguendo*, that the first crossing of 134th along the spur line on each of the 18 days that such occurred (for the purposes of delivering or picking up freight cars from Sound Delivery Service between October 17, 2010 and December 20, 2010) amounted to Meeker Southern ***starting*** *operation of the spur line and Phase 1 Service Siding*, only 18 violations of Order 01 occurred, not 50 violations as Staff has alleged.

b. **Affirmative Defense 3: Mitigating Circumstances Militate Against Imposition of a Penalty.** Alone or in connection with Affirmative Defenses 1, 2, 4, and 5, several mitigating circumstances exist relating to the violation. Some of them are set forth in the table that is part of Exhibit B attached to my February 15, 2011 letter to Betty Young, Compliance Investigator, Transportation Safety Enforcement, Washington Utilities and Transportation Commission, a letter with its exhibits hereby incorporated by reference. [A copy of that letter with its exhibits, including above-referenced Exhibit B, is attached to this Answer as Attachment 1 and is also attached (as Appendix Q) to the report of the Staff Investigation of Meeker Southern Railroad dated March 2011 prepared by Ms. Young.] Further elaboration of those mitigating circumstances, as well as identification and discussion of additional mitigating circumstances, are set forth on pages 2 through 10 of my February 28, 2011 letter addressed jointly to Fronda Woods, Assistant Attorney General, Washington Utilities and Transportation Commission, and to Ms. Young, a letter with its attached exhibits that is hereby incorporated by reference. [A copy of that letter along with its six attached exhibits labeled Exhibits 1 through 6 is attached to this Answer as Attachment 2 and is also attached (as Appendix R) to the report of the Staff Investigation of Meeker Southern Railroad dated March 2011 prepared by Ms. Young.]

c. **Affirmative Defense 4: Meeker Is Already Bearing a $22,600 Expense That Is a Functional Equivalent to an Extensive Civil Penalty and, in View Thereof, the Commission Should Not Impose a Penalty:** Meeker Southern is already bearing an

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5 Meeker recently became aware that although the Complaint seeks a civil penalty under RCW 81.04.380 (a statute applicable to all public service companies in general), another civil penalty statute, RCW 81.53.210, deals with railroad companies specifically and appears to have been enacted concurrently with or subsequent to RCW 81.04.380, which was originally enacted in 1911 and was codified in RCW 81.04.380 in 1961. RCW 81.53.210 (Penalty) states:

> If any ***railroad company*** shall fail or neglect to obey, comply with, or carry out the requirements of this chapter, or any order of the commission made under it, such company shall be liable to a penalty ***not to exceed five thousand dollars***, such penalty to be recovered in a civil action brought in the name of the state of Washington by the attorney general. All penalties recovered shall be paid into the state treasury.

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expense that is a functional equivalent of a civil penalty amounting to $22,600—see the main text of my Attachment 2 letter to Ms. Woods and Ms. Young on pages 31 through 33 thereof[2] and see footnotes 11 and 12 on pages 32 and 33 thereof. The Commission should not impose a civil penalty on top of that expense. Affirmative Defense 4 should be considered alone and in connection with Affirmative Defenses 1, 2, 3, and 5.

d. Affirmative Defense 5: In View of (a) the Approach to Civil Penalties the Commission Took in *WUTC v. Puget Sound Energy, Inc.*, Docket No. UG-001116 (the "PSE Case") and (b) a Comparison and Contrasting of the Circumstances of that Case with the Circumstances of the Subject Case (including the comparison of the $106,000 in civil penalties and funding of an anti-drug and alcohol misuse awareness training program in the PSE Case in relation to the $22,600 Functional Equivalent of a civil penalty in the subject case), the Commission Should Not Impose a Penalty Against Meeker Southern. Pages 11 through the middle of page 14 of my Attachment 2 letter to Ms. Woods and Ms. Young describe in detail the approach to civil penalties the Commission took in *Washington Utilities and Transportation Commission v. Puget Sound Energy, Inc.* (Docket No. UG-001116; 2002 Wash. UTC LEXIS 235) (July 25, 2002) (the "PSE Case").[2] Pages 14 through 35 of my Attachment 2 letter set forth a detailed application of the approach to penalties used in the PSE Case to Meeker Southern's violation, including a comparison and contrasting of the circumstances of PSE's violation with the circumstances of Meeker Southern's violation (such as a comparison of the Commission-affirmed settlement agreement in the PSE case that provided for a combination of only $106,000 in civil penalties and funding of an anti-drug and alcohol misuse awareness training program in that case in relation to the $22,600 functional equivalent of a civil penalty that Meeker Southern is already bearing in the subject case, despite the fact that the violation in the PSE case was clearly more severe and a much greater risk to public safety and despite the fact that PSE has 5,000 times the annual earnings that Meeker Southern has).

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HISTORY: ***1961*** c 14 § 81.53.210. Prior: ***1913*** c 30 § 18; RRS § 10528. Formerly RCW 81.52.280.

(Emphasis added) In view of (a) the rule of statutory construction that a special statute enacted concurrently with or subsequent to a general statute will prevail over the provisions of the general statute, *State v. Munson, 23 Wn. App. 522; 597 P.2d 440*, and (b) the fact that Meeker is a railroad company, Meeker contends that, under *Munson*, RCW 81.53.210 prevails over RCW 81.04.380 and limits the overall penalty that can be imposed upon Meeker to $5,000.

6 As a practical matter, the $380 per railroad carload figure noted in Paragraph 6 of the Commission Staff Status Report was in fact based upon gross revenues, not net revenues, and thus the amount calculated and recommended on the basis of the $380 per railroad carload figured was on its face excessive. Note that a $5,000 penalty (the amount that the penalty appears to be limited to under *Munson*), would be equivalent to a 47 percent gross profit, a profit rate that certainly must be larger than what Meeker or any other short line railroads are making, especially during these tough times. Meeker respectfully requests an agreed settlement in that amount.

7 Note that despite Meeker's above-noted factual and legal arguments, Meeker cannot afford further processing of this penalty matter and does not wish to protract it any further. Accordingly, if the Commission is unwilling to limit the penalty to $5,000, Meeker is willing to accept a penalty of up to the full $10,640 recommended by Commission Staff if the amount of the penalty can be paid in equal monthly installments over twelve months.

8 Meeker appreciates the courtesies and cooperative of Commission Staff throughout the Staff investigation process.

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DATED this 10th day of June 2011.

Respectfully submitted,

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By: David L. Halinen

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