

[Service Date October 15, 2004]

October 15, 2004

**NOTICE OF OPPORTUNITY TO FILE WRITTEN COMMENTS  
(By November 19, 2004)**

**NOTICE OF CONTINUATION OF ADOPTION HEARING  
(Set for Friday, December 10, 2004)**

RE: Railroad Rulemaking to Consider Possible Point Protection Rule,  
WAC 480-62-218; Docket No. TR-040151

TO INTERESTED PERSONS:

On July 21, 2004, the Washington Utilities and Transportation Commission filed a Notice of Proposed Rulemaking (CR-102) in this docket with the Code Reviser. The CR-102, as filed with the Code Reviser, is available for inspection on the Commission's web site at: <http://www.wutc.wa.gov/040151>.

On August 11, 2004, the Commission received joint comments from the Burlington Northern and Santa Fe Railroad Company and Union Pacific Railroad Company in opposition to the proposed rule. The Commission also received comments from the Brotherhood of Locomotive Engineers and the King County Labor Council in support of the proposed rule.

In addition to addressing other matters such as preemption by federal law and general objections to the proposed rule, the railroads' August 11, 2004, comments raise the question of whether the Commission's stated bases of statutory authority in the CR-102 form filed with the Code Reviser, RCW 80.01.040 and RCW 81.04.160, authorize adoption of this rule. Based on these comments, the Commission continues the adoption hearing scheduled for October 13, 2004, until December 10, 2004, and seeks additional comments from interested persons on the issue of the Commission's state statutory authority before proceeding to adoption of the proposed rule.

**ADOPTION HEARING**

The Commission reschedules the adoption hearing to its regularly scheduled open meeting, **Friday, December 10, 2004, beginning at 9:30 a.m., in the Commission's Main Hearing Room, Second Floor, Chandler Plaza Building, 1300 S. Evergreen Park Drive S.W., Olympia, Washington.**

The Commission filed a CR-102, Notice of Proposed Rulemaking, with the Code Reviser on July 21, 2004, published as WSR# 04-15-140. The Commission filed a continuance of WSR# 04-15-140 on August 11, 2004, reflecting October 13, 2004, for the adoption hearing and date of intended adoption. The continuance of WSR# 04-15-140 was published as WSR# 04-17-057. The Commission filed a continuation of WSR# 04-17-057 on October 15, 2004, reflecting December 10, 2004, for the adoption hearing and date of intended adoption. This continuation of WSR# 04-17-057 will be published as WSR# 04-21-037. In all other respects the CR-102 remains unchanged.

**WRITTEN COMMENTS**

The Commission requests comments from interested persons that will assist the Commission in determining whether it has adequate state statutory authority to adopt the proposed rule. In particular, the Commission seeks responses to the following questions regarding the various potential sources of authority:

1) Do the statutes identified in the CR-102 form filed with the Code Reviser, *i.e.*, RCW 80.01.040 and RCW 81.04.160, provide statutory authority for the Commission to adopt the proposed rule?

2) Do other statutes in Title 81 RCW provide statutory authority for the Commission to adopt the proposed rule, *e.g.*, RCW 81.44.065, RCW 81.53.030, or RCW 81.104.120(3)?

a) What about RCW 81.44.065, relating to the devolution of powers and duties relative to safety of railroads?

b) What about the language in RCW 81.53.030 (Petition for crossing) that states that the "commission may provide in the order authorizing a grade crossing, or at any subsequent time, that the railroad company shall install and maintain . . . flagmen . . . or other devices or means to secure the safety of the public and its employees"?

c) What about RCW 81.104.120(3), which provides that “The utilities and transportation commission shall maintain safety responsibility for passenger rail service operating on freight rail lines”?

3) RCW 81.04.160 identifies several examples of appropriate subjects for commission rulemaking, including the regulation of railroads in the interest of the “comfort and convenience” of the consumers of railroad services (*e.g.*, the bulletining of trains, terms and conditions contained in contracts for the shipment of property, and the time station offices will be kept open). The examples are followed by the phrase “and generally such rules as pertain to the comfort and convenience of the public concerning the subjects treated of in this title.” Does this language authorize the Commission to adopt rules for the safety of the general public as opposed to “comfort and convenience” of the customers of railroads?

4) RCW 81.28.240 authorizes the Commission to “determine the just, reasonable, *safe*, adequate, sufficient and proper *rules, regulations, practices*, equipment, appliances, facilities or service to be observed, furnished, constructed or enforced and be used in the transportation of persons and property by such common carrier, and fix the same by its order or rule.” What significance should the Commission attribute to the phrase “in respect to the transportation of persons and property by such common carrier”? Please consider the definitions of the terms “transportation of persons” and “transportation of property” in RCW 81.04.010.

Please consider, also, the Attorney General Opinion dated May 3, 1916 (five years after enactment of the statute now codified at RCW 81.28.240) to the then Public Service Commission. (Available on the Commission’s website at <http://www.wutc.wa.gov/040151>.) Please also consider the opinion in *Seattle Electric Company v. Seattle*, 78 Wash. 203, 214 (1914) (*Parker, J. concurring*). Do these authorities require that the Commission’s rulemaking authority under this statute is limited to prescribing rules for the safety of the passengers or shippers using the services of the regulated common carrier as opposed to the safety of motorists or the general public?

5) If your answer to question 4 is that the Commission’s authority under the 1911 public service law does extend to the safety of the general public, does this mean that local governments in Washington are precluded from adopting ordinances applicable to railroads that are for the safety of the general public? *See, e.g., Kennewick Municipal Code § 11.80.070* (<http://www.ci.kennewick.wa.us/city%20clerk/kmc/11-80.pdf>). Wouldn't the

*Seattle Electric Company* case and the 1916 Attorney General Opinion mean that such local ordinances would be preempted by the 1911 public service law?

6. What significance should we attribute, in RCW 81.28.230, to the words “after *such* hearing” and “*such* common carrier”?

7. What significance, if any, should the Commission ascribe to the fact that RCW 81.28.230 states “This section does not apply to railroad companies, which shall be regulated in this regard by chapter 81.34 RCW and rules adopted thereunder.”

The Commission requests that comments be provided in electronic format to enhance public access, for ease of providing comments, to reduce the need for paper copies, and to facilitate quotations from the comments. Comments may be submitted by electronic mail to the Commission’s Records Center at <[records@wutc.wa.gov](mailto:records@wutc.wa.gov)>. Please include:

- The docket number of this proceeding (TR-040151)
- The commenting party’s name
- The title and date of the comment or comments

An alternative method for submitting comments may be by mailing/delivering an electronic copy on a 3 ½ inch, IBM-formatted, high-density disk, in .pdf Adobe Acrobat format or in Word 97 or later. Include all of the information requested above. The Commission will post on the Commission’s web site all comments that are provided in electronic format. The web site is located at <<http://www.wutc.wa.gov/040151>>.

If you are unable to file your comments electronically or to submit them on a disk, the Commission will always accept a paper document. Questions may be addressed to Mike Rowswell at (360) 664-1265 or e-mail at <[mrowswel@wutc.wa.gov](mailto:mrowswel@wutc.wa.gov)>.

Your participation is welcomed via written comments. Information about the schedule and other aspects of the rulemaking, including comments, will be posted on the Commission’s web site as it becomes available. If you wish to receive further information on this rulemaking you may (1) call the Commission’s Records Center at (360) 664-1234, (2) e-mail the Commission at <[records@wutc.wa.gov](mailto:records@wutc.wa.gov)>, or (3) mail written comments to the address below. When contacting the Commission, please refer to Docket No. TR-040151 to ensure that you are placed on the appropriate service list. The Commission’s mailing address is:

Executive Secretary  
Washington Utilities and Transportation Commission  
1300 South Evergreen Park Drive S.W.  
P.O. Box 47250  
Olympia, Washington 98504-7250

Sincerely,

CAROLE J. WASHBURN  
Executive Secretary