

WSR 22-24-021
PERMANENT RULES
UTILITIES AND TRANSPORTATION
COMMISSION

[Docket TR-200536, General Order R-606—Filed November 30, 2022, 10:41 a.m., effective December 31, 2022]

In the Matter of Amending and Adopting Rules in chapter 480-62 WAC pertaining to the establishment of minimum crew sizes on certain trains.

1 STATUTORY OR OTHER AUTHORITY: The Washington utilities and transportation commission (commission) takes this action under Notice No. WSR 22-19-024, filed with the code reviser on March 18, 2022. The commission has authority to take this action pursuant to RCW 80.01.040, 81.01.010, 81.04.160, and chapter 81.40 RCW. Specifically, RCW 81.40.015(1) provides that except under certain circumstances "any person, corporation, company, or officer of the court operating any railroad, railway, or any part of any railroad or railway, in the state of Washington, and engaged, as a common carrier, in the transportation of freight or passengers, shall operate and manage all trains and switching assignments over its road with crews consisting of no less than two crewmembers." RCW 81.40.025 (4) (a) also provides that the commission "may order railroad carriers to increase the number of railroad employees in areas of increased risk to the public, passengers, railroad employees, or the environment."

2 STATEMENT OF COMPLIANCE: This proceeding complies with the Open Public Meetings Act (chapter 42.30 RCW), the Administrative Procedure Act (chapter 34.05 RCW), the State Register Act (chapter 34.08 RCW), the State Environmental Policy Act of 1971 (chapter 43.21C RCW), and the Regulatory Fairness Act (chapter 19.85 RCW).

3 DATE OF ADOPTION: The commission adopts this rule on the date this order is entered.

4 CONCISE STATEMENT OF PURPOSE AND EFFECT OF THE RULE: RCW 34.05.325(6) requires the commission to prepare and publish a concise explanatory statement about an adopted rule. The statement must identify the commission's reasons for adopting the rule, describe the differences between the version of the proposed rules published in the register and the rules adopted (other than editing changes), summarize the comments received regarding the proposed rule changes, and state the commission's responses to the comments reflecting the commission's consideration of them.

5 To avoid unnecessary duplication in the record of this docket, the commission designates the discussion in this order, including appendices, as its concise explanatory statement. This order provides a complete, but concise, explanation of the agency's actions and its reasons for taking those actions.

6 REFERENCE TO AFFECTED RULES: This order amends WAC 480-62-125 Definitions; and adopts WAC 480-62-255 Minimum crew size on certain trains.

7 PREPROPOSAL STATEMENT OF INQUIRY AND ACTIONS THEREUNDER: The commission filed a preproposal statement of inquiry (CR-101) on July 20, 2020, at WSR 20-15-127. The statement advised interested persons that the commission was considering a rule making to implement provisions of HB 1841, chapter 170, Laws of 2020, which pertains to the establishment of minimum crew size on certain trains. The commission also informed persons of this inquiry by providing notice of the subject and the CR-101 to everyone on the commission's list of persons requesting such information pursuant to RCW 34.05.320(3), and by sending notice to all railroad companies operating in the state and the commission's list of

transportation attorneys. The commission posted the relevant rule-making information on its website at www.utc.wa.gov/200536. Pursuant to the notice, the commission noticed an opportunity to provide written comments by September 4, 2020, and the commission convened a workshop for interested stakeholders on November 19, 2020. The commission received written comments from several stakeholders, most of whom also participated in the workshop.

8 On May 6, 2021, the commission issued a notice of the opportunity to provide written comments on draft rules and a notice of an opportunity to respond to a small business economic impact statement (SBEIS) questionnaire. The commission indicated that comments were due by June 7, 2021. The commission received written comments on the draft rules but no responses to the SBEIS questionnaire.

9 On November 15, 2021, the commission issued a notice of the opportunity to respond to a supplemental SBEIS questionnaire. The commission indicated that responses were due by December 15, 2021. The commission received no responses.

10 **Small Business Economic Impact.** The proposed rules implement the legislature's specific requirements in the statute, but the commission nevertheless undertook a small business economic impact analysis. The commission received no responses to the SBEIS questionnaire or the supplemental SBEIS questionnaire, nor did any interested person provide information concerning the potential economic impact of the proposed rules on small businesses. Based on the information available to the commission, the commission has concluded that any economic impact on small businesses that may result from adoption of the proposed rules is attributable solely to the statute that the proposed rules implement.

11 **NOTICE OF PROPOSED RULE MAKING:** The commission filed a notice of proposed rule making (CR-102) on March 18, 2022, at WSR 22-07-071. The commission scheduled this matter for oral comment and adoption under that notice at 9:30 a.m., Thursday, May 19, 2022. This was a virtual hearing using the Zoom videoconferencing software. The notice also provided interested persons the opportunity to submit written comments to the commission by April 18, 2022.

12 In June 2022, the commission became aware that interested persons had not been served with the CR-102 and had been aware of neither the date of the adoption hearing nor the opportunity to comment on the proposed rules. To rectify the omission and provide ample opportunity for all interested persons and stakeholders to comment on the proposed rules, the commission filed a supplemental notice of proposed rule making (supplemental CR-102) with the code reviser on June 22, 2022, at WSR 22-13-173. The supplemental CR-102 established a deadline for comments of July 18, 2022, and scheduled an adoption hearing on August 1, 2022, at 1:30 p.m. The commission received substantive comments from interested persons in response to the supplemental CR-102.

13 On July 22, 2022, the commission advised interested persons that it was withdrawing the supplemental CR-102 and canceling the adoption hearing. The commission advised that it intended to file a new CR-102 with revised proposed rules at a later date.

14 On September 13, 2022, the commission filed a CR-102 with the office of the code reviser at WSR 22-19-024. The commission also issued a notice of opportunity to comment seeking written comments on the proposed rules. The commission indicated that any written comments should be submitted by November 7, 2022.

15 **WRITTEN COMMENTS:** The commission received written comments in response to the WSR 22-07-071 notice from Cascade and Columbia River

Railroad (CSCD), Olympia and Belmore Railroad (OYLO), Puget Sound and Pacific Railroad (PSAP), American Short Line and Regional Railroad Association (ASLRRA), and the Association of American Railroads.

16 CSCD, OYLO, PSAP, and ASLRRA raised concerns with the definition of a short line railroad under the proposed rules set forth in WSR 22-07-071, indicating that these short line railroads operated independently and that it was problematic to classify them based on their ownership structure. CSCD, OYLO, and PSAP commented further that the proposed definitions for Class I, Class II, and Class III railroads depart from the definitions used by the United States Surface Transportation Board.

17 CSCD, OYLO, PSAP, and ASLRRA raised concerns that the proposed rules would incentivize short line railroads to limit their maximum speed to 25 m.p.h. ASLRRA observed that this may create a disincentive to invest in infrastructure upgrades.

18 CSCD, OYLO, and PSAP submit that the proposed rules could lead to arbitrary decisions requiring railroads to use additional crew members. ASLRRA similarly suggested that the proposed rules provided little guidance to railroads and would give the commission unfettered discretion.

19 Finally, CSCD, OYLO, PSAP, ASLRRA, and the Association of American Railroads all raised concerns that this rule making is preempted by federal law.

20 The commission has considered each of these comments. The commission observes, however, that it must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.

21 The commission received written comments in response to the supplemental CR-102, at WSR 22-13-173. Mike Elliott, a member of the Seattle freight advisory board, commented in favor of HB 1841 and argued that the commission should not allow single-person remote control operations of any kind. Elliott discussed railroads' opposition to similar rules at the federal level and directed the commission to relevant resources.

22 The United Transportation Union, Sheet Metal, Air, Rail and Transportation (SMART Transportation Division) also submitted written comments in response to the supplemental CR-102, expressing opposition to amending proposed WAC 480-62-255 (3)(c) to allow one-person remote control operations under certain circumstances and explaining the dangers of remote control operations.

23 The commission has considered these comments. The commission must exercise its authority consistent with the legislature's directive. Furthermore, we observe that the current version of the proposed rules, as set forth at WSR 22-19-024, and adopted by the commission in this order, do not provide the exception for one-person remote control operations that concerned SMART Transportation Division.

24 The commission also received written comments in response to the WSR 22-19-024 notice from SMART Transportation Division, expressing no concerns or objections to the proposed rules.

25 Summaries of all written comments in response to the WSR 22-07-071 notice, the WSR 22-19-024 notice, and commission staff's responses are contained in Appendix A, attached to, and made part of, this order.

26 **RULE-MAKING HEARING:** The commission considered the proposed rules for adoption at a rule-making hearing on November 22, 2022, before Chair David W. Danner, Commissioner Ann E. Rendahl, and Commissioner Milton

H. Doumit. A staff representative briefly summarized the proposed rules and recommended that the commission adopt them without change. Herb Krohn, Washington state legislative director for SMART Transportation Division, provided brief comments in support of the proposed rules. No other person appeared or commented on the proposed rules.

27 COMMISSION ACTION: The commission adopts as its own staff's responses to the written comments the commission received contained in Appendix A. After considering this and all other information regarding the proposed rules, the commission adopts the proposed rules as noticed at WSR 22-19-024 without change.

28 STATEMENT OF ACTION; STATEMENT OF EFFECTIVE DATE: After reviewing the entire record, the commission determines that the proposed provisions of chapter 480-62 WAC should be amended and adopted to read as set forth in Appendix B, as rules of the commission, to take effect pursuant to RCW 34.05.380(2) 31 days after filing with the code reviser.

Number of Sections Adopted in Order to Comply with Federal Statute: New 0, Amended 0, Repealed 0; Federal Rules or Standards: New 0, Amended 0, Repealed 0; or Recently Enacted State Statutes: New 1, Amended 0, Repealed 0.

Number of Sections Adopted at the Request of a Nongovernmental Entity: New 0, Amended 0, Repealed 0.

Number of Sections Adopted on the Agency's own Initiative: New 0, Amended 1, Repealed 0.

Number of Sections Adopted in Order to Clarify, Streamline, or Reform Agency Procedures: New 0, Amended 0, Repealed 0.

Number of Sections Adopted using Negotiated Rule Making: New 0, Amended 0, Repealed 0; Pilot Rule Making: New 0, Amended 0, Repealed 0; or Other Alternative Rule Making: New 0, Amended 0, Repealed 0.

ORDER

29 THE COMMISSION ORDERS:

30 The commission amends WAC 480-62-125, and adopts WAC 480-62-255 to read as set forth in Appendix B, as rules of the Washington utilities and transportation commission, to take effect 31 days after the date of filing with the code reviser pursuant to RCW 34.05.380(2).

31 This order and the rule set out below, after being recorded in the order register of the Washington utilities and transportation commission, shall be forwarded to the code reviser for filing pursuant to chapters 80.01 and 34.05 RCW and chapter 1-21 WAC.

DATED at Olympia, Washington, November 30, 2022.

WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

Appendix A (Comment Summary Matrix)

	Question/Topic	Commenter	Comment	UTC Staff Response
1.	Definitions	Cascade and Columbia River Railroad (CSCD), Olympia and Belmore Railroad (OYLO), and Puget Sound and Pacific Railroad (PSAP)	<ul style="list-style-type: none"> • The definition of a short line company in the proposed rule is perplexing. To be clear, CSCD, OYLO, and PSAP are individually their own legal entities, and are considered as such by both the Federal Railroad Administration (FRA) and the Surface Transportation Board (STB). Each is considered a separate Class III short line common carrier freight railroad. They do not physically connect, and each have their own unique sets of on-line customers. Each has its own financial statements, and the revenue earned by each railroad determines the amount of capital reinvested by that railroad. Employees of each railroad operate under operating timetables specific to their own railroad. Furthermore, there is no legitimate basis to attempt to classify a short line railroad based on its ownership structure for the purpose of operational regulations. • The proposed regulation arbitrarily and needlessly attempts to redefine "Class I," "Class II," and "Class III" railroads. These definitions are determined by STB under section 1201.1-1 of Title 49, C.F.R. The proposed language is not compliant with the current definitions as provided by STB. 	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.
		American Short Line and Regional Railroad Association (ASLRRRA)	WAC 480-62-255 is inconsistent with established STB railroad classifications. WAC 480-62-255 uses ambiguous phrases such as "owned" and "operated" to distinguish certain short lines that may be affiliated with other short lines through a holding company structure without an appropriate understanding of the fact that these short lines are discrete legal entities. There is no justification offered in the proposed rule making, based on relevant safety and performance history, to differentiate between Class III short line railroads based on ownership structure.	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.

	Question/Topic	Commenter	Comment	UTC Staff Response
2.	Operations	CSCD, OYLO, PSAP	The proposed rule would arbitrarily require a specific train crew size based on train speed. This could lead a small freight railroad to maintain its tracks to a lower speed limit. Unfortunately, the result would be a freight service that is less competitive with trucking, and Washington residents coping with an ever-increasing number of trucks on public roadways.	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.
ASLRRRA		WAC 480-62-255 suggests that Class III short line operations would be excluded from the crew size restrictions because they would choose to operate at speeds less than 25 mph, qualifying for an exemption from the minimum crew size requirement. The regulations therefore create a financial disincentive for small railroads to invest in their infrastructure, upgrade their track, and improve their performance times.	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.	
3.	Train crew size	CSCD, OYLO, PSAP	The proposed rule would create an arbitrary and erratic process resulting in new operating mandates. Concerningly, there is no requirement for the mandates to be based on an unbiased factual analysis. Railroads could be required to use additional crew members simply at the behest of the commission without any guidance on how the process would work or how the commission would determine that more crew members are needed.	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.
ASLRRRA		WAC 480-62-255 states that the commission may order railroad carriers to increase the number of railroad employees, to require additional crew members, or direct the placement of additional crew members. It does not provide any regulatory guidance on how this process would work, nor does it provide any process by which a railroad may appeal any such order. WAC 480-62-255 gives the commission unfettered ability to dictate train crew staffing in Washington, which will result in an increase in the cost of shipping commodities by rail in Washington, which could then force a modal shift of traffic from rail to the less-environmentally friendly and more dangerous option of trucks on the highway.	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.	

	Question/Topic	Commenter	Comment	UTC Staff Response
4.	Preemption	Association of American Railroads	<ul style="list-style-type: none"> • The draft rules remain preempted by federal law. • FRA has announced its intention to promulgate rules addressing minimum crew size under authority delegated to the agency in the Federal Railroad Safety Act. • UTC should withdraw the rule making. 	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.
		ASLRRA	<ul style="list-style-type: none"> • The rules remain preempted by federal law. • UTC should withdraw the rule making. 	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.
		CSCD, OYLO, PSAP	<ul style="list-style-type: none"> • The proposed rule making serves as a significant contradiction to the authority of FRA in determining minimum crew size standards. • UTC should withdraw the rule making. 	The commission must exercise its authority in accordance with the legislature's directives. The proposed rule implements chapter 170, Laws of 2020, in language that tracks the language of the statute.

David W. Danner, Chair
 Anne E. Rendahl, Commissioner
 Milton H. Doumit, Commissioner

Appendix B

(CHAPTER 480-62 WAC - RULES)

OTS-3674.2

AMENDATORY SECTION (Amending WSR 18-10-001, filed 4/18/18, effective 5/19/18)

WAC 480-62-125 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

"Class I railroad company" means a railroad company having annual operating revenues of (~~(\$250 million)~~) \$250,000,000 or more;

"Class II railroad company" means a railroad company having annual operating revenue of less than (~~(\$250 million)~~) \$250,000,000, but more than (~~(\$20 million)~~) \$20,000,000; and

"Class III railroad company" means a railroad company having annual operating revenues of (~~(\$20 million)~~) \$20,000,000 or less.

"Commission" means the Washington utilities and transportation commission.

"Contract crew transportation company" means any person, organization, company or other entity that operates one or more contract crew transportation vehicles.

"Contract crew transportation vehicle" means every motor vehicle designed to transport (~~(fifteen)~~) 15 or fewer passengers, including the driver, that is owned, leased, operated, or maintained by a person contracting with a railroad company or its agents, contractors, sub-contractors, vendors, subvendors, secondary vendors, or subcarriers and used primarily to provide railroad crew transportation.

"Department of labor and industries" means the Washington state department of labor and industries.

"Department of transportation" means the Washington state department of transportation.

"On track equipment" means self-propelled equipment, other than locomotives, that can be operated on railroad tracks.

"Passenger carrying vehicle" means those buses, vans, trucks, and cars owned, operated, and maintained by a railroad company primarily used to transport railroad employees, other than in the cab of such vehicles, and are designed primarily for operation on roads which may or may not be equipped with retractable flanged wheels for operation on railroad tracks.

"Railroad" means every permanent road with a line of rails fixed to ties providing a track for cars or equipment drawn by locomotives or operated by any type of power, including interurban and suburban electric railroads, for the public use of conveying persons or property for hire, with all bridges, ferries, tunnels, equipment, switches, spurs, sidings, tracks, stations, and terminal facilities of every kind, used, operated, controlled, managed, or owned by or in connection therewith. Unless otherwise provided by rule, the term "railroad" does not include logging and industrial railroads, or street railways operating within the limits of any incorporated city or town.

"Railroad company" means every corporation, company, partnership, association, joint stock association, or person, their lessees, trustees, or receivers appointed by any court, and any common carrier owning, operating, controlling or managing any railroad or any cars or other equipment used on, or in connection with the railroad within this state.

"Railroad police officer" means a peace officer who is commissioned in his or her state of legal residence or state of employment by a railroad company to enforce state laws for the protection of railroad property, personnel, passengers and/or cargo.

"Remote-control area" means any place remote-control operations are conducted on a railroad.

"Remote-control operations" means (~~(controlling)~~) control of the movement of locomotives through the use of radio transmitter and receiver systems by persons not physically located at the controls within the confines of a locomotive cab.

"Remote-control zone" means a designated restricted access area (~~(where access is restricted)~~) in which remote-control operations may occur under alternative point protection procedures.

"State" means the state of Washington.

[Statutory Authority: RCW 80.01.040, 81.04.160, and 81.61.050. WSR 18-10-001 (Docket TR-170780, General Order R-591), § 480-62-125, filed 4/18/18, effective 5/19/18. Statutory Authority: RCW 80.01.040 and 80.04.160. WSR 04-11-023 (Docket No. TR-021465, General Order No. R-514), § 480-62-125, filed 5/11/04, effective 6/11/04. Statutory Authority: RCW 80.01.040, 81.04.160, 81.24.010, 81.28.010, 81.28.290, 81.40.110, 81.44.010, 81.44.020, 81.44.101-81.44.105, and chapters 81.48, 81.53, 81.54, 81.60, and 81.61 RCW. WSR 01-04-026 (Docket No.

TR-981102, General Order No. R-477), § 480-62-125, filed 1/30/01, effective 3/2/01.]

NEW SECTION

WAC 480-62-255 Minimum crew size on certain trains. (1) For the purpose of this section, unless the language or context indicates that a different meaning is clearly intended, the following definitions apply:

"Class I" means a railroad carrier designated as a class I railroad by the United States surface transportation board and its subsidiaries or is owned and operated by entities whose combined total railroad operational ownership and controlling interest meets the United States surface transportation board designation as a class I railroad carrier.

"Class III" means a railroad carrier designated as a class III railroad by the United States surface transportation board.

"Crewmember" has the same meaning as "operating craft employee" as defined in this section.

"Operating craft employee" means a person employed by a railroad carrier and identified as train or yard crew as defined in 49 C.F.R. Part 218.5.

"Other railroad carrier" means a railroad carrier that is not a class I carrier.

"Railroad carrier" means a carrier of persons or property upon vehicles, other than streetcars, operated upon stationary rails, the route of which is principally outside incorporated cities and towns. "Railroad carrier" includes any officers and agents of the railroad carrier.

(2) Any person, corporation, company, or officer of the court operating any railroad, railway, or any part of any railroad or railway, in the state as a common carrier of freight or passengers shall operate and manage all trains and switching assignments over its road with no less than two crewmembers.

(3) The minimum crew size requirement of subsection (2) of this section does not apply to:

(a) Class III railroad carriers operating on their roads while at a speed of 25 miles per hour or less; or

(b) Other railroad carriers in possession of an effective automatic waiver issued under subsection (4) of this section.

(4) Other railroad carriers operating in the state on or after June 11, 2020, receive an automatic waiver of the minimum train crew size requirements of subsection (2) of this section that shall remain in effect until the commission terminates the effectiveness of such a waiver by order.

(5) The commission may order railroad carriers to increase the number of railroad employees, to require additional crewmembers, or direct the placement of additional crewmembers if the commission determines that the increase is necessary to protect the safety, health, and welfare of the public, passengers, or railroad employees, to prevent harm to the environment or to address site specific safety or security hazards. In issuing any order to increase the number of railroad employees, the commission may consider, but is not limited to, the factors found in RCW 81.40.025 (4)(b).

(6) Any railroad carrier in violation of this section may be subject to fines of not less than \$1,000 and not more than \$100,000 for each offense, as determined by the commission through order. In the event of a serious injury or fatality the commission may impose fines exceeding \$100,000 per offense.

[]