

DEPARTMENT OF LAND
CONSERVATION & DEVELOPMENT

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SALEM

PUBLIC UTILITY COMMISSION

STATE AGENCY COORDINATION PROGRAM

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Oregon Public Utility Commission
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EXECUTIVE SUMMARY

This document fulfills the Oregon Public Utility Commission's (PUC) obligation under Oregon Revised Statutes 197.180 to prepare a State Agency Coordination Program (SAC). Included in this document are: a description of the PUC's responsibilities and functions, a summary of PUC's rules and regulations, and an explanation of PUC's actions affecting land use.

The PUC is charged with the responsibility of regulating various aspects of the utility and transportation industries. The majority of PUC's activities have no affect on land use. The PUC has identified only one program affecting land use. This program is the Granting of a Certificate of Public Convenience and Necessity, pursuant to ORS 758.015, which involves the condemnation of private property to construct an overhead transmission line. This document includes a copy of the rule amendment, approved May 28, 1991, which ensures that the granting of a Certificate of Public Convenience and Necessity will comply with Oregon land use laws.

In 1978, the PUC identified nine programs as affecting land use. Based on application of the current SAC, the PUC concludes that only the one program, explained above, meets the test of a program affecting land use. This document provides a complete analysis of the eight programs identified the the 1978 SAC.

The PUC is committed to ensure compliance and compatibility with Oregon's land use laws by submitting notice of any amendment to an agency program or administrative rule that affects land use. In addition, the PUC is available to the Department of Land Conservation and Development and to any other government entity, as we are to the public generally, to provide technical assistance and information as it relates to the industries PUC regulates.

SECTION I

INTRODUCTION

ORS 197.180 requires each state agency to prepare a coordination program for review and certification by the state Land Conservation and Development Commission (LCDDC). The purpose of State Agency Coordination (SAC) programs is to ensure that state agency rules and programs, which affect land use, comply with the statewide planning goals and are compatible with acknowledged city and county comprehensive plans and land use regulations.

The Public Utility Commission of Oregon (hereafter referred to as PUC or Agency) has developed this coordination program to fulfill its land use responsibilities. The Agency will ensure its compliance by following the administrative rules and procedures in its coordination program.

The PUC's original state agency coordination program was approved by LCDDC on May 10, 1978. In that plan the following nine programs were identified as affecting land use:

Rail Program

1. Construction of new railroad-highway crossings, pursuant to ORS 763.013, 763.020, and 763.040.
2. Alteration of existing railroad-highway crossings, pursuant to ORS 763.013 and 763.030.
3. Closure of an existing railroad-highway grade crossing, pursuant to ORS 763.013 and 763.030

Utility Program (electric, natural gas, telephone, and water companies)

1. Granting of a certificate of public convenience and necessity, under ORS 758.015.
2. Allocation of new service territory, under ORS 758.400 to 758.470.
3. Ordering a utility to extend service to a previously unserved area, pursuant to ORS 757.050.
4. Approval of a utility's issuance of securities for the purpose of financing specific improvements, pursuant to ORS 757.400 to 757.450.
5. Approval of a sale of property of a public utility, the disposal of property or other transaction under ORS 757.480.
6. Approval of a tariff setting utility line extension changes pursuant to ORS 757.205 to 757.255.

Although numerous significant amendments have been made to the PUC's statutes and administrative rules since 1978, the Agency has not modified its State Agency Coordination program since receiving initial approval from LCDC. As a result of legislative changes and policy actions by LCDC, the coordination rule (OAR 660, Division 30) has been updated twice. The PUC must bring its revised coordination program into compliance with all current SAC requirements. The PUC's 1978 SAC program will be considered rescinded upon certification of the revised program by LCDC.

AGENCY PURPOSE AND HISTORY

The Oregon Public Utility Commission's primary responsibility is to ensure that customers of the state's utility and transportation industries receive safe, reliable service at reasonable rates and at the same time allow the regulated companies the opportunity to earn a fair return on investment. PUC is vested with the authority to represent customers of any public⁽¹⁾ utility, railroad, air carrier,⁽²⁾ or motor carrier, and the public generally in matters relating to rates, valuations, service and safety. The Commission is also vested with the power to supervise and regulate every investor-owned utility, railroad, air carrier and motor carrier and to participate in any proceeding before any federal agency related to its regulated industries. (ORS 756.040.) The scope of regulation varies among the regulated industries and is limited in many areas by federal law.

OPUC was established in 1907 under the name of the State Board of Railroad Commissioners. Regulation of public utilities was added in 1911 and the regulation of motor carriers was added in 1922.

AGENCY ORGANIZATION

The Commission consists of three members appointed by the Governor, subject to confirmation by the Oregon State Senate. The term of office for each member is four years. Unlike most Oregon agency commissions, the Public Utility Commission members are salaried, full-time employees of the state. In addition to acting as a quasi-judicial body on contested cases relating to the various regulated industries, the Commission also establishes the general policy direction of the agency.

Each of the agency's five major programs are administered by an Assistant Commissioner who reports to the Executive Director and the Commission. The five program areas are: Transportation, Utility, Administrative Hearings, Personnel, and Administrative Services.

PUC's governing statutes are Oregon Revised Statutes Chapters 756, 757, 758, 760, 761, 763, 764, 767, 771, 772, 773, and 774.

Commission Office

The Commission Office includes the three Commissioners, three support personnel, an executive assistant, and an Executive Director. The Executive Director is responsible for overall coordination of the agency's administration. The Public Affairs and Consumer Assistance Offices report directly to the Executive Director, as do two special assistance programs created by the 1987 Legislature which are also within the Administrative Services Program. One provides monthly telephone assistance to eligible low-income people (OTAP) and the other provides special equipment and statewide relay service to the deaf (TDAP). Both programs are funded from a surcharge levied on all local telephone access lines.

Public Affairs and Consumer Assistance

The Public Affairs Office develops informational publications and handles agency news releases. The Consumer Assistance Office answers complaints primarily related to utility service.

Transportation Program

The Transportation Program employs approximately 250 people and is divided along functional lines into three divisions. The divisions are Economic Regulation, Transportation Safety and Weight-Mile. All three divisions have field offices located throughout the state. The field offices are all involved with motor carrier responsibilities.

The field offices for the Economic Regulation and Safety Enforcement staff, as well as those for Tax Audit staff, are located in rented facilities. Except for two Registration field offices located in Portland and Umatilla,³ all Registration field offices are located in Ports of Entry (POE). The Ports are owned by the Department of Transportation Highway Division, which is responsible for the siting and construction of the facilities.

Economic Regulation Division

The primary function of the Economic Regulation Division is to regulate intrastate passenger and freight motor carriers. Intrastate carriers of general commodities are regulated for entry and rates. Log truck carriers and sand and gravel carriers are regulated for entry only. Under this authority, the Commission issues a certificate of Public Convenience and Necessity.⁴ The purpose for PUC's regulation is to ensure that the public receives adequate service and that carriers receive a reasonable return on investment. (ORS chapter 767).

The criteria for determining whether a regulated carrier may enter the trucking business in Oregon are set forth in ORS 767.020. These criteria are in addition to the general regulatory theories applied in granting Certificates of Public Convenience and Necessity. The PUC also regulates the rates of intrastate general commodity carriers. As is similar to utility rate setting, rates are set by the PUC to ensure that rates adequately cover the cost of operation, i.e., that they are compensatory, and at the same time are reasonable for the carrier's customers.

The Economic Regulation Division also has responsibility for intrastate rail regulation as allowed by federal law. The division handles the abandonment of both rail and motor carrier agencies and participates before the federal Interstate Commerce Commission (ICC) in proceedings relating to both rail and motor carrier cases, including those related to rail line abandonments and rail mergers.

Transportation Safety Division

The Transportation Safety Division is responsible for the safety regulation of both the rail and motor carrier industry. The Safety Division works closely with the Department of Transportation and with state and local law enforcement agencies in carrying out federal and state motor carrier safety regulations. The PUC is designated as the lead motor carrier safety agency. In that capacity, PUC enforces federal regulations through safety audits and roadside inspections of trucks.

The Transportation Safety Division issues safety permits to carriers of certain commodities, as required by state and federal law. Currently, these commodities are hazardous materials, as defined by federal statute; radioactive materials, through a Memorandum of Understanding (MOU) with the Oregon Department of Energy; and infectious wastes, through an MOU with the Oregon Health Division.

Rail safety responsibilities include those related to crossing safety, employee safety and track and equipment safety. The Commission has exclusive jurisdiction over alteration, closure and opening of all public grade crossings. (See Appendix A.) The Commission also has jurisdiction over train speeds and train warning devices at crossings. (ORS 763) The Commission regulates track clearances and walkways in areas where railroad employees work, and, under federal certification granted by the Federal Railroad Administration, the Commission is authorized to inspect track and railroad equipment.

Weight-Mile Division

The Weight-Mile Division is responsible for collecting highway use taxes assessed on all motor carriers. To carry out that responsibility, the Weight-Mile Division registers (or permits) all motor carriers, collects taxes, and audits motor carriers for compliance with tax requirements. This division also enforces requirements related to liability insurance, tax bonds, and prorated vehicle registration for commercial vehicles over 26,000 pounds.

Administrative Services Program

The Administrative Services Program is responsible for fiscal accounting services, budget development, information services (computers), secretarial support services, payroll and financial analysis. Administrative Services also includes the Collections Unit, which collects debts owed to the PUC, primarily from motor carriers seriously delinquent in their tax payments.

Administrative Hearings Program

The Administrative Hearings Program provides hearings officers for PUC's numerous hearings. The staff attorneys conduct hearings on matters related to utility and transportation regulation and draft orders for Commission approval.

Personnel Program

The Personnel Program is responsible for matters related to employee hiring, firing and disciplinary actions as well as employee development and employee assistance.

UTILITY PROGRAM

The Utility Program, operating under authority of ORS Chapters 756, 757, and 758, deals with regulating investor owned (private) utilities in terms of charges, quality of service, and safety. The agency has authority over publicly owned electric utilities (cooperatives, municipals, and Public Utility Districts) only in the limited areas of safety, territory allocation, and emergency load curtailment planning. The investor owned utilities include three electric companies, three natural gas companies, about 10 telephone companies, and 3 water companies.

Because of the natural monopolistic nature of utilities, the companies are granted exclusive service territories but must submit to regulation by the Commission to preclude possible abuse. A natural monopoly is a situation where the most efficient service can be provided by a single company. For example, if two electric companies served the same area, there would be duplicate facilities. It is the duplication of facilities that creates the inefficiency. To regulate investor-owned utility companies, the Utility Program is organized into the following divisions:

Energy Division. The Energy Division deals with the electric and natural gas industry. The Energy Division is functionally organized into four sections. The Natural Gas Rates and Planning Section monitors the operation and planning activities of gas utilities in terms of economics, service, quality, and planning. The Electric Rates and Planning Section performs the same function with respect to the electric utilities. The Safety Section is responsible for the safe operation of both gas and electric utilities. An additional responsibility within the safety section is the allocation of exclusive service territories. The Revenue Requirement Section monitors the overall financial performance of the electric and gas utilities to assess the need for changes in rate levels.

Telecommunications Division. The Telecommunications Division monitors the economics, service quality, and planning of the telecommunications companies operating in Oregon. The primary function of the division is to assure that the utilities provide adequate service at reasonable rates. It has no role in authorizing construction of telecommunication facilities.

Financial Analysis Division. The Financial Analysis Division performs three functions. The Audit Section makes spot audits of the utilities' books of account to assure their accuracy and compliance with accounting standards. The Diversification and Affiliated Interest Section reviews the diversification and affiliated interests activities of the utilities to assure that they have no adverse effect on the utilities' primary function of providing service. The Rate of Return and Depreciation Section provide the financial expertise required to assist in determining the appropriate rate levels for utility services.

SECTION II

OREGON PUBLIC UTILITY RULES AND PROGRAMS

This section addresses the requirements of LCDC's Oregon Administrative Rules, specifically OAR 660-30-060(3), and the Agency's statutory purpose, administrative rules, and programs. Those programs that were previously determined to affect land use and were listed in the 1978 LCDC Coordination Plan are discussed in this section.

A. Enabling Statutes

The Public Utility Commission's authority and obligations are contained in Oregon Revised Statutes ORS 756, 757, 758, 760, 761, 763, 764, 767, 768, 771, 772, and 773. These statutes are quite voluminous. The following is a listing of the statutes section from the Table of Contents of the "1990 Laws Relating to the Public Utility Commission of Oregon." Appendix D contains a copy of this document.

ORS Ch. 756

PUBLIC UTILITY COMMISSION

- Definitions
- Commission powers and duties generally
- Investigatory power
- Enforcement and remedies
- Funds and fees
- Transportation company regulation
- Declaratory rulings
- Complaint and investigation procedure
- Hearing procedure
- Penalties

This chapter deals with the general powers and duties of the Commission. It defines its enforcement authority, funding, and hearing procedures.

ORS Ch. 757

UTILITY REGULATION GENERALLY

- Definitions; general provision
- Budget, accounts, and reports of utilities
- Rate schedules; measuring equipment
- Attachments regulation
- Illegal practices

This chapter deals in greater detail with the Commission's authority to regulate utilities. It contains the record keeping and reporting requirements as well as specific areas of jurisdiction, such as emergency load curtailment and certain areas of utility transactions.

ORS Ch. 756

PUBLIC UTILITY COMMISSION

- Definitions
- Commission powers and duties generally
- Investigatory powers
- Enforcement and remedies
- Funds and fees
- Transportation company regulations
- Issuance of securities
- Transactions involving utilities
- Excavation regulation³
- Emergency curtailment of electricity or natural or manufactured gas
- Health-endangering termination of penalties

ORS Ch. 758

UTILITY RIGHTS OF WAY AND TERRITORY ALLOCATION; COGENERATION

- Rights of way
- Underground electric and communication facilities
- Allocation of territories and customers
- Cogeneration and small power production facilities

This chapter deals with the authority of utilities to construct gas, electric, water, and communication facilities and defines the methods for approval. The power of public authorities to require undergrounding of overhead electric or communication facilities is also defined. The Commission's authority to issue Certificates of Public Convenience and Necessity is defined. This area is discussed in detail (below) in paragraph F of this Section II.

The Commission's authority and procedures for the allocation of exclusive utility service territories is discussed along with the Commission's duties and authority to administer the federally mandated cogeneration and small power production facility program. This latter program requires that utilities purchase the energy produced by privately constructed (nonutility) and operated plants that meet certain criteria such as using a renewable resource (wind, water, solar, hydro, etc.).

ORS Ch. 760

RAILROAD REGULATION GENERALLY

- Definitions; general provisions
- Inspectors
- Rates
- Reports and accounts
- Special orders; actions against carriers
- Acquisition of lines
- Penalties

This chapter provides the general provisions relating to railroad regulation, and specific provisions relating to intrastate rate regulations and railroad abandonments and acquisitions.

ORS Ch. 761

RAILROAD EQUIPMENT, BUILDINGS, AND TRACKS; TRANSPORTATION OF HAZARDOUS MATERIALS

- Railroad buildings, tracks, and facilities
- Railroad equipment
- Hazardous materials
- Caboose requirements
- Penalties

This chapter establishes provisions relating to railroad safety, including those relating to employees, track and railroad equipment, and hazardous materials.

ORS Ch. 763

RAILROAD CROSSINGS

- General provisions
- Cost apportionments
- Penalties

This chapter establishes provisions relating to PUC's authority over public railroad/highway grade crossings.

ORS Ch. 764

RAILROAD EMPLOYEES

- Employment safety regulations
- Procedures for contested discharge of bonded employees
- Penalties

This chapter establishes provisions relating to railroad employees.

ORS Ch. 767

MOTOR CARRIER

- Economic Regulation
 - Generally
 - Certificates, permits, and licenses

Taxes and fees

- Regulations and enforcement
- Records, reports, and funds
- Miscellaneous

Weight-Mile Tax

- Certificates, licenses, and permits
- Taxes and fees
- Regulation and enforcement
- Records and reports

Penalties

This chapter establishes provisions relating to the taxation and economic and safety regulations of motor carriers.

ORS Ch. 768

REGISTRATION OF COMMERCIAL VEHICLES

This chapter grants PUC the authority to issue proportional registration of commercial vehicles and establishes requirements and fees for prorated vehicles.

ORS Ch. 771

LIABILITY OF CARRIERS

This chapter addresses the responsibilities of carriers as they relate to bills of lading and damage claims.

ORS Ch. 772

RIGHTS OF WAY FOR PUBLIC USES

- Condemnation of property by private corporations generally
- Appropriation of public lands for railroads
- Condemnation by public utilities and electrical cooperative associations
- Condemnation for drainage or irrigation
- Condemnation by corporations for reduction of ores, mining, quarries, lumbering, and transportation of mining products
- Condemnation by pipeline and gas corporations
- Condemnation for underground natural gas storage

This chapter of the statutes grants authority to certain public and private entities to acquire right of way for facilities of a public nature (railway, irrigation, canal, pipelines, etc.), but does not address utility facilities, which are included in ORS Ch. 758 and are discussed earlier in this document. The only area that the Commission has any authority in condemnations is under ORS 758.015, Certificate of Public Convenience and Necessity. This area is discussed in detail in paragraph 5 of this Section II. The Commission's responsibility under Ch. 772 is to arbitrate disputes between railroads regarding crossings (not railroad/highway grade crossings) and connections, and between public and private entities.

ORS Ch. 773

AIR CARRIERS AND AIR COMMERCE

This section establishes PUC's responsibilities regarding the regulation of air carriers. While this section remains in the ORS, PUC's authority in this area has been preempted by federal law.

B. Agency Programs

The agency is responsible for administering the following programs:

1. Utility Program
 - a. Energy
 - b. Telecommunications
 - c. Economic Research
 - d. Financial Analysis
 - e. Tariffs and Data
 - f. Policy Assessment
 - g. Rate of Return and Depreciation
2. Transportation Program
 - a. Economic Regulation
 - b. Weight-Mile
 - c. Transportation Safety
3. Administrative Hearings Program
4. Administrative Services Program
5. Personnel Program

C. Administrative Rules

The Agency has adopted administrative rules to implement its statutory responsibilities. The rules are contained in Oregon Administrative Rules (OAR) Chapter 860 and contained in Appendix D. The following listing is taken from the rules' tables of contents:

1. Practice and Procedure

- Division 11 General Provisions
- Division 12 Practice Before the Commission
- Division 13 Pleadings and Tariff Filings
- Division 14 Hearings
- Division 15 Charges

2. Utility Regulation

- Division 21 General Provisions
- Division 22 Rates
- Division 23 Service Standards
- Division 24 Construction and Safety Standards, General
- Division 25 Regulation to Prevent Duplication of Facilities
- Division 26 Sales Promotion
- Division 27 Budgets, Finance, Accounting, and Annual Reports
- Division 29 Electric Utilities' Interconnection with Electric Cogeneration and Small Power Production Facilities
- Division 30 Residential and Commercial Energy Conservation
- Division 31 Inspection of Gas Pipeline Operators and Waiver of Safety Standards
- Division 32 Telecommunications
- Division 40 Railroads
- Division 42 Railroad-Highway Crossings
- Division 43 Applications
- Division 44 Railroad Employee Safety
- Division 46 Movement of Excess Dimension Loads and Marking of Cars and Oregon Railroad Hazardous Materials Transportation Rules
- Division 47 Accident Notices and Reports
- Division 48 Uniform System of Accounts for Railroads

3. Motor Carriers

- Division 61 Definitions; General Provisions
- Division 62 Certificates, Permits, Licenses, and Documents
- Division 63 Insurance and Bonds
- Division 64 Identification, Issuance, and Placement of Plates, Markers, Devices, or Passes
- Division 65 Vehicles; Driver; Equipment; Equipment Required and Condition of Vehicles
- Division 66 Freight: Hazardous Materials: Logs, Poles, Pilings, Commissions
- Division 67 Tariffs and Time Schedules
- Division 68 Records, Reports, and Accounting Fees and Taxes
- Division 69 Transportation of Household Goods
- Division 70 Cargo Loading and Securement Rules
- Division 71 Baled Hay and Straw--Loading, Securement, and Transportation
- Division 72 Baled Cotton, Paper, and Jute--Loading, Securement, and Transportation
- Division 73 Logs and Poles--Loading, Securement, and Transportation
- Division 74 Junk and Scrap Metal--Loading, Securement, and Transportation
- Division 75 Steel Coil--Loading, Securement, and Transportation
- Division 76 Steel Plate, Sheet, and Tinplate--Loading and Securement

- Division 77 Empty Wooden or Plastic Boxes--Loading, Securement, and Transportation
- Division 78 Detachable Freight Vans or Tank Containers--Loading, Securement, and Transportation
- Division 79 Lumber and Lumber Products--Safe Loading, Securement, and Transportation
- Division 80 Sacked Cement, Sand, Ready-Mix Concrete, Bark Dust, Bark Chips,

D. Overview of Commission Procedures

The Public Utility Commission is unique in Oregon State Government as its Commission acts as a quasi-judicial body in approving all orders, granting certificates, and adopting Commission policies and administrative rules. The functions of the Commission are fully governed by the Oregon Open Meetings Law, and the Agency's administrative procedures ensure the maximum public involvement possible. Any meeting where any decision is made, even those relating to internal office procedures, must be open to the public.

E. Additional Nonrule Administrative Procedures

The Agency has established internal procedures to assure its actions are within statutes and administrative rules applicable to the Agency's programs. These documents are available for public review at the Agency's main office in Salem.

F. PUC Programs Affecting Land Use

1. Definition of "Programs Affecting Land Use"

The determination of whether a PUC rule or program "affects land use" requires an evaluation of the Agency's rules and programs against the definition of that term in the SAC rule, OAR 660, Division 30:

The definition of a "rule or program affecting land use" is found in LCDC's SAC rule at OAR 660-30-005(2). Under this provision an agency rule or program affects land use if it is:

- a. Specifically referenced in the Statewide Planning Goals; or is
- b. Reasonably expected to have significant effects on:
 - (1) Resources, objectives, or areas identified in the Statewide Planning Goals; or
 - (2) Present or future land use identified in acknowledged comprehensive plans.

The SAC rule also states that an agency rule or program does not affect land use if:

- a. An applicable statute, constitutional provision, or appellate court decision expressly exempts the requirement of compliance with the statewide goals and compatibility with acknowledged com-prehensive plans; or

b. The rule, program, or activity is not reasonably expected to have significant effects on:

- (1) Resources, objectives, or areas identified in the statewide goals; or
- (2) Present or future land uses identified in acknowledged comprehensive plans; or
- (3) A state agency transfers or acquires ownership or an interest in real property without making any change in the use or area of the property. Action concurrent with or subsequent to a change of ownership that will affect land use or the area of the property is subject to either the statewide goals or applicable city and county land use regulations.

2. Analysis of PUC Programs

The Agency has undertaken a general review of all of its rules and programs described in II.A-C above to determine which, if any, fall within the definition of a "program affecting land use" provided in OAR 660-30-005(2).

As part of this analysis, individual reviews have been made (presented below) of each of the nine PUC (six utility and three transportation) programs previously identified in PUC's 1978 SAC program as affecting land use.

It is the Agency's conclusion, based on application of the definition in the SAC rule, after consultation with legal counsels for PUC and DLCD, that only one PUC program now qualifies as a "program affecting land use." This program is the Granting of a Certificate of Public Convenience and Necessity, pursuant to ORS 758.015, involving condemnation of private property to construct an overhead transmission line.

a. PUC Programs Listed in Statewide Planning Goals

A comparison of the Agency's rules and programs described above with the statewide goals reveal that there is no PUC rule or program listed in the goals for the purposes of compliance. Therefore, there are no PUC "programs affecting land use" based on this criterion.

b. PUC Programs Reasonably Expected to Have Significant Effects on Uses in Comprehensive Plans

The analysis below of significant effects evaluates only the six programs in the Utility area. The Agency has concluded that the three transportation programs are statutorily exempt from the requirements of ORS 197.180 (see discussion beginning on page 18).

(1) Utility Programs

Within the Utility Program, there are six individual programs that were listed in the 1978 PUC Coordination Plan as being "programs affecting land use." Each program is discussed below, including the analysis under OAR 660-30-005(2), whether it is a "program affecting land use" based upon significant effects on the statewide planning goals or acknowledged comprehensive plans.

(a) Granting of a Certificate of Public Convenience and Necessity (CPCN), under ORS 758.015.

In the event construction of an overhead transmission line will require condemnation of private property, the utility must first obtain a CPCN from the PUC. The CPCN is granted only after a public hearing. A CPCN does not authorize construction of the line. The CPCN is limited to being used as conclusive evidence in court proceedings. The certificate attests that the transmission line for which the land is being sought is required for public use and is necessary for public convenience. Left to the court is the determination of the amount of compensation due to the landowner.

Although only a prerequisite for a utility condemnation, the granting of a CPCN by PUC is an essential step in the process to acquire, use, and develop private land for power transmission lines. It is concluded that the issuance of a CPCN is reasonably expected to cause or produce significant effects on the Statewide Planning Goals and uses in acknowledged comprehensive plans.

For this reason, the issuance of a CPCN is judged to be a "program affecting land use" as defined in OAR 660-30-005(2).

(b) Allocation of Service Territory, Under ORS 758.400 to 758.470.

Electrical utilities are granted exclusive territories in which to serve. The nature of utility facilities makes it inefficient for more than one utility to serve the same area.

In return for being granted the privilege to be the exclusive provider for an area, a utility must submit to regulation to prevent possible abuse of its inherent monopolistic position.

State statutes at ORS 758.400 to 758.470 are designed to prevent the inefficient duplication of facilities or service. PUC carries out this responsibility through the approval of contracts which allocates service territories and customers between potentially competing utilities.

PUC's territorial allocation function is set forth in ORS 758.415, which provides:

Notwithstanding any other provision of law, a contract entered into pursuant to ORS 758.410, when approved by the Commission as provided in ORS 758.420 to 758.475, shall be valid and enforceable, provided that the Commission shall approve such a contract only if the Commission finds, after a hearing, as provided in ORS 758.420 to 758.475, that the contract will eliminate or avoid unnecessary duplicating facilities and will promote the efficient and economic use and development and safety of operation of utility systems of the parties to the contract, while providing adequate and reasonable service to all territories and customers affected thereby. (Emphasis added.)

Although most of the territory in Oregon is already allocated to the various utilities operating in the state, some areas remain unallocated. Utilities operating in areas adjacent to the unallocated territory may negotiate an allocation contract for service to that territory. Before the contract can be effective it must be approved by the Commission.

In terms of land use, it is clear that a PUC decision under this statute to issue a contract under the Allocation of New Service Territory program does not in any manner grant a utility authority to develop or construct electrical facilities or provide a specified level of electrical service. (Note: State law at ORS 757.050 requires that areas not served by a utility must be rendered service upon a demonstration of public convenience and necessity.)

In reaching their decision to approve or disapprove a contract for territorial allocation, state law clearly restricts the scope of PUC's discretion to consider only matters related to "efficient and economic use and development and safety of operation of the utility systems." On the basis that these issues are not expected to have a significant effect on the statewide goals and uses in comprehensive plans, it is concluded that the Allocation of Service Territory program is not a "program affecting land use."

(c) Ordering a Utility to Extend Service to a Previously Unserved Area, Pursuant to ORS 757.050.

In the situation where no electrical utility has been allocated to serve a particular area, PUC, after public hearings, may order a utility to provide service.

The authority of PUC to order service to be extended to unserved areas is found at ORS 757.050. The statute states:

The Commission has power to require any public utility, after a public hearing of all parties interested, to extend its line, plant or system into, and to render service to, a locality not already served when the existing public convenience and necessity requires such extension and service. However, no such extension of service shall be required until the public utility has been granted such reasonably franchises as may be necessary for the extension of service, and unless the conditions are such as to reasonably justify the necessary investment by the public utility in extending its line, plan or system into such locality and furnishing such service.

A PUC order directing a utility to provide service to an unallocated service territory comes about in the following manner.

Most of the state has been divided into designated areas for service by individual utilities. The allocation of the area to a utility allows that utility the exclusive right to provide its utility service therein and the obligation to serve customers requesting service. Those areas that have not been allocated to a utility are generally areas that are undeveloped.

When a customer locates in an unallocated territory and requests utility service, there is the possibility of a dispute arising between nearby utilities as to which utility should be authorized to serve the unserved area.

This situation is distinct from the allocation of service territory under ORS 758.400 to 758.470 discussed above. In that case, the Commission must approve the contract negotiated by the utilities for allocation of service territory. Where the utilities cannot reach agreement, they must come to the Commission for resolution of the dispute under ORS 757.050.

In the event of such a dispute, the PUC is empowered to resolve the matter by issuing an order directing one of the competing utilities to serve the area/customer in question. The Commission's decision is based solely on which utility is best able to provide the service from an economic standpoint.

In terms of land use, state law does not authorize PUC to require a utility to provide service to an area that otherwise should not be served. PUC's function under this program is simply to rule on which utility is best suited from an economic position to provide electrical service to an area where development previously has occurred or is permitted.

Because the decision to select one utility over another to serve an unserved area has no significant effects on the statewide goals and acknowledged comprehensive plans, it is concluded that this program pursuant to ORS 757.050 is not a "program affecting land use."

(d) Approval of a Utility's Issuance of Securities for the Purpose of Financing Specific Improvements, Pursuant to ORS 757.400 to 757.450.

Prior to the issuance of any stock or the sale of any bonds, a utility is required to obtain an authorization from the Commission. Such authorization is similar to a credit check on a private firm prior to seeking funding for a loan.

The Commission's action under this program does not authorize or in any direct way cause a utility to construct facilities, request, or change land uses or alter service levels in territory served by the utility. For these reasons, PUC's approval of the issuance of securities is not a "program affecting land use."

(e) Approval of a Sale of Property of a Public Utility, the Disposal of Property, or Other Transaction Under ORS 757.480.

Under state law, PUC must approve any action by a utility to sell, lease, or dispose of property with a value in excess of \$10,000.

In reviewing such transactions, the PUC is required to assure that there be no adverse economic effects on ratepayers. Guiding PUC decisions with respect to this program is its policy in PUC Order No. 85-010, issued in 1985, which states in part that:

A Commissioner setting rates based on the social benefits would be acting as a mini-Legislature rather than a utility regulator, whose lawful concern is "adequate service at fair and reasonable rates."

The Commissioner's primary objective is to evaluate proposals with a view to keeping rates for consumers at the lowest possible level over the long run. Programs which do not meet the criteria of cost effectiveness and equity, and are proposed to achieve social or environmental ends, should be addressed by the Legislature. That body is far better suited to deal with the complexity and competing interests presented by social and environmental programs.

This program of regulating property transactions applies to utility owned property; it has no application to property owned by PUC. For this reason, this program does not qualify as a "program affecting land use."

(f) Approval of a Tariff Setting Utility Line Extension Charges, Pursuant to ORS 757.205 to 757.255.

Routine connections by utilities for new customers are made free of charge. However, for connections involving higher costs due to the length of the line or other factors, utilities are allowed to charge the customer.

Any such charges that a utility imposes on its customers must be in the form of a PUC-approved and published tariff.

There are no significant effects on the statewide goals or comprehensive plans resulting PUC's approval of tariffs or charges for line extensions. For this reason, this program is not a "program affecting land use."

(2) Transportation Programs

The 1978 PUC Coordination Plan listed three individual transportation programs as being "programs affecting land use." Each program is described below, including review under OAR 660-30-005(2), whether it is a "program affecting land use."

The three programs in question are:

1. Construction of new railroad-highway crossings, pursuant to ORS 763.013, 763.020, and 763.040.
2. Alteration of existing railroad-highway crossings, pursuant to ORS 763.013 and 763.030.
3. Closure of an existing railroad-highway grade crossing, pursuant to ORS 973.013 and 763.030.

The PUC, on the basis of consultation and advice from the Department of Justice, has determined that the three rail crossing programs referred to above are statutorily exempt from the state agency coordination requirements listed in ORS 197.180 and in OAR Chapter 660, Divisions 30 and 31.

Under ORS 763.013, the authority to control and regulate the construction, alteration, and closure of a crossing is "vested exclusively in the state, and in the Public Utility Commission." The statute is intended to "achieve uniform and coordinated regulation of railroad-highway grade crossings." This statute specifically preempts any local regulation of grade crossings. See attached letter in Appendix A from Paul A. Graham to Claudia L. Howells, Deputy Assistant Commissioner, dated April 22, 1991.

In that letter, the Department of Justice concludes, in summary:

The PUC's crossing safety program is expressly exempt from SAC requirements of ORS 197.180. This is supported by the legislative history of ORS 763.013 and by relevant case law. The legislative history of ORS 197.180(1) also supports DOJ's conclusion that programs such as PUC's crossing program are exempt from SAC obligation.

Operation of Railroad Crossing Programs

The statutory direction to PUC is to improve the safety of public grade crossings in Oregon. Oregon has succeeded in that endeavor far better than any other state in the nation. The PUC has accomplished this by objectively analyzing all public grade crossings using a formula based on the amount of vehicular traffic, the number of train movements, the history of accidents, and the physical characteristics of the state's public grade crossings. Options for improving safety include installing protective devices (e.g., flashing lights, gates, illumination, etc.) and closing crossings.

Under ORS 763.020, PUC may accept an application to open a public crossing grade and under ORS 763.030, it may accept an application to close, relocate, or alter a public grade crossing. Either a road authority (city, county, or state) or a railroad may file an application. The PUC may also initiate the action on its own. The purpose for taking any of these actions is to carry out the statutory policy to improve safety and to reduce the potential for injury or loss of life at public grade crossings.

In administering the grade crossing programs, the PUC carries out an extensive process that provides for a maximum of public participation, but also ensures that the final decision will be made based solely on public safety considerations.

Following receipt of an application, or PUC on its own initiative, the process begins with a detailed analysis of a grade crossing, or more typically a corridor of crossings. PUC staff involves the affected railroad, the road authority, and potentially affected local governments early in these studies. Efforts are made to negotiate with these parties on how best to improve the safety of a crossing or group of crossings.

It is at this stage that PUC staff encourages involvement from any affected party and attempts to draw out any relevant concerns, including land use considerations, traffic flows, emergency vehicle access, and school bus routes. Staff will conduct on-site meetings with public officials, road engineers, and railroad crossing engineers to review every possible concern or option. Eventually this process results in PUC staff proposing an order to the Commission.

At the point when PUC staff believes there is consensus among the parties, PUC staff drafts an order and sends copies to all interested parties. PUC has broadly defined "parties" to mean anyone who has expressed interest in the crossing or crossings. If there are objections to the proposed order, a hearing is scheduled.

PUC hearings are handled by PUC's Administrative Hearings Division, as provided under ORS Chapter 756. Parties to the case, including PUC staff, make sworn testimony and provide evidence that either supports or objects to the proposed order. Based on evidence presented at the hearing, the Hearings Officer drafts a final order which is then sent to the Commission for approval. If controversy still remains, the Commission may choose to hold an information-gathering hearing before signing or rejecting the proposed order.

Railroad crossing orders, like all PUC orders, may be appealed to an Oregon Circuit Court, as provided under ORS 756.580. A decision of the circuit court may be appealed to the Oregon Court of Appeals under ORS 756.610.

In summary, the PUC's exclusive jurisdiction over public railroad-highway grade crossings serves several purposes. It first ensures uniformity of safety regulation throughout the state; second, it ensures that decisions will be made based solely on safety considerations; and third, it ensures the best use of scarce public resources for the installation of automatic protective devices.

G. PUC Programs Subject to LCDC State Agency Permit Compliance and Compatibility Rule

Currently, PUC railroad-highway grade crossing actions are listed in LCDC's state agency permit compliance and compatibility rule as Class B permits. See OAR 660-31-012(2)(i).

As discussed above, while PUC makes every effort to consider land use issues in formulating its crossing decisions, the Legislature has exempted PUC from the obligation in ORS 197.180 to assure compliance with the Statewide Planning Goals and compatibility with acknowledged comprehensive plans. See attached letter from Department of Justice in Appendix A.

SECTION III

OREGON PUBLIC UTILITY COMMISSION PROGRAM TO ASSURE COMPLIANCE WITH THE STATEWIDE GOALS AND COMPATIBILITY WITH ACKNOWLEDGED COMPREHENSIVE PLANS

This section responds to the requirements of OAR 660-30-060(4) in the Granting of Certificates of Public Convenience and Necessity (CPCN) pursuant to ORS 758.015. Described below is PUC's process for assuring how the agency's actions will comply with the Statewide Planning Goals and will be compatible with acknowledged city and county comprehensive plans and land use regulations in issuing Certificates of Public Convenience and Necessity for transmission lines.

A. Exempt and Compatible Agency Land Use Programs

PUC's only program determined to affect land use falls into the category of a "compatible land use program" as defined in OAR 660-30-060(4)(a)(B). There are no applicable statutes, constitutional provisions, or appellate court decisions which expressly exempt the CPCN transmission line program from compatibility with acknowledged comprehensive plans, but not from compliance with the statewide goals.

B. Rules and Procedures to Assure Compliance with the Statewide Goals

1. Agency Rules

PUC's CPCN transmission line program is the only agency program determined to be a "program affecting land use." (See ILF above.) PUC's administrative rule that governs this program is presented below. This rule has been amended to incorporate the requirements of ORS 197.180 and OAR 660, Division 30, for Goal Compliance and Plan Compatibility. New text is underlined.

a. Petitions for Certificate of Public Convenience and Necessity for Construction of Overhead Transmission Lines

860-25-030(1) [Petitions] Petitions under ORS 758.015, for a certificate of public convenience and necessity to construct an overhead transmission line, which will necessitate a condemnation of land or an interest therein, shall contain the following information:

[(1)](a) The information required under rule 860-25-005.

[(2)](b) A detailed description and the purpose of the proposed transmission line which shall include but not be limited to a general description of the proposed route, voltage and capacity of the line. The description of the project should be in sufficient detail as to enable a full understanding of the public convenience, necessity and justification in the public interest for the proposed transmission line and the benefits to be derived therefrom and to enable a determination of its safety and practicability.

[(3)](c) A map or maps to appropriate scale showing the general location and boundaries of petitioner's service area to be connected or served by the proposed transmission line and showing, by appropriate distinguishing colors and symbols, but not limited to, the following information:

[(a)](A) Proposed route, voltage and capacity of the proposed transmission line.

[(b)](B) Available alternate routes.

[(c)](C) Other transmission lines and substations of petitioner connecting or serving or capable of being adapted to connect or serve the areas covered by the proposed transmission line.

[(d)](D) The terminals, substations, sources of energy and load centers related to the proposed project.

[(e)](E) Land to be condemned.

[(4)](d) An estimate of the cost of developing the project including:

[(a)](A) Land and land rights to be condemned.

[(b)](B) Other land and land rights acquired or to be acquired.

[(c)](C) Transmission facilities.

[(d)](D) Substation, accessory and miscellaneous labor, plant and equipment.

[(e)](E) Indirect and overhead costs including engineering, legal expense, taxes, interest during construction and itemized administrative and general expenses:

[(f)](F) Any other costs, direct or indirect, relating to the project.

[(g)](G) Such explanation of the various cost estimates as is necessary to enable a full understanding of their basis and derivation.

[(5)](e) An explanation of the financial feasibility of the proposed project including the kind, nature, extent, and estimated growth of the energy requirements or reasonably anticipated need, load or demand, for the proposed transmission line.

[(6)](f) A description of the property and interest to be condemned, together with a full explanation of the intended use, and the specific necessity and convenience for the taking of said property:

[(a)](A) A map must be included whereon the land to be condemned is clearly marked, and the general contour, culture and improvements along that portion of the route are clearly shown.

[(b)](B) The names and addresses of all persons who have an interest, known or of record, in the land to be affected or traversed by the proposed route from whom applicant has not acquired the necessary right of way or option therefor.

[(7)](g) A statement and explanation with supporting data comparable to that described in the above sections (4) and (5) for possible alternative routes.

[(8)](h) Such additional information may be necessary for a full understanding of the situation.

(i) Such information and supporting data necessary for the Commission to satisfy the land use findings requirement described in OAR 860-25-030(2), (3) and (4).

(2) The Commission, as part of its approval of a Certificate of Public Convenience and Necessity, shall adopt findings which assure that the proposed transmission project complies with the Statewide Planning Goals and is compatible with the acknowledged comprehensive plan(s) and land use regulations of each of the local government(s) in which the project is to be located. The Commission's findings shall be developed in accordance with the rules and procedures as set forth in the Commission's state agency coordination program pursuant to ORS 197.180.

(3) The Commission's land use findings assuring the proposed project's goal compliance and plan compatibility shall be based on the hearing record and include at least one of the following:

(a) A copy of the local land use permit from each affected city or county planning agency, building department, or governing body that the proposed transmission project has received the jurisdiction's approval; or

(b) A copy of a letter from each affected local planning agency, building department, or governing body that the proposed transmission project is permitted under the jurisdiction's comprehensive plan, land use regulations, and development codes, but does not require specific approval by the jurisdiction; or

(c) Other written or oral land use information and documentation equivalent to OAR 860-25-030(3)(a) or (b) above properly presented to the Commission from an authorized representative from each affected city or county; or

(d) Commission goal compliance findings adopted pursuant to OAR 660-30-065(3) in situations where the Commission is unable to assure goal compliance by acting compatibly with one or more of the affected comprehensive plans.

(4) If a proposed transmission line is subject to the jurisdiction of the Energy Facility Siting Council (EFSC), the Commission shall adopt findings which assure that the project and route have been certified by EFSC and the requirements of OAR 860-25-030(2) and (3) shall not apply.

2. Agency Procedures

The rule listed above requires that the agency adopt findings that the action complies with Statewide Planning Goals and is compatible with acknowledged city and county comprehensive plans and land use regulations. Since all comprehensive plans in the state have been acknowledged to be in compliance with the Statewide Planning Goals, when the agency acts compatibly with an acknowledged comprehensive plan, it is acting in compliance with the Statewide Planning Goals. The agency does not anticipate ever having to adopt compliance findings directly under the Statewide Planning Goals, except in situations where compliance cannot be achieved by acting compatibly with the acknowledged comprehensive plan. See OAR 860-25-030(3)(d).

The specific process for handling applications for Certificates of Public Convenience and Necessity under ORS 758.015 is as follows:

- a. The utility's application is received by the Regulatory and Technical Support Division of the Utility Division.
- b. Copies are distributed to Utility Division staff and the Administrative Hearings Division.
- c. A Hearings Officer from the Administrative Hearings Division is assigned and a prehearing conference is scheduled. Notice of the prehearing conference is sent to all parties that may have an interest in the proceeding.
- d. Within the Energy Division of the Utility Program, staff is selected to review the application to assure that the project meets the statutory requirements and the Commission rules. Staff is represented by an attorney assigned to the case from the Department of Justice.
- e. At the prehearing conference, a schedule is set for information requests, response deadlines, and the hearing itself. In addition, those that want to become parties to the case (actively participate in the proceedings) are identified.
- f. Prior to the hearing, a period of investigation takes place where the parties gather information, establish positions, and prepare testimony.
- g. At the hearing, the parties present testimony under oath and are subjected to cross-examination by the other parties.
- h. The Commission renders its decision based on the record of the hearing.

In each of these proceedings, notice to the media in the affected areas is given. Hearings are required by statute.

C. Rules and Procedures for Assuring Compatibility with Acknowledged Comprehensive Plans

1. Agency Rules

The rule listed in III.B.1 (see OAR 860-25-030) above relating to assurance of compliance with statewide goals also is designed to assure compatibility with acknowledged comprehensive plans.

2. Agency Procedures

The procedures described in III.B.2 for assurance of compliance with statewide goals are equally applicable to assurance of compatibility with acknowledged comprehensive plans.

D. Dispute Resolution

The agency shall use one or more of the following procedures to resolve a land use dispute which may arise before, during, or after approval of a project or action under the CPCN transmission line program determined to affect land use. The procedures are:

- a. Coordinating closely with local land use planning authorities to identify and resolve any potential land use conflicts at an early stage;
- b. Holding direct meetings with the affected local government(s), any affected local, state, or federal agency, and any other interested or affected parties involved with the dispute;
- c. Pursuing alternative actions including withdrawal of the proposal in question, modifying the proposal, appealing the local land use decision, or requesting comprehensive plan revisions through use of the statutory plan amendment or periodic review processes; and
- d. Requesting, if necessary, informal LCDC mediation or compatibility determination under OAR 660-30-070.

E. Compliance and Compatibility of New or Amended Land Use Programs

The agency has adopted the following to assure that new amended PUC rules and programs will comply with the statewide goals and be compatible with acknowledged comprehensive plans and land use regulations:

The PUC shall submit notice of any amendment to any agency program that affects land use or any new agency rules or programs to the Department of Land Conservation and Development (DLCD), as required by OAR 660-30-075.

The state agency coordination program shall be amended, as necessary, when any of the following occurs which add to, affect, or modify agency rules and programs determined to affect land use:

- a. Adoption or amendment of Oregon Revised Statutes;
- b. Adoption or amendment of Oregon Administrative Rules;

- c. Decisions by the state Land Use Board of Appeals (LUBA) or Oregon appellate courts;
- d. Attorney General opinions; or
- e. Other unanticipated actions or decisions.

SECTION IV

OREGON PUBLIC UTILITY COMMISSION PROGRAM FOR COORDINATION WITH THE DEPARTMENT OF LAND CONSERVATION AND DEVELOPMENT, AFFECTED CITY, COUNTY, STATE, AND FEDERAL AGENCIES, AND OTHER ORGANIZATIONS AND SPECIAL DISTRICTS

A. Public Utility Commission Coordination With Other Agencies

The agency coordinates as needed with all appropriate local, state, and federal agencies, particularly with those involved with utility facilities and railroads. Agencies most frequently contacted in these coordination efforts include:

1. Local. Among the local agencies and organizations are cities, counties, public utility districts, electric cooperatives, telephone cooperatives, and irrigation districts.
2. State. The state agencies include Economic Development, Land Conservation and Development, Energy, Revenue, Water Resources, Forestry, and Transportation.
3. Federal. The federal agencies include the Bonneville Power Administration, Federal Energy Regulatory Commission, Interstate Commerce Commission, U.S. Department of Transportation (Federal Highway Administration and Federal Railroad Administration) and Internal Revenue Service.

B. Interagency Coordination Procedures

The agency cooperates with all local, state, and federal agencies having an interest in the actions taken under agency programs that affect land use. There are several methods which the agency uses to coordinate with other agencies. Such methods are as follows:

1. Inviting participation in the review and comment on individual proposals through press releases, direct mailing, informal communications, and meetings;
2. Participation in meetings and hearings involving actions affecting other agencies, such as rulemaking, review of program plans, technical assistance plans, etc.; and
3. Providing meeting and hearing notices, reports, draft rules, or other materials upon request by an agency. The agency maintains lists of potentially interested parties in various areas based on their prior expression of interest in similar activities.

C. Interagency Coordination Contract

The agency's contacts for interagency coordination are the following:

For transportation-related actions:

Deputy Assistant Commissioner
Transportation Program
Labor & Industries Building
Salem, OR 97310
378-6218

For utility-related actions:

Deputy Assistant Commissioner
Utility Program
Labor & Industries Building
Salem, OR 97310
378-6371

SECTION V

OREGON PUBLIC UTILITY COMMISSION PROGRAM FOR COOPERATION AND TECHNICAL ASSISTANCE TO LOCAL GOVERNMENTS

A. Agency Participation In and Coordination With City and County Land Use Planning

The agency participates in city and county planning programs when requested to do so or when a specific issue develops in which the agency has a particular interest. The agency is not normally a direct participant in local land use decision-making.

B. Contact for Cooperation and Technical Assistance

The agency's contacts for cooperation and technical assistance are the Deputy Assistant Commissioners for Transportation and Utility, the same individuals identified in Section IV, C, for inter-agency coordination contact.

C. Technical Assistance and Information to Aid Cities and Counties

The agency provides technical assistance and information, when requested, by local jurisdictions. This consists of a wide range of expertise in the utility and transportation fields.

The Transportation Program has extensive data on both railroads and motor carriers and Transportation Program staff can provide valuable information relating to both. Because the Transportation Program monitors the status of railroad branchlines, PUC can assist local communities, as well as state agencies, in economic development projects.

Where local entities are planning urban redevelopment projects that involve or affect rail lines, PUC can offer extensive technical advice relating to track clearance regulations and grade crossing matters.

The PUC also provides information to local communities on short-line railroad operations, tourist excursion train operations and use of abandoned rail lines for recreational trails.

D. Participation in Periodic Review Process

In view of having only one land use program and the agency's minimal involvement in local land use planning activities, PUC's participation in the Periodic Review process will be very limited.

Actual PUC involvement in specific periodic reviews will be in response to requests from the affected local government, or from information requests from the state Departments of Energy, Land Conservation and Development (DLCD), or Transportation.

E. Special Programs or Procedures to Provide Technical Assistance to Coastal Cities and Counties

The agency makes no distinction between cities and counties in coastal areas and those in other areas. These agencies are provided with technical assistance when requested. (See B., C., and D., above.)

Oregon Coastal Zone Management Program (OCMP)

PUC is listed as one of the state agencies whose authority is identified as a complementary part of the state's coastal management program. Within the limits of budget and staff resources, PUC will participate if requested in the development of a strategic plan for Oregon's coastal zone. PUC will also advise DLCD, if requested, on the consistency of federal actions and activities which may affect the coastal zone, including rail line abandonments (see below).

Currently, the only specific area where PUC's activities may in any way affect the state's CZM program relates to certification by the U.S. Interstate Commerce Commission allowing a rail line to be abandoned. ICC's action involving railroad lines within the coastal zone must be consistent with the CZM program. While the ICC's action does not directly affect PUC's responsibilities, PUC understands that rail abandonments within the state's coastal zone must be consistent with the OCMP.

F. Technical Assistance Pursuant to ORS 197.712(2)(f) and 197.717(1). Local Public Facility Planning, Permit Issuance, and Economic Development

These requirements do not apply to the agency or its programs.

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NOTES

1. Public utility, as defined under Oregon law, means an investor-owned utility, rather than a Public Utility District or co-op.
2. Oregon's ability to regulate air carriage has been entirely preempted by federal law.
3. A POE is planned for Umatilla, with an anticipated late 1991 completion date.
4. The PUC grants industries that it regulates for economic purposes Certificates of Public Convenience and Necessity. Certificates are issued not only to motor carriers but also to utilities, water companies, and telephone companies. To receive the certificate an applicant must demonstrate that it is "fit, willing and able," that the applicant can comply with all relevant state and federal regulations and that the service is needed. The procedure the PUC must follow in making its determination follows the administrative procedures prescribed in ORS Chapters 183 and 756.
5. *This section requires private contractors to notify the utilities prior to excavation to prevent damage to utility property and interruption of services. It does not "regulate" excavation as the title implies.

APPENDICES

Appendix A: Legal Opinions and Analysis

Appendix B: Organization Chart

Appendix C: Transportation Field Offices

Appendix D: PUC Statutes

Appendix E: PUC Administrative Rules

Appendix F: Railroad Accidents in Oregon, Statistics Summary & Analysis, Public Utility Commission of Oregon, published annually.

Oregon Department of Justice Fax Cover Sheet

GENERAL COUNSEL DIVISION

Regulated Utility & Business Section
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Phone: (503) 378-4620
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Date: May 6, 2002

Subject: PUC SAC Program Letter

No. Pages (including cover sheet): 8

TO:

NAME	COMPANY	PHONE NO.	FAX NO.
Claudia Howells	ODOT Rail		(503) 986-3183
Eric D. Jacobson	Land C&D		(503) 378-2687

FROM: Paul A. Graham

TITLE: Attorney-in-Charge

Special Instructions:

Here is the April 22, 1991 letter Paul Graham to Claudia.

If you do not receive complete fax information or it is not clearly received, please call us immediately.

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April 22, 1991

Post-it® Fax Note 7671		Date 5/6/02	# of pages 7
To Chris Gilmore	From Eric Jacobson		
Co./Dept.	Co.		
Phone #	Phone # (503) 373-0050		
Fax # (503) 226-2348	Fax # x265		

Claudia Howells
Deputy Assistant Commissioner
Transportation Program
Public Utility Commission
Labor & Industries Bldg.
Salem, OR 97310-0335

Re: Crossing Safety Program and SAC Obligation Under
ORS 197.180

Dear Ms. Howells:

You have asked me to review the crossing safety program administered by the Public Utility Commission (Commission or PUC) under ORS chapter 763 and to determine whether that program is exempt from the state agency land use coordination (SAC) obligation under ORS 197.180.

Background

ORS 197.180(1) requires state agencies to "carry out their planning duties, powers and responsibilities and take actions that are authorized by law with respect to programs affecting land use * * * in compliance with [statewide land use] goals * * * and * * * in a manner compatible with * * * [acknowledged local] comprehensive plans and land use regulations." The Land Conservation and Development Commission (LCDC) has adopted regulations to implement this statutory requirement. OAR 660, Divisions 30 and 31. Under OAR 660-30-005(2), a state agency rule or program is a "program affecting land use" if it is specifically referenced in a statewide goal or is reasonably expected to have significant effects upon "the resources, objectives or areas identified in the statewide planning goals; or * * * present and future land uses identified in acknowledged comprehensive plans."

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There are a number of important exceptions to the state agency coordination (SAC) requirement, however. Some programs are expressly exempted by ORS chapter 197. See ORS 197.277 (Forest Practices Act). Other programs are "expressly exempted by another statute." ORS 197.180(1). These exemptions may arise from statutory provisions that expressly reference ORS chapter 197, or they may arise from statutory provisions clearly showing legislative intent not to require compliance with SAC provisions. A program with a significant effect on land use or the goals may also be found not to be a program affecting land use because the legislature has required the agency's actions to be based upon considerations other than land use. See West Side Sanitary Dist. v. LCDC (#26780), 289 Or 393, 614 P2d 1141 (1980) (West Side I); West Side Sanitary Dist. v. LCDC (#26779), 289 Or 409, 614 P2d 1148 (1980); Letter of Advice dated October 11, 1980, to Susan Brody, Director, Department of Land Conservation and Development (OP 6390), at 5-10.

In 1987, the legislature amended ORS 197.180 to clarify that the specific state agency coordination requirements found in ORS 197.180 and OAR 660-30-005 do not apply to programs "expressly exempted by another statute." ORS 197.180(1). This express exemption need not specifically refer to ORS 197.180.

Crossing Safety Program and the SAC Obligation

I conclude that the Commission's crossing safety program is expressly exempt from SAC requirements of ORS 197.180. My conclusion is based upon:

- (A) the language and the legislative history of ORS 763.013 which shows that the Legislative Assembly intended that the PUC provide "one-stop shopping" regarding crossing safety;
- (B) the legislative history of ORS chapter 763 which shows that in 1917 and in 1969 the Legislative Assembly took steps to take control over crossings from local government and give it to the Commission;
- (C) case law which shows that the Commission has exclusive control over crossings; and
- (D) the legislative history of ORS 197.180(1) which shows that the Legislative Assembly intended to exempt from the SAC obligation programs similar to the crossing safety program.

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A. The Language and Legislative History of ORS 763.013

The language and legislative history of ORS 763.013 show that the crossing safety program is the type of program which ORS 197.180 refers to as "expressly exempted by another statute." ORS 763.013 provides that:

It is the policy of this state to achieve uniform and coordinated regulation of railroad-highway crossings and to eliminate crossings at grade wherever possible. To these ends, authority to control and regulate the construction, alteration, and protection of railroad-highway crossings is vested exclusively in the state, and in the Public Utility Commission as provided in this chapter.

In 1973, the year in which LCDC was created, the Legislative Assembly gave the Commission exclusive jurisdiction over railroad-highway crossings. It passed SB 246, which includes what is now ORS 763.013. The reason for giving the Commission exclusive jurisdiction is set forth in testimony which was offered by Lionel Topaz, then an Assistant Commissioner who was in charge of the rail program. A memorandum of March 13, 1973, submitted by Mr. Topaz to a Senate committee, states that:

The Commissioner has had broad jurisdiction in the field of railroad-highway crossing safety for many years; however, this jurisdiction has been shared to some extent with other public authorities. This bill clearly establishes that one state agency, the Public Utility Commissioner, is charged with developing, implementing and coordinating this state's railroad-highway crossing safety program. It eliminates those provisions in the motor vehicle code which tend to dilute or share the Commissioner's jurisdiction with other public authorities. This will permit even more uniform administration and control over the various factors influencing safety at railroad crossings throughout the state than has been possible in the past.

Mr. Topaz offered the same testimony to a House committee hearing the bill on May 30, 1973.

Mr. Topaz's testimony shows that the purpose of ORS 763.013 is to allow the Commission, and the Commission alone, to decide matters dealing with crossing safety. More

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importantly, the statute itself expresses a clear intent on the part of the legislature that the PUC be solely responsible for safety at crossings. As such, ORS 763.013 is the type of express statutory exemption mentioned in ORS 197.180.

B. The Legislative History of ORS Chapter 763

ORS 763.013 was the culmination of a legislative process which gave exclusive control over crossings to the Commission. In 1917, the Legislative Assembly gave the Commission statewide control over crossings, with the exception of Portland. In 1969, Portland lost its authority to the Commission.

In 1917, the Legislative Assembly passed SB 233. That act stripped local government, with the exception of Portland, of control over crossings. For example, section 2 of the bill gave the Commission authority to authorize new crossings. It stated, in relevant part:

No highway shall hereafter be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a highway at grade, without having first secured the permission of the Commission * * *.¹

Section 4 of the bill gave the Commission authority over existing crossings. It stated that:

The Commission shall also have power, after a hearing, to alter or abolish any grade crossing heretofore or hereafter established, or to change the location of such crossing, when in its opinion the public safety requires such alteration, abolition or change, or to require a separation of grades at any such crossings, and to prescribe, after a hearing of the parties, the terms upon which such separation, alteration or change shall be made, and the proportion in which the expense of the alteration, abolition or change of such crossings and the separation of such grades, and the maintenance thereof, shall be divided between the railroad company or companies and the State, county, municipality, or other public authority in interest.²

Section 11 of the bill exempted Portland from Commission jurisdiction. It provided that:

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The provisions of this Act shall not apply to cities of 100,000 population or over.

In 1917 only Portland had a population anywhere near 100,000, so the purpose of section 11 was to allow that city to maintain control over its crossings. Section 11 later became part of ORS 763.015, which by 1969, had been amended to read:

ORS 763.010 to 763.100 do not apply to cities of 100,000 population or over and shall not be construed as taking away the power and duties of the Commission[er], as defined in ORS 763.150 and 763.160.

In 1969 the Legislative Assembly gave the Commission jurisdiction over crossings in Portland by repealing ORS 763.015.

C. Case Law

In addition to the legislative history of ORS chapter 763, there is case law which shows that the Commission has exclusive jurisdiction over crossings. In Multnomah County v. Union Pacific Railroad Company, 297 Or 341 (1984), Multnomah County sued Union Pacific to prevent it from closing an existing pedestrian walkway across the railroad's tracks. The county alleged that for more than ten years before the attempted closure the public had enjoyed a right of access across the tracks. The county argued that it had acquired an easement by prescription and asked for an injunction preventing the railroad from interfering with the use of that easement. The railroad defended by arguing, among other things, that the Commission had not authorized the pedestrian crossing and that PUC permission is a prerequisite for creation of such a crossing.

The court agreed with the railroad, making clear that a right-of-way, standing alone, is not sufficient to create a crossing. The court stated that:

The policy statement of the statute, ORS 763.013, as well as ORS 763.020, expressly makes the PUC, not the counties or the circuit courts, responsible for deciding where grade crossings can safely accommodate both the needs and convenience of local traffic and the needs of an efficient railroad system."

297 Or at 347.

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D. The Legislative History of ORS 197.180(1)

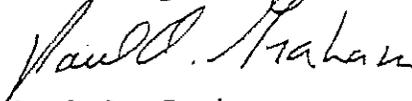
Although ORS 763.013 does not expressly mention ORS 197.180, the legislative history of ORS 197.180(1) indicates that the Legislative Assembly intended the exemption to cover programs similar to the crossing safety program. The 1987 amendment to ORS 197.180 was proposed by the Association of Oregon Counties. Their representative, Gordon Fultz, stated that the intent of the amendment was "to clarify that the existing exemption from ORS 197 [sic] for the Energy Facility Siting Council, solid waste siting for DEQ, and possibly one or two others, will be retained." Minutes of Senate Committee on Agriculture and Natural Resources, January 28, 1987, at 2 (emphasis added).

The crossing safety program is similar to the two programs specifically mentioned in the legislative history of ORS 197.180(1). Both the siting of energy and solid waste facilities involve expertise beyond that held by decisionmakers in the land use arena. The same is true of crossing safety. The PUC has a professional staff whose members have years of experience in evaluating hazards at crossings and in determining the most cost-effective way to reduce those hazards. It also has expertise in determining which crossings require immediate attention and which do not. Moreover, its decisions are based upon what safety demands, not on land use considerations. It is this type of program which the Legislative Assembly had in mind in exempting certain programs from the SAC obligation.

Conclusion

I conclude that the crossing safety program is exempt from the SAC requirements of ORS 197.180.

Sincerely,



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PAG:gcp/0795G

¹ Section 2 is now ORS 763.020 which provides, in relevant part:

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(1) Except for the repair of lawfully existing roads and highways or the replacement of tracks, no highway shall be constructed across the track of any railroad company at grade, nor shall the track of any railroad company be constructed across a highway at grade, without having first secured the permission of the commission.

² Section 4 is now ORS 763.030 which provides, in relevant part:

(1) The commission, upon application by a railroad, the public authority in interest, the Department of Transportation, or upon the commission's own motion, subsequent to a hearing, unless a hearing is not required under ORS 763.080, and upon finding that such action is required by the public safety, necessity, convenience and general welfare may:

(a) Eliminate a grade crossing by relocation of the highway;

(b) Alter or abolish any grade crossing or change the location thereof, or require a separation of grades at any such crossing;

(c) Alter or change any existing crossing at separated grades; and

(d) Require installation or alteration of protective devices.

(2) The commission shall prescribe the time and manner of such alteration, change, installation or alteration, and the terms and conditions thereof.