

October 10, 2011

Cindy Ireland
Washington Department of Labor & Industries
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RE: Comments on Proposed Construction Crane Safety Rules

Dear Ms. Ireland:

The Washington Public Utility Districts Association (WPUDA) represents 27 non-profit community-owned utilities that provide electricity, water, wastewater, and wholesale telecommunications services to over 1.7 million Washington residents. This letter provides our comments on the Department of Labor and Industries (LNI) proposed Phase II construction crane rules. We appreciate the considerable time spent by LNI staff in this rulemaking process, including both the stakeholder process that included certain utility representatives, as well as the time and efforts of LNI staff to work directly with utilities on issues in the rulemaking.

I. Background – Purpose of Washington’s Crane Safety Rules

LNI’s crane safety rules have two separate purposes. First, to provide state standards at least equal to the federal construction crane rules adopted by the federal Occupational Safety and Health Administration (OSHA), and second, to implement ESHB 2171, Washington’s crane safety legislation passed in 2007.

The 2007 state legislation was passed in response to a tragic crane accident just a few months earlier, in which a 200-foot tall tower crane collapsed at a construction site in Bellevue. The Legislature’s response to this tragic accident was understandable, and utilities and other non-construction industries worked closely with legislative sponsors and stakeholders to ensure that non-construction activities were not inadvertently subject to unintended regulation as the state sought to improve safety for construction crane activities such as the large tower crane involved in the 2006 Bellevue incident. In the rulemaking process, much of the challenge for LNI and other stakeholders has been to reconcile the intent of the state legislation – to regulate construction cranes – but not various other types of cranes, with the statutory language. At the same time, OSHA’s federal rulemaking process has been underway, thereby obligating Washington State to adopt construction crane safety regulations at least as stringent as the federal standard adopted by OSHA. Specific to utilities, the OSHA rulemaking has been the subject of litigation under which the Edison

Electric Institute (EEI), representing investor-owned electric utilities, challenged OSHA's inclusion of digger derricks as subject to construction crane safety laws. Over the last few months, OSHA and EEI reached a settlement agreement under which electric utility digger derricks trucks would not be subject to federal construction crane rules.

In addition to these specific state and federal construction crane issues, LNI's rulemaking should also be analyzed under Governor Gregoire's Executive Order 10-06, which is applicable to all agency rulemaking. As explained further in this letter, the application of construction crane safety requirements in the rule is inconsistent with the Executive Order.

Overall, while progress has been made in some aspects of the rule, we continue to have concerns that LNI's construction crane safety rules inappropriately regulate electrical work that is already subject to a separate rule at WAC Chapter 296-45, and that the State Legislature had no intention of regulating when it passed the construction crane legislation in 2007. The consequence of this over-regulation is the additional cost to utilities to comply with the rule, both in terms of actual costs and lost time for PUD employees. If the proposed rule provided benefits to PUD employees or the general public in terms of increasing worker safety, the added time and costs to comply would be worthwhile. However, the rules to do not increase worker or public safety, they merely detract from the existing safety and training programs that our member PUDs currently implement in partnership with employees and the IBEW. We strongly believe that if additional worker and public safety is the objective, then PUDs and LNI should work together to strengthen apprenticeship and training programs that currently exist.

I. Clarification of Powerhouse Crane Exemption

The crane safety legislation included an exemption for powerhouse cranes, on the basis that these types of cranes are installed within the powerhouse building and specifically designed for the types of operations inside powerhouses. As such, they are not used for "construction" purposes, and unlike large construction cranes, are not mobile or used in outside environments where slopes, stability, and weather present different circumstances.

Over the past year, WPUA and other utilities have worked with LNI staff to ensure that the statutory powerhouse crane exemption is accurately reflected in LNI's rules, and as proposed the new rule language accomplishes this objective. However, we believe that the having two different powerhouse crane exemption subsections in proposed WAC 296-155-52900(3) will cause confusion for utilities about the scope of the exemption for crane work within powerhouses.

II. Proposed Rule Applies to Utility Digger Derricks, Which Legislature Sought to Exempt from Construction Crane Rules.

LNI's proposed crane rules provide a partial exemption from crane safety requirements for digger derricks:

(3) The equipment listed below are exempted from WAC 296-155-529 (Crane certifier accreditation and crane certification) through 296-155-53300 (Operator qualifications and certification):

...

(e) Digger derricks when used for augering holes for poles carrying electric and telecommunications lines, placing and removing the poles, and for handling associated materials to be installed on or removed from the poles. Digger derricks used in work subject to chapter 296-45 WAC, Safety standards for electrical workers, must comply with chapter 296-45 WAC. Digger derricks used in work for telecommunications service (as defined in chapter 296-32 WAC, Safety standards for telecommunications) must comply with chapter 296-32 WAC.

Proposed WAC 296-155-52900(3)(e)

This exemption language results in the situation where some routine electrical utility work conducted with digger derricks is exempt from the rule, while other routine electrical work is subject to the rule. This result is inconsistent with the language of the crane safety statutes, the intent of the Legislature in adopting the 2007 crane safety law, the federal crane safety rules, and with the Governor’s rulemaking moratorium.

A. 2007 Crane Legislation Provided Exemption for Electrical Industry Service Trucks

Under the proposed crane rules, LNI has concluded that digger derricks are only partially exempt from the construction crane rules. This conclusion contradicts both the language and intent of the 2007 crane safety legislation, which provides a specific exemption for service trucks in the electrical utility industry. This exemption states as follows:

(2) RCW 49.17.400 through 49.17.430 do not apply to:

...

(d) Service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries, such as digger derricks (radial boom derricks), when used in the power line and electric service industries for auguring holes to set power and utility poles, or handling associated materials to be installed or removed from utility poles;

This exemption language has two parts – first, an exemption, and second, an example of that exemption. Digger derricks and other types of electric service trucks are clearly exempt under the exemption language applying to “service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries . . . “ The second part of the exemption language explains the exemption but cannot be fairly read to narrow or otherwise limit the exemption. The use of the terms “such as” indicates the Legislature’s intention of providing an example of one type of a service truck with a mobile lifting device, and equally importantly, that the electric service truck is being used for the purpose for which it was designed, by an operator who is qualified for that activity. The correct interpretation of this exemption language is that the exemption applies to service

trucks with mobile lifting devices designed specifically for use in the power line and electric service industries, so long as the service truck is performing an operation that is customary in the electric service industry.

In contrast, the statutory exemption would not apply if an electric utility was using a digger derrick for a non-electrical construction project such as lifting construction materials onto the roof of a building, because the device is not designed for this use. Under LNI's interpretation, only two utility activities are exempt: (1) auguring holes to set power and utility poles, and (2) handling associated materials to be installed or removed from poles. LNI's interpretation means that all other activities not specifically described in the statutory exemption are not exempt, even though there are countless tasks regularly performed in the electrical utility industry using digger derricks. The legislative language sought to exempt a certain type of equipment and the operator of that equipment, and provided an example, not an exhaustive list of activities that should be exempt.

Further, LNI's proposed partial exemption language imports the concept that telecommunications work is also partially exempt, and must comply with WAC Chapter 296-32 WAC. Interestingly, the statutory exemption applicable to the electrical utility service trucks says nothing about the telecommunications industry. In fact, the word "telecommunications" does not appear anywhere in ESHB 2171, the 2007 crane safety legislation. Nonetheless, we agree that telecommunications work is yet another example of work that while not specifically listed as exempt in the statute, is regulated elsewhere and was not intended to be covered by the new crane safety rules. Just as it is correct for LNI to look at the overall purpose of the legislation and determine that telecommunications work should be exempt, it should also do the same for electric utility work.

B. Legislative History Shows Clear Intent to Conform to Federal Crane Safety Regulations

Federal crane regulations adopted by the OSHA have also included the identical issue of the scope of the exemption for digger derricks in federal crane rules. OSHA and EEI have recently finalized a settlement agreement on this issue that is relevant to how LNI must interpret the exemption for electric service trucks under the state's crane law. Under this agreement, digger derricks will not be subject to additional regulations under OSHA's crane regulations. This means that the federal crane rules will not apply to the normal operations of digger derricks by electrical utilities. Under the settlement agreement, OSHA has agreed not to enforce provisions of its crane rule (29 C.F.R. § 1926) relating to digger derricks, and further will

"exempt from the requirements of the Standard all digger derricks operations covered by subpart V of 29 C.F.R. § 1926. This expanded exemption would cover digger derrick activities conducted by both electric utility companies and electric utility contractors."

OSHA/EEI Settlement Agreement, Sec. 2.

The legislative history of ESHB 2171 shows a clear intent to maintain consistency with federal crane regulations. Testimony in favor of the legislation was summarized as follows:

This bill, with the substitute, conforms to federal consensus documents. The substitute provides the appropriate guidance to the Department on what is needed in the rule-making. The bill allows the Department to accomplish the Department's mandates under the Occupational Safety and Health Act.

...

There were two areas of concern that were worked out. First, the scope of the bill. The scope was copied directly from the Crane and Derrick Negotiated Rule-making Committee federal consensus document and that is coming down the pike and will be here anyway. It makes sense to follow what is coming at the federal level.

House Bill Report, HB 2171.

C. Federal OSHA/EEI Settlement on Digger Derricks Eliminates LNI's Basis for Including Digger Derricks in Rulemaking Based On Governor's Rulemaking Moratorium

In November 2010, Governor Gregoire issued Executive Order 10-06 suspending all non-critical rule development, and directing the Office of Financial Management to publish criteria for exceptions to the rulemaking moratorium. Both the Executive Order and OFM memorandum cite the impacts of the current recession on local governments and businesses, and the need for a "stable and predictable regulatory environment." The OFM memo provides that a rulemaking is non-critical unless the rule is "required by federal law or state law or required to maintain federally delegated or authorized programs."

The OFM Memo further directs agencies to identify whether an exception to the rulemaking moratorium applies in issuing the agency's rulemaking agenda. In issuing its rulemaking agenda, LNI listed the crane rulemaking as exempt from the moratorium for the following reasons:

"The Occupational Safety and Health Administration recently adopted a crane construction rule, effective November 8, 2010. This rulemaking is to address the requirements that employers must follow with regard to inspection, maintenance, and operation of cranes used in the construction industry.

The LNI rulemaking document classifies the crane rulemaking with a status of "proceed," with the rationale that the rule is "required to be in compliance with federal law."

LNI Rulemaking Summary Under Executive Order 10-06, Page 1.

While it may be the case that certain parts of the state's construction crane rules must be updated to meet the new federal OSHA standards, this is not true as it relates to digger derricks. Clearly, with the recent OSHA decision to fully exempt digger derricks from federal crane rules, it is incorrect to classify the digger derricks portion of LNI's crane rules as necessary to comply with federal standards.

D. Requested Amendments to Proposed Rule Language

Based on the foregoing, we request the following amendments to the proposed rule language:

(1) *Proposed WAC 296-155-52900(3)(e) (Exemption Language)*

(3) The equipment listed below are exempted from WAC 296-155-529 (Crane certifier accreditation and crane certification) through 296-155-53300 (Operator qualifications and certification):

...

(e) Service trucks with mobile lifting devices designed specifically for use in the power line and electric service industries. ~~Digger derricks when used for augering holes for poles carrying electric and telecommunications lines, placing and removing the poles, and for handling associated materials to be installed on or removed from the poles. Digger derricks used in work subject to chapter 296-45 WAC, Safety standards for electrical workers, must comply with chapter 296-45 WAC. Digger derricks used in work for telecommunications service (as defined in chapter 296-32 WAC, Safety standards for telecommunications) must comply with chapter 296-32 WAC.~~

In addition to the exemption language, the definition of “construction work” is also confusing and needs to be modified. The addition of language specific to utility work in the definition of “construction work” is unnecessary, and this language was not part of the stakeholder definition draft. Further, no other industry is specifically called out in this defined term, and so it is odd that only electrical work would be specifically included. By amending the exemption section as suggested above, the applicability of the rules is clarified and the proposed language below is unnecessary.

(2) Proposed WAC 296-155-52902 (Definition of “Construction Work”)

Construction work means (for the purposes of this part) all or

any part of excavation, construction, erection, alteration, repair, demolition, and dismantling of buildings and other structures and all related operations; the excavation, construction, alteration, and repair of sewers, trenches, caissons, conduits, pipelines, roads, and all related operations; the moving of buildings and other structures, and the construction, alteration, repair, or removal of wharfs, docks, bridges, culverts, trestles, piers, abutments, or any other related construction, alteration, repair, or removal work. ~~Construction work that involves the use of a crane/derrick includes the erection of new electric transmission and distribution lines including telecommunications and equipment, and the alteration, conversion, and improvement of existing electric transmission and distribution lines including telecommunications and equipment.~~ Construction work does not include the normal day-to-day activities at manufacturing facilities or powerhouses.

The language we propose for the exemption section, and the elimination of utility-specific portions of the definition of “construction work” are intended to achieve the intent of the Legislature that the crane safety law and rules apply to construction activities, not electrical work that is already regulated through other rules. There may be other language concepts proposed by utilities or others on this subject, and we would appreciate the opportunity to meet with LNI before final rule adoption to discuss this subject further.

III. Proposed Construction Crane Rule Fails to Meet APA Rulemaking Requirements

The proposed construction crane rules also fail to meet certain provisions of the Administrative Procedures Act (APA). The proposed rule is a significant legislative rule under RCW 34.05.328(5)(a), which applies to significant legislative rules adopted by LNI and certain other agencies. Therefore, the rulemaking is subject to additional analysis under this statute. These APA rulemaking requirements were established by the Legislature to subject certain types of significant rules to additional analysis to avoid duplication and ensure coordination with other existing regulatory requirements. Specifically, prior to adopting the rule, LNI must undertake the following analysis:

RCW 34.05.328(1)(e) - “Determine, after considering alternative versions of the rule and the analysis required under (b), (c), and (d) of this subsection, that the rule being adopted is the least burdensome alternative for those required to comply with it that will achieve the general goals and specific objectives stated under (a) of this subsection.”

RCW 34.05.328(1)(h) – “Determine if the rule differs from any federal regulation or statute applicable to the same activity or subject matter and, if so, determine that the difference is justified by the following:

- (i) A state statute that explicitly allows the agency to differ from federal standards; or
- (ii) Substantial evidence that the difference is necessary to achieve the general goals and specific objectives stated under (a) of this subsection . . .

RCW 34.05.328(1)(i) – “Coordinate the rule, to the maximum extent practicable, with other federal, state, and local laws applicable to the same activity or subject matter.”

We believe that if existing safety and training requirements and programs in the utility industry are analyzed as required by the APA, the outcome would be that any necessary additional training would be incorporated into these existing programs implemented by PUDs in partnership with the IBEW.

For example, RCW 34.05.328(1)(e) requires the regulation to be the “least burdensome” that will “achieve the general goals and specific objectives” of the underlying law. Rather than creating a new operator certification program, a “least burdensome”

approach would seek to utilize the already-existing safety and training programs implemented by PUDs in partnership with IBEW.

Taken together, these rulemaking provisions require that LNI analyze how the proposed construction crane rules are coordinated with other state and federal laws and rules. These include the existing rules adopted and enforced by LNI at WAC Chapter 296-45 (Safety Standards for Electrical Work), Washington's Apprenticeship Act and Rules, RCW Chapter 49.04 RCW and WAC Chapter 296-05, and federal OSHA standards at 29 C.F.R. § 1926. To date, the rulemaking materials provided by LNI include no such analysis.

IV. Request for One-Year Implementation Period

In addition, if LNI cannot address these proposed changes in the rulemaking process, then WPUDA requests a one-year implementation period for the training and certification requirements. These requirements result in significant costs to utilities, both in terms of actual costs and loss of employee time. We believe a one-year implementation period is warranted to reduce these costs. This time period would enable us to analyze the final rules as adopted, and consider clarification by the Legislature of the applicability of these rules to utility work.

Thank you for consideration of these comments on LNI's proposed construction crane safety rules. We would appreciate the opportunity to meet with LNI staff to discuss the proposed rule and our comments in more detail, and will contact your staff to see if such a meeting can be scheduled.

Sincerely,

A handwritten signature in black ink, appearing to read "Erik Poulsen", written over a horizontal line.

Erik Poulsen,
Government Relations Director