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LEGISLATIVE ACTION

Senate

House

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Floor: WD/2R

12/08/2009 01:15 PM

Senator Dockery moved the following:

Senate Amendment (with title amendment)

Delete lines 827 - 950

and insert:

(17) In conjunction with the acquisition, ownership, construction, operation, maintenance, and management of a rail corridor, have the authority to:

(a) Contract with a freight rail operator, from whom the department has acquired a real property interest in the rail corridor, for the freight rail operator to assume the obligation to forever protect, defend, indemnify, and hold harmless the department from and against any liability, cost, and expense, including, but not limited to, commuter rail passengers and rail



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14 corridor invitees in the rail corridor, regardless of whether
15 the loss, damage, destruction, injury, or death giving rise to
16 any such liability, cost, or expense is caused in whole or in
17 part, and to whatever nature or degree, by the fault, failure,
18 negligence, misconduct, nonfeasance, or misfeasance of the
19 department or its agents and employees, or any other person or
20 persons whomsoever. Any contract regarding the assumption of
21 liability executed by the department under this subsection must,
22 at a minimum, comply with the following parameters of allocation
23 of risk:

24 1. The freight rail operator shall be solely responsible
25 for any loss, injury, or damage to commuter rail passengers,
26 rail corridor invitees, or trespassers, regardless of
27 circumstances or cause, subject to subparagraphs 2., 3., 4., and
28 5.

29 2. When only one train is involved in an incident, the
30 freight rail operator shall be solely responsible for any loss,
31 injury, or damage if the train is a freight train, including,
32 but not limited to, commuter rail passengers, rail corridor
33 invitees, and incidents with trespassers or at grade crossings,
34 but only if when an incident occurs with only a department train
35 involved the department is solely responsible for any loss,
36 injury, or damage.

37 3. When more than one train is involved in an incident:

38 a. Any train involved in an incident that is neither the
39 department's train nor the freight rail operator's train shall
40 be referred to as an "other train."

41 b. If only a department train and freight rail operator's
42 train are involved in an incident, the department may be



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43 responsible for its property and all of its people, but only if
44 the freight rail operator is responsible for its property and
45 all of its people, all commuter rail passengers, and rail
46 corridor invitees, and the department and the freight rail
47 operator each share one-half responsibility as to trespassers,
48 grade crossers, or third parties outside the rail corridor who
49 incur loss, injury, or damage as a result of the incident.

50 c. If only an other train and a freight rail operator's
51 train are involved in an incident, the department may be
52 responsible for its property and all of its people only, but
53 only if the freight rail operator is responsible for its
54 property and all of its people, all commuter rail passengers,
55 and rail corridor invitees.

56 d. If a department train, a freight rail operator train,
57 and any other train are involved in an incident, the allocation
58 of liability between the department and the freight rail
59 operator shall remain one-half each as to trespassers, grade
60 crossers, or third parties outside the rail corridor who incur
61 loss, injury, or damage as a result of the incident; the
62 involvement of any other train shall not alter the sharing of
63 equal responsibility as to trespassers, grade crossers, or third
64 parties outside the rail corridor who incur loss, injury, or
65 damage as a result of the incident; and, if the owner, operator,
66 or insurer of the other train makes any payment as to injured
67 trespassers, grade crosser, or third parties outside the rail
68 corridor who incur loss, injury, or damage as a result of the
69 incident, the allocation of credit between the department and
70 the freight rail operator as to such payment shall not in any
71 case reduce the freight rail operator's trespasser, grade



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72 crosser, or third-party-sharing allocation of one-half under
73 this paragraph to less than one-third of the total trespasser,
74 grade crosser, or third-party liability.

75 4.a. Any such contractual duty by the freight rail operator
76 to protect, defend, indemnify, and hold harmless the department
77 shall expressly include a specific cap on the amount of the
78 contractual duty, which amount shall not exceed \$200 million,
79 and shall require the freight rail operator to maintain
80 liability insurance and establish a self-insurance retention
81 fund in the amount of the specific cap established under this
82 sub-subparagraph. The self-insurance retention fund or
83 deductible shall not exceed \$10 million.

84 b. Any such contractual duty of the department to protect,
85 defend, indemnify, and hold harmless the freight rail operator
86 shall expressly include a specific cap on the amount of the
87 contractual duty, which amount shall not exceed \$200 million,
88 and shall require the department to maintain liability insurance
89 and establish a self-insurance retention fund in the amount of
90 the specific cap established under this sub-subparagraph.

91 c. No such contractual duty shall in any case be effective
92 nor otherwise extend the department's liability in scope and
93 effect beyond the contractual liability insurance and self-
94 insurance retention fund required pursuant to this sub-
95 paragraph.

96 d. The freight rail operator's compensation to the
97 department for future use of the department's rail corridor
98 shall include a monetary contribution to the cost of the
99 insurance coverage the department purchases to cover any
100 liability it has agreed to indemnify.



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101 5. In the event of a limited covered accident, the
102 requirement for the freight rail operator to protect, defend and
103 indemnify the department for all liability, cost and expense in
104 excess of the freight rail operator's deductible or self-
105 insurance retention fund established under subparagraph 4. and
106 actually in force at the time of the limited covered accident
107 exists only if the department agrees, with respect to the
108 limited covered accident, to protect, defend, and indemnify the
109 freight rail operator for the amount of the freight rail
110 operator's deductible or self-insurance retention fund
111 established under subparagraph 4. and actually in force at the
112 time of the limited covered accident.

113 (b) Purchase liability insurance, which amount shall not
114 exceed \$200 million, and establish a self-insurance retention
115 fund for the purpose of paying the deductible limit established
116 in the insurance it may obtain, including coverage for the
117 department, any freight rail operator as described in paragraph
118 (a), commuter rail service providers, governmental entities, or
119 any ancillary development, which self-insurance retention fund
120 or deductible shall not exceed \$10 million. Each additional
121 insured shall pay a reasonable monetary contribution to the cost
122 of the insurance purchased by the department for the purpose of
123 covering any liability the department has agreed to indemnify.
124 Such insurance and self-insurance retention fund may provide
125 coverage for all damages, including, but not limited to,
126 compensatory, special, and exemplary, and be maintained to
127 provide an adequate fund to cover claims and liabilities for
128 loss, injury, or damage arising out of or connected with the
129 ownership, operation, maintenance, and management of a rail



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130 corridor.

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133 ===== T I T L E A M E N D M E N T =====

134 And the title is amended as follows:

135 Delete lines 58 - 68

136 and insert:

137 development of a regional rail system plan; providing
138 parameters within which the department may contract with a
139 freight rail operator from whom it has acquired interest in a
140 rail corridor regarding indemnification against certain losses;
141 requiring the contract to provide for the freight rail operator
142 to indemnify the department against losses related to commuter
143 rail passengers and rail corridor invitees; authorizing the
144 department to indemnify the freight rail operator against
145 certain losses under specified conditions; prescribing a
146 contractual duty of the freight rail operator to purchase
147 liability insurance; authorizing the department to purchase
148 liability insurance including coverage for the department, as
149 additional insured, any freight rail operator, commuter rail
150 service providers, governmental entities, or any ancillary
151 development and establish a self-insurance retention fund;
152 limiting the amount of the insurance and self-insurance
153 retention fund; providing that the additional insureds must make
154 payments for the coverage; providing that the

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