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June 28, 1983

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ATTORNEY GENERAL OPINION NO. 83-101

Mr. Brian Moline, Esq.
General Counsel
State Corporation Commission
Fourth Floor, State Office Building
Topeka, Kansas 66612

RE: Public Utilities -- Powers of the State Corporation
Commission -- Intrastate Rail Regulation

Synopsis: Where Section 214 of the Staggers Rail Act of 1980 (49 U.S.C. § 11501), explicitly providing for the regulation of intrastate rail rates by the Interstate Commerce Commission, is in conflict with Kansas statutes providing for the regulation of intrastate rail rates by the State Corporation Commission, federal law must prevail, pursuant to the Supremacy Clause of the United States Constitution, Art. VI. Cited herein: K.S.A. 66-117, 66-170, 49 U.S.C. § 10101, 49 U.S.C. § 10501, 49 U.S.C. § 10701, 49 U.S.C. § 10706, 49 U.S.C. § 10707, 49 U.S.C. § 10712, 49 U.S.C. § 10762, 49 U.S.C. § 11501, and U.S. Constitution, Art. VI.

* * *

Dear Mr. Moline:

As General Counsel for the State Corporation Commission (KCC) you have asked for our opinion regarding the regulatory authority of the KCC over intrastate rates, where Congress, by means of the Staggers Rail Act of 1980 created statutes regulated by the Interstate Commerce Commission (ICC) which conflict with state laws. Your specific inquiry is whether the KCC can assume that the federal government has preempted the field of intrastate

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rail rate regulation, and is therefore required to act in accordance with federal law where it conflicts with state law on intrastate rail rates, or must the KCC follow present state law until the legislature specifically authorizes the KCC to act in conformance with the Staggers Rail Act. As a preliminary matter we would emphasize that you have not asked, and we have not addressed, any question concerning the constitutionality of the Staggers Rail Act of 1980, which we understand is on appeal in The State of Texas, et al. v. United States of America, et al., No. 82-1693 in the Fifth Circuit.

The question you pose was addressed in a 1982 Kentucky case where a railroad brought suit against a utility company to collect amounts due the railroad pursuant to newly enacted tariffs on file with the ICC. Louisville & N.R. CO. v. Kentucky Utilities Co., 535 F. Supp. 244 (1982). The federal district court, in holding that the utility was required to pay rates set out in the tariff on file with the ICC, rather than the lower rate set by the Kentucky Railroad Commission, stated:

"On October 1, 1980, Congress enacted the Staggers Rail Act to assist the nation's railroads in rehabilitating the rail system and to offset the industry's inadequate rate of return on investment. . . . As part of the Staggers Rail Act, under Section 214 (b)(6), Congress preempted state authority to establish general rate increases for commerce traveling wholly intrastate. It is undisputed that the rate increases at issue are "general rate increases" subject to Section 214(b)(6); and it is likewise undisputed that Congress was authorized under the Interstate Commerce Clause to enact Section 214(b)(6)." (Id at 246.)

. . . .

"[T]here is nothing in the statute to suggest that rail carriers must comply with state filing requirements to enforce prescribed intrastate tariff increases subsequent to October 1, 1980. Section 214(b)(6), 49 U.S.C. § 11501(b)(6), is explicit: the statute wholly preempts state regulatory authority to prescribe certain interstate and intrastate rate increases. Since the

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ICC has the exclusive duty to establish general rate increases, Kentucky has the correlative duty not to interfere with the agency's exercise of its mandate. The statute wholly preempts inconsistent Kentucky law defining filing procedure, since Kentucky no longer has jurisdiction to establish certain intrastate tariff increases." (Id at 247.) (Emphasis added.)

The language of Section 214(b)(6) [49 U.S.C. § 11501(b)(6)] provides:

"Notwithstanding any other provision of this subtitle [49 USCS §§ 10101 et seq.], a State authority may not exercise any jurisdiction over general rate increases under section 10706 of this title [49 USCS § 10706], inflation-based rate increases under section 10712 of this title [49 USCS § 10712], or fuel adjustment surcharges approved by the Commission."

A plain reading of the emphasized part of the Louisville case and the statute clearly suggests that it was the intent of the Congress, in enacting the quoted section of the Staggers Rail Act of 1980, to wholly preempt state regulation of tariff rates. Pertinent parts of other subsections of 49 U.S.C. § 11501 suggesting a preemption of state laws are:

"(b)(1) A State authority may only exercise jurisdiction over intrastate transportation provided by a rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title if such State authority exercises such jurisdiction exclusively in accordance with the provisions of this subtitle.

. . . .

(b)(4)(A) Any State authority which is denied certification or which does not seek certification may not exercise any jurisdiction over intrastate rates, classifications, rules, and practices until it receives certification under this subsection. . . .

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(c) Any rail carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may petition the Commission to review the decision of any State authority, in any administrative proceeding in which the lawfulness of an intrastate rate, classification, rule, or practice is determined, on the grounds that the standards and procedures applied by the State were not in accordance with the provisions of this subtitle. . . .

(d) (1) The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title [49 USCS §§ 10501 et seq.] when--

(A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule, or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and

(B) the State authority does not act finally on the change by the 120th day after it was filed.

(2) When a rail carrier files an application with the Commission under this subsection, the Commission shall prescribe the intrastate rate under the standards of subsection (a) of this section. Notice of the application shall be served on the State authority and chapter 107 or this title [49 USCS §§ 10701 et seq.]"

The statutory language, above, emphasizes the intent of Congress that ultimate jurisdiction and regulatory authority over intrastate rates lies with the ICC. Where conflicts between state and federal laws arise, federal law supersedes state law.

An example of where federal law conflicts with state law is 49 U.S.C. § 10762(c)(3) which provides that new rail rate increases become effective upon 20 days notice, while K.S.A. 66-170 prohibits increases in rail rates by the KCC without giving 60 days notice.

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Another illustration of a conflict is 49 U.S.C. § 10707(b) (1) which mandates a final decision on rail rate cases within 5 months while K.S.A. 66-117 grants the KCC 240 days in which to make a decision.

The United States Supreme Court discussed the preemption of state law by federal statute or regulation at some length in Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 101 S.Ct. 1124, 67 L.Ed.2d 258 (1981). Justice Marshall, in delivering the opinion of the court, observed that:

"The underlying rationale of the pre-emption doctrine, as stated more than a century and a half ago, is that the Supremacy Clause invalidates state laws that 'interfere with, or are contrary to, the laws of Congress. . . .' Gibbons v. Ogden, 9 Wheat. 1, 211, 6 L.Ed. 23 (1824). The doctrine does not and could not in our federal system withdraw from the States either the 'power to regulate where the activity regulated [is] a merely peripheral concern' a federal law, San Diego Building Trades Council v. Garmon, or the authority to legislate when Congress could have regulated 'a distinctive part of a subject which is peculiarly adapted to local regulation. . .but did not.' But when Congress has chosen to legislate pursuant to its constitutional powers, then a court must find local law pre-empted by federal regulation whenever the 'challenged state statute "stands as an obstacle to the accomplishment and execution of the full purpose and objectives of Congress."' Perez v. Campbell, 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971), quoting Hines v. Davidowitz, *supra*, at 67-68, 61 S.Ct., at 404." (Id at 1131.)

The court in Chicago and North Western Transportation Co. v. Kalo Brick & Tile Co., *supra*, further states that the common rationale of the Supreme Court's treatment of cases involving the Interstate Commerce Act in favor of the federal statutes, as opposed to conflicting state statutes is that:

"[T]here can be no divided authority over interstate commerce, and. . .the acts of

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Congress on that subject are supreme and exclusive.' Missouri Pacific R. Co. v. Stroud, 267 U.S. 404, 408, 45 S.Ct. 243, 245, 69 L.Ed. 683 (1925). Consequently, state efforts to regulate commerce must fall when they conflict with or interfere with federal authority over the same activity." (Id at 1131.)

An even more recent analysis of the preemption doctrine, in which a regulation of the Federal Home Loan Bank Board preempted state law, was similarly treated in Fidelity Federal S. & L. Assn. v. de la Cuesta, ___ U.S. ___, 102 S.Ct. ___, 73 L.Ed.2d 664, 674-675, (1982). Justice Blackman, speaking for the court, concluded

"The pre-emption doctrine, which has its roots in the Supremacy Clause, U.S. Const, Art VI, cl 2, requires us to examine congressional intent. Pre-emption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.' Jones v. Rath Packing Co., 430 US 519, 525, 51 L Ed 2d 604, 97 S Ct 1305 (1977)." Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because '[t]he scheme of federal regulation may be so pervasive that Congress left no room for the states to supplement it,' because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.' Rice v. Santa Fe Elevator Corp. 331 US 218, 230, 91 L Ed 1447, 67 S Ct 1146 (1947)."

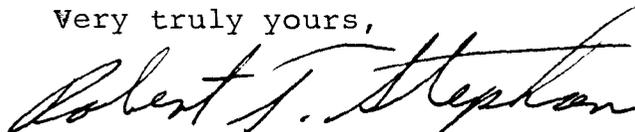
"Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a

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conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers Inc. v. Paul, 373 US 132, 142-143, 10 L Ed 2d 248, 83 S Ct 1210 (1963), or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,' Hines v. Davidowitz, 312 US 52, 67, 85 L Ed 581, 61 S Ct 399 (1941)."

Based upon the most recent court decisions and the language of Stagers Rail Act, we are compelled to conclude that the federal statute explicitly grants ultimate jurisdiction over intrastate rail rates to the ICC rather than state authorities, and it is the intent of Congress that the federal government preempt the field of intrastate rail regulation. Thus, where the Stagers Rail Act of 1980 and the Kansas statutes regulating intrastate rail rates conflict, federal law must prevail.

Very truly yours,



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RTS:BJS:CMA:ljh