

March 2, 2023

Dan Burrows
Chief Deputy Attorney General
Attorney General Kris Kobach
Memorial Hall, 120 SW 10th Avenue, 2nd Floor
Topeka, KS 66612

Re: Kansas Department of Transportation's statutory authority to issue regulations related to safety and operation of railroads in Kansas

Dear Mr. Burrows:

I am writing to address the topics discussed between the Kansas Department of Transportation ("KDOT") and the Office of the Attorney General in regard to proposed regulation K.A.R. 36-43-1. Governor Kelly would like KDOT to resubmit this regulation for legal approval by the Attorney General. We are in receipt of a legal analysis completed on September 1, 2020, by Deputy Attorney General Athena Andaya and Assistant Attorney General Janet Arndt. They both raised concerns about KDOT's authority to issue such regulations and analyzed that this regulation was pre-empted by the Federal Railroad Safety Act. The landscape has changed dramatically with regards to the FRSA through both Federal Railroad Administration action and court decisions across the country.¹ Based on those changed circumstances, I am going to focus this letter specifically on KDOT's authority to issue this regulation.

I. Introduction

Specifically, Ms. Andaya and Ms. Arndt raise the following issue in their letter regarding the statutory authority of the KCC and KDOT:

The history section of the regulation lists two statutes, K.S.A. 66-1,216 and K.S.A. 75-5078, as authorizing statutes. K.S.A. 75-5078 transfers "all the powers, duties and functions" of the Kansas Corporation Commission (KCC), as it relates to railroads, to the KDOT. K.S.A. 66-1,216 authorizes the KCC the "full power, authority and jurisdiction to supervise and control common carriers . . . and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction." However, neither statute authorizes the KCC to adopt rules and regulations concerning the subject of K.S.A. 36-43-1. If the KCC had no such authority, then none transferred to the KDOT.²

¹ The FRSA does not preempt all railroad law: "A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement." *Stonebarger v. Union Pac. R.R. Co.*, 76 F. Supp. 3d 1228, 1240 (D. Kan 2015)(quoting 49 U.S.C. § 20106(a)(2)); *Transportation Div. of the Int'l Ass'n of Sheet Metal, Air, Rail, & Transportation Workers v. Fed. R.R. Admin.*, 988 F.3d 1170 (9th Cir. 2021).

² See attachment A.

The objection raises a couple of questions that need to be addressed in order. First, whether the legislature vested the KCC with authority to issue regulations related to railroad safety. Second, whether such authority was transferred to KDOT. We strongly believe that the answer to both of these questions is in the affirmative.

II. The KCC had legal authority under state law to issue rules and regulations concerning the operation of railroads in the State of Kansas, including the safety of users and employees

The KCC had legal authority under state law to issue rules and regulations concerning the operation of railroads in the State of Kansas, including the safety of users and employees. This is supported by case law, practice, and a plain reading of the text. The plain reading relies in part on the broad grant of authority of the KCC to exercise “all incidental powers necessary to carry into effect the provisions of this act.” The Kansas Supreme Court noted that the “all powers” language as a broad grant of authority provide by the 1911 Public Utilities Act in *State v. Kansas Postal-Tel.-Cable Co.*, 96 Kan. 298, 150 P. 544, 547 (1915):

The Commission [Public Utilities Commission, one predecessor of the KCC] vested with full power, authority and jurisdiction to supervise and control the public utilities and common carriers, and empowered to do all things necessary and convenient for the exercise of the power, authority, and jurisdiction. That is to say, whatever power is necessary to the effectual exercise of the specific powers conferred is likewise conferred. Utilities Act (Laws 1911, c. 238, §§ 1, 41). *Id.* At 547.

We agree it would have been clearer had the legislature expressly stated that such powers include the power to promulgate rules and regulations as is often made clear in more recent legislation, but it was not necessary for them to do so because “all incidental powers” necessarily includes the power to regulate in furtherance of the aims of the Act.

The KCC is the successor in part to the Public Utilities and Public Service Commission.

The 1911 Public Utilities Act created the Public Utilities Commission, which was recognized by the Kansas Supreme Court as a Commission with regulatory power over railroads. *See, State v. Atchison, T. & S.F. Ry. Co.*, 117 Kan. 86, 230 P. 333, 333 (1924) (“By the Public Utilities Act regulation of public utilities was provided for in a comprehensive scheme, which included regulation of railroads.”); *see also Cities Serv. Gas Co. v. State Corp. Comm’n*, 201 Kan. 223, 233, 440 P.2d 660, 670 (1968)(“ the [Public Utility Act (K.S.A. 66-101 et seq.)] was comprehensive in scope. It created the commission and granted it full and exclusive authority and jurisdiction to supervise, control and *regulate* all public utilities and *common carriers* doing business in this state.”) (emphasis added).

Chapter 238, Section 1 of the 1911 Session Laws created the Public Utilities Commission:

The Board of Railroad Commissioners of the state of Kansas is hereby constituted and created a Public Utilities Commission for the state of Kansas, and such com-mission is given full power, authority and jurisdiction to supervise and control the public utilities

and all common carriers, as hereinafter defined, doing business in the state of Kansas, and is empowered to do all things necessary and convenient for the exercise of such power, authority and jurisdiction.

Section 4 of that Act defined “common carriers” as including among other entities, “all railroad companies, express companies, street railroads, suburban or interurban railroads, sleeping car companies, freight line companies...”

To the extent prior regulation of the railroads (common carriers) was done by the Board of Railroad Commissioners, see, e.g., *State v. Missouri Pac. Ry. Co.*, 76 Kan. 467, 92 P. 606 (1907), *aff'd sub nom. Missouri Pac. Ry. Co. v. State of Kansas ex rel. Taylor*, 216 U.S. 262, 30 S. Ct. 330, 54 L. Ed. 472 (1910), the powers, duties, authority and jurisdiction of the Board of Railroad Commissioners was also “imposed and conferred upon the commission [Public Utilities Commission] created under the provisions of [the 1911 Public Utilities Act].” Chapter 238, Section 2 of the 1911 Session Laws.

In 1925, Chapter 258, Section 1 of the session laws created the Public Service Commission. Section 3 of that Chapter abolished the Public Utilities Commission as well as the Tax Commission and the Court of Industrial Relations. And Section 2 of that Chapter conferred the jurisdiction, authority, powers, and duties of those abolished entities upon the Public Service Commission. Section 2 of Chapter 258 of the 1925 Session Laws provided:

All of the jurisdiction, authority, powers and duties now conferred and imposed by law upon the public utilities commission of the state of Kansas, the tax commission of the state of Kansas and the court of industrial relations of the state of Kansas, are hereby conferred upon the public service commission created by this act, and all acts relating to the public utilities commission, the court of industrial relations, the state tax commission and the inheritance tax commission shall apply to the public service commission created and established by this act as fully as though herein reenacted, and such public service commission is hereby empowered to do all things necessary and convenient for the exercise of all such jurisdiction, powers, authority and duties of said public utilities commission of the state of Kansas, the tax commission of the state of Kansas, the inheritance tax commission and the court of industrial relations of the state of Kansas.

That Kansas Supreme Court explained the chronology and effect as follows:

Prior to 1911, the duties of the state regulatory body, then the State Board of Railroad Commissioners, pertained only to railroads. See article 3, c. 99, Gen. Stat. 1909. By the Cities Act (chapter 122, L. 1903; chapter 114, L. 1907 [in part revised in R. S. 13-431; 13-432; 13-434]), cities were authorized to grant franchises for all electric light, water, heat, gas, or telephone service furnished the inhabitants by any person, firm or corporation, to prescribe and fix maximum rates and charges therefor, and to provide punishment for persons who might wrongfully interfere with the same, and this without regard as to whether the person, firm, or corporation furnishing the service supplied one or many cities. In 1911 our Legislature enacted a comprehensive Public Utilities Act (chapter 238, L. 1911) creating the Public Utilities Commission, having jurisdiction over

public utilities generally, including railroads, and whose power and authority, as supplemented, amended, or modified (see R. S. 66-101 et seq.), has been passed on to the present defendant, the Public Service Commission (chapter 258, L. 1925).

Wichita Water Co. v. Pub. Serv. Comm'n of Kan., 126 Kan. 381, 268 P. 89, 89 (1928).

Then in 1933, Chapter 275 of the of the 1933 Session Laws abolished the Public Service Commission (Sec. 2), created the State Corporation Commission (Sec. 1), and transferred the powers of both the Public Service Commission and the Public Utilities Commission to the State Corporation Commission. As to the transfer of powers from the Public Service Commission and the Public Utilities Commission to the State Corporation Commission, Sec 3 of Chapter 275 of the 1933 Session Laws said:

All of the powers, duties, authority and jurisdiction now exercised by and imposed by law upon the public service commission relating to public utilities, common carriers and motor carriers, and all the powers, duties, authority and jurisdiction imposed upon the public utilities commission by chapter 238 of the Laws of 1911, as amended (now sections 66-101 to 66-195, inclusive, Revised Statutes of 1923, and 1931 Supplement thereto), and by chapter 239 of the Laws of 1931, the same being Revised Statutes 1931 Supplement, 74-602a to 74-602d, inclusive, and all parts of the laws relating to the duties and liabilities of railroads (now sections 66-201 to 66-1209, inclusive, Revised Statutes of 1923, and 1931 Supplement thereto), under which the public service commission now exercises jurisdiction over common carriers and motor carriers, are hereby transferred to and imposed and conferred upon the state corporation commission created under the provisions of this act, and the state corporation commission herein created is hereby empowered and directed to do all things necessary and convenient for the proper exercise of all such powers, duties, authority and jurisdiction.

See also State ex rel. Steiger v. Cap. Gas & Elec. Co., 139 Kan. 870, 33 P.2d 731, 740 (1934) (“Chapter 275 of the Laws of 1933 creates the State Corporation Commission. It confers all the rights, powers, and duties of the Public Service Commission upon the new commission, and it transfers all files, records, documents, and property of the Public Service Commission to the Corporation Commission.”).

We think it is clear that the powers, duties, authority, and jurisdiction, including regulatory powers over the railroads as common carriers, was over time transferred to the State Corporation Commission from earlier entities such as the Board of Railroad Commissioners, the Public Utilities Commission, and the Public Service Commission. The KCC had regulatory power over railroads.

There is historical practice showing that the KCC has exercised this regulatory power. Between 1971 and 1995, the KCC promulgated and amended a series of regulations under Article 5 titled “Railroad Safety.”³ In promulgating these regulations, the KCC relied specifically, and

³ https://www.sos.ks.gov/publications/pubs_kar_Regs.aspx?KAR=82-5

primarily, on two statutes: K.S.A. 66-156 and K.S.A. 66-141.⁴ Prior to 1985, K.S.A. 66-156 stated that:

The corporation commission shall have the general supervision of all public utilities and common carriers, and of all persons, companies or corporations doing business as public utilities or common carriers in this state, as defined in Laws of 1911, chapter 238, and amendments thereto; and shall inquire into any neglect or violations of the laws of this state by any person, company or corporation engaged in the business of operating a public utility or common carrier therein, or by the officers, agents or employees thereof; and shall also from time to time carefully examine and inspect the condition of each public utility and common carrier, and of its equipment and the manner of its conduct and the management with reference to the public safety and convenience. Nothing in this section shall be construed as relieving any public utility or common carrier from its responsibility or liability for damage to person or property.

K.S.A. 66-156 was revised in 1985 by Senate Bill 49 to remove references to “common carriers”⁵ and then transferred K.S.A. 66-156 to K.S.A. 66-101h⁶ where it currently resides. Prior to 1985, K.S.A. 66-141 provided that:

The provisions of this act and all grants of power, authority and jurisdiction herein made by the commissioners, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are hereby expressly granted to and conferred upon the commissioners.

In 1985, Senate Bill 49 amended K.S.A. 66-141 to state:

As applied to regulation of electric public utilities, the provisions of this act and all grants of power, authority and jurisdiction herein made to the commission, shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission.

K.S.A. 66-141 was then transferred to K.S.A. 66-101g.⁷ 1985 Senate Bill 49 went on to state, as it relates to common carriers:

as applied to regulation of common carriers, the provisions of this act and all grants of power, authority and jurisdiction herein made to the commission shall be liberally construed, and all incidental powers necessary to carry into effect the provisions of this act are expressly granted to and conferred upon the commission.

⁴ See attachment B.

⁵ See attachment C.

⁶http://www.kslegislature.org/li/b2023_24/statute/066_000_0000_chapter/066_001_0000_article/066_001_0001h_section/066_001_0001h_k/

⁷http://www.kslegislature.org/li/b2023_24/statute/066_000_0000_chapter/066_001_0000_article/066_001_0001g_section/066_001_0001g_k/

This language was added to Chapter 66 at K.S.A. 66-1,216⁸ where slightly modified language currently exists. K.S.A. 66-156 (K.S.A. 66-101(h) and K.S.A. 66-141 (K.S.A. 66-101(g) very clearly provided the KCC with the necessary authority to promulgate the regulations contained in Article 5 and that authority was maintained through the 1985 amendments.

III. In 2005, KDOT was transferred all powers, duties and functions of the KCC with regards to regulating railroads in the State of Kansas and has specific authority to issue K.A.R. 36-43-1

In 2005, KDOT was transferred all powers, duties and functions of the KCC with regards to regulating railroads in the State of Kansas and has specific authority to issue K.A.R. 36-43-1. House Bill 2123 (“HB 2123”)⁹, an act relating to railroads, concerning the transfer of certain powers, duties and functions of the state corporation commission to the Kansas department of transportation, was introduced in the Kansas House of Representatives on Friday, January 21, 2005.¹⁰ The bill passed the House on final action on February 9, 2005, on a vote of 120-3 with 2 absent or not voting.¹¹ It then passed the Senate after minor modifications in the Senate Transportation Committee on March 10, 2005, on a vote of 37-0 with 3 absent or not voting.¹² On March 15, 2005, the House concurred with the amendments of the Senate on a vote of 122-2 with 1 absent or not voting.¹³ Governor Sebelius signed HB 2123 on March 28, 2005.¹⁴

The contents of 2005 HB 2123 now resides in K.S.A. 75-5078.¹⁵ K.S.A. 75-5078(a) provides that “[e]xcept as otherwise provided by law, all of the powers, duties and functions of the state corporation commission as it relates to railroads are hereby transferred to and conferred upon the Kansas department of transportation.” As it relates to rules and regulations, K.S.A. 75-5078(b) states:

All rules and regulations of the state corporation commission referencing railroads in existence on the date of passage of this act shall be reviewed by the Kansas department of transportation prior to July 1, 2005. Any such rules and regulations which the Kansas department of transportation does not notify the state corporation commission to retain shall be revoked by the state corporation commission prior to the effective date of this act. Any rules and regulations which the Kansas department of transportation notified the state corporation commission to retain shall continue to be effective and shall be deemed to be duly adopted rules and regulations of the Kansas department of transportation until revised, amended, revoked or nullified pursuant to law.

⁸http://www.kslegislature.org/li/b2023_24/statute/066_000_0000_chapter/066_001_0000_article/066_001_0216_section/066_001_0216_k/

⁹ See attachment D.

¹⁰ 2005 House Journal, page 70, attachment E.

¹¹ *Id* at 147.

¹² 2005 Senate Journal pages 250; 287, attachment E.

¹³ 2005 House Journal, page 387, attachment E.

¹⁴ *Id* at 567.

¹⁵http://www.kslegislature.org/li/b2023_24/statute/075_000_0000_chapter/075_050_0000_article/075_050_0078_section/075_050_0078_k/

In reviewing HB 2123, the legislature's intent was clear. It intended to transfer the entirety of the broad authority of the KCC to oversee and regulate railroad activity in Kansas to KDOT. While New Section 1(b), now K.S.A. 75-5078(b), is odd in its operation, it actually bolsters the argument that this authority was transferred to KDOT. HB 2123 did not take effect until July 1, 2005, despite being signed by the Governor on March 28, 2005. In preparation for the transfer to take place on July 1, the Legislature directed the KCC to utilize their existing authority to revoke regulations deemed unnecessary by KDOT prior to the official transfer taking place. The reason that the revocation had to be done by the KCC prior to the enactment of HB 2123 is that KDOT did not have the authority before then. Once the transfer took place on July 1, the KCC no longer had the authority to take such action.

It was suggested in discussions that K.S.A. 75-5078(b)'s construction should be viewed as a limitation in that KDOT could only pick from preexisting KCC regulations and was not otherwise granted broader regulatory authority. The argument appears premised on the idea that subsection (b) is a specific grant of limited authority, and thus relying on the principle that the more specific statute controls, subsection (b) controls over the general broad grant of authority provided by K.S.A. 75-5078(a). We believe this argument misconstrues intent of subsection (b) because, subsection (b) was enacted for practical administrative effect – KDOT did not have the authority to “clean up” the regulations until July 1 for a law signed on March 28 of the same year. This provision merely provided the administration for transferring applicable KCC regulations to KDOT, but did not otherwise limit KDOT's regulatory power in this space.

Moreover, where the KCC had clear authority to promulgate safety-related regulations for rail roads, if the legislature intended to curtail the regulatory power transferred from KCC to KDOT, we would expect clear legislative language in HB 2123 expressly removing such authority during the transfer from KCC to KDOT. No such language is present. Instead, the argument for legislative intent to strip KDOT of regulatory authority is premised on an administrative provision.

K.S.A. 75-5078(b) is just the means of taking “seed” regulations already promulgated by the KCC and giving KDOT the option to review and decide which ones should be revoked. Subsection (b) is really just the process by which the existing regulations were reviewed and transferred to KDOT, but subsection (b) itself is not a limited grant of rulemaking authority – it's just a transfer of regulation provision. The regulatory power comes from existing K.S.A. 66-1,216, which is plenary with a power for “all things necessary and convenient.” And notably, K.S.A. 66-1,216 does not contain language limiting its “all things necessary” powers such as “except as provided in K.S.A. 75-5078(b)” or “unless otherwise provided by law.”

Harmonizing these provisions while giving the language “all things necessary” its plain meaning supports that KDOT has the authority to issue safety-related railroad regulations, and subsection (b) is not inconsistent with the exercise of that power because subsection (b) merely provides the administration of how existing regulations were to transfer from KCC to KDOT.

Upon review of the statutory and legislative history related to the regulation of railroads in the State of Kansas, it is clear that the Legislature intended on the KCC having broad authority to occupy this space. It is also clear that the Legislature intended to transfer the entirety of that authority to KDOT. This clearly must include the authority to promulgate rules and regulations. K.S.A. 75-5078(b), as odd as it is in terms of operation, cannot logically be read to mean that the Legislature did not intend to transfer rules and regulatory authority to KDOT when read together with K.S.A. 75-5078(a) and the history of Chapter 66. KCC promulgated rules and regulations on railroad safety under their authority, and that authority was transferred to KDOT in K.S.A. 75-5078. Thus, KDOT has the authority to promulgate rules and regulations regarding railroad safety.

IV. Conclusion

Upon review of the statutory and legislative history of Chapter 66 and Chapter 75, Article 50, it is very clear that the Legislature intended to provide broad authority first to the KCC and then transfer that authority to KDOT. Admittedly, K.S.A. 75-5078(b) is awkward in its operation and was probably not the most efficient way for the review and clean-up of the regulations related to railroads. However, when you read the contents carefully and consider the very specific timing of requiring the KCC to make revocation of unnecessary regulations **prior to** the transfer of authority to KDOT, it is clear that the regulatory authority was intended to transfer as well. All of this is more than legally sufficient to support KDOT's legal authority to issue regulation K.A.R. 36-43-1. Please let me know if you have any questions.

Sincerely,



Will Lawrence
Chief of Staff, Governor Kelly