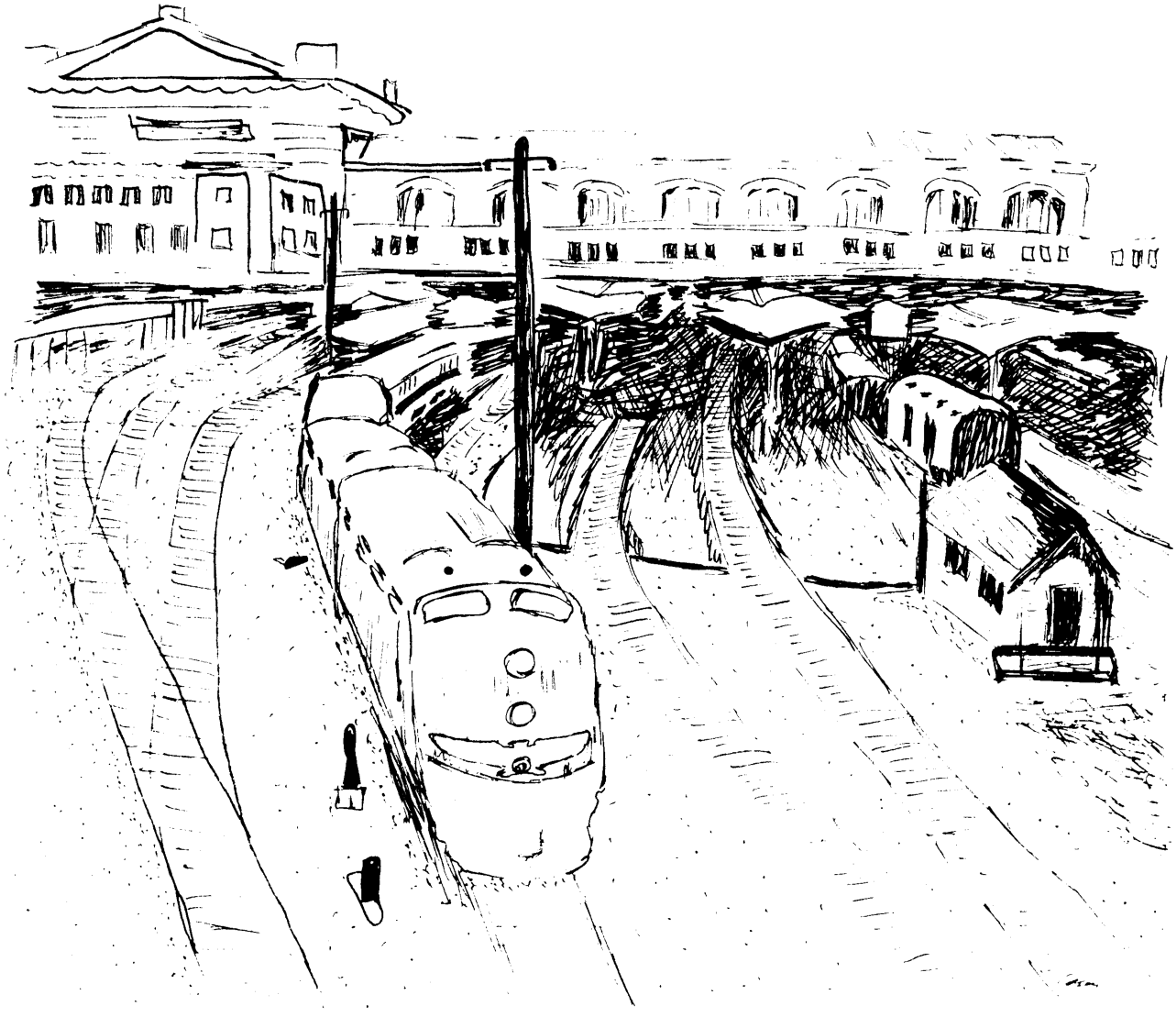
RAIL TRANSPORTATION PROGRAMS IN KENTUCKY



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LEGISLATIVE RESEARCH COMMISSION
Frankfort, Kentucky

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RAIL TRANSPORTATION PROGRAMS IN KENTUCKY

Prepared by
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FOREWORD

Rail transportation has been a concern of federal and state governments since the late 1800s. In recent years, innovative programs at both levels of government have spurred new interest. The study is an attempt to examine these rail programs, their implementation and their effects on state government.

Since the time the resolution directing this study passed, several changes have been made in the federal and state rail transportation programs. The 1980 Staggers Act, passed by the United States Congress, deregulated much of the railroad industry activity. Several executive orders promulgated by Governor John Y. Brown, Jr., change the administrative procedure involving rail programs. This report addresses those activities.

Legislators, state executive officials, and interested citizens will find this study helpful in determining past rail policies and establishing some direction for the future. The Legislative Research Commission gratefully acknowledges the cooperation of the Kentucky Railroad Commission, the Kentucky Railroad Association, the rail industry and the Department of Transportation for their cooperation in this effort.

The report was prepared by James Roberts of the LRC staff and edited by Dr. Charles Bush. Beth Wilson prepared the manuscript for publication.

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The Capitol
Frankfort, Kentucky
May, 1981

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SUMMARY

Government involvement in rail transportation has increased at all levels of government in the past decade. Federal and state governments have taken active roles in planning, regulation, and in safety and rehabilitation programs. Additionally, local governments have increased their involvement, both to maintain rail service in their communities and to police areas affected by train derailments.

Throughout the 1970s the Kentucky General Assembly appropriated funds for various rail programs. A safety program was to be initiated jointly by the Kentucky Department of Transportation and the Kentucky Railroad Commission, but no longer exists in the Commonwealth. In the mid-1970s, planning and rehabilitation money was made available to the Kentucky Department of Transportation.

These programs complement the regulatory role of the Kentucky Railroad Commission and have resulted from a perceived need for safer and more efficient rail transportation. The more recent programs have been initiated as national concern has arisen, and as federal matching funds have been made available by Congress.

Despite these new programs, it appears that rail transportation problems still exist. Smaller communities in this state have had rail lines abandoned or they are facing such abandonment. Train derailment and other safety problems concern many citizens throughout the Commonwealth.

As the state has become more involved with rail transportation and its problems, the General Assembly has shown increased interest by continuing to fund new rail transportation programs. However, it has recently been felt that these policies are in need of review, not only to determine whether the intent of the programs is being met, but also to investigate methods of implementing and administering the programs. This need for a review of rail transportation led to the passage of House Concurrent Resolution 105, which authorizes this study.

The purpose of this study is to analyze rail programs in an effort to determine whether there is any duplication of services between agencies involved in rail transportation. Particular emphasis has been placed on rail safety and regulatory functions.

In order to meet the objective of the resolution, the Kentucky Railroad Commission is examined first. The study includes the history of the Commission's formative years, its recent activities, and its current duties.

The role of the Kentucky Department of Transportation in rail transportation has only developed since the expansion of the federal programs. The second part of this study concentrates on the Kentucky Department of Transportation's rail transportation responsibility since that time. In this way, hopefully, any duplication of rail service would be uncovered.

Government concern with rail transportation is not new; rather, changing political, social and economic conditions have created new governmental programs. The purpose of the study is to ensure that established rail programs are not being threatened by unnecessary activity involved in the implementation of new programs.

The study establishes three major findings and three recommendations for legislative action. The findings and recommendations reflect policy decisions of previous periods that were either unclear or misunderstood.

Findings

1. The Kentucky Department of Transportation and the Kentucky Railroad Commission do not have duplicate functions regarding rail safety and planning.

2. Railroad planning and safety functions have been subjected to constant reorganization since their beginnings in Kentucky. An examination of the related Executive Orders shows that state planning and safety roles have not been totally understood by the agencies of state government.

3. State funds in previous fiscal years have been allocated for railroad safety and development, yet the safety program was never certified by the Federal Railroad Administration, and development programs have been limited to subsidy support in one Central Kentucky project and plans for rehabilitation in one South Central Kentucky location.

Recommendations

1. The General Assembly, in its interim studies, should re-examine Kentucky's authority to establish and determine intrastate rail rates as a result of the 1980 Staggers Act passed by the United States Congress. Should a determination be made to grant a state agency authority to ensure that federal standards for establishing intrastate rail rates are met, the appropriate commission or agency to provide this authority must be determined.

2. The General Assembly should review past executive action and policy relating to rail transportation programs, in order to better understand the rail safety and planning programs and to determine if the executive decisions best serve the public interest.

3. The General Assembly should examine previous rail transportation allocations, specific programs and their associated implementation problems and determine whether further action by Kentucky in rail safety and planning is called for.

CHAPTER I

THE RAILROAD COMMISSION AND KENTUCKY'S 1891 CONSTITUTION

Pre-Constitutional Provisions

The Kentucky Railroad Commission was established by the General Assembly in 1880, eleven years before the 1891 Constitution was approved by the voters. The primary purpose of the Railroad Commission during this period was the assessment of railroad property for tax purposes.

Prior to the creation of the Railroad Commission, the Board of Assessors established the value of rail property. Their approach, unpopular with the railroad companies, was to assess such property at a straight value of $20,000 per mile. Initially, the Railroad Commission was established to eliminate this inequity by assessing railroad company property by inspection, and reviewing track usage and profits from particular segments of track before assessing the property.

However, the Commission was also charged with reviewing complaints of railroad companies' business activities. Various public officials accused railroad companies of extortion and discrimination in their dealings with customers. By the time the 1891 Constitutional Convention was called, considerable distrust of the railroad companies and their activities was being expressed.

This mood of distrust is illustrated by Mason County delegate Emery Whittaker's opening remarks to the Constitutional Convention Railroad Subcommittee:

> They [referring to Cornelius Vanderbilt and his sons] made it all out of railroads;—not by any six percent of his money—but by making twelve, fifteen, and twenty-five percent; by having the power to take that much from people which they should not have gotten. The way they did it was a sealed book to the people. They were kept in darkness, while he stretched out his avaricious hand and grappled all the interest of the people, and carried them back into his coffers, and it could not have been done in any other way.[1]

It was in this emotional atmosphere that the Constitutional Convention convened in 1890.

The Constitutional Debates

The Railroad Commission issue stirred an emotional debate during the Constitutional Convention. Three basic questions regarding the Commission had to be resolved during these debates:

(1) Should the Railroad Commission exist as a Constitutional Office?
(2) Should the Commissioners be elected or appointed?
(3) What powers and duties should the Commission be delegated?

The consensus of the delegates was that a Commission was necessary. The key decisions to be made involved enabling authority of the Commission, its organization and its duties.

The proposal to regulate railroads was also a sign of the times. Industries were generating large profits which were not subjected to government scrutiny. Railroad companies, as part of the industrial development, showed large holdings growth, and were seemingly granted privileges not available to the individual citizen. Regulation of industry was designed to place individuals and corporations on an equal basis. Again, Delegate Whittaker echoed this sentiment with the following statement:

> There is but one way of transportation, and that is over railroads, and should not there be some power in the State to see that the people be guarded on their side; to see that there is not more taken from the people and put into the pockets of the corporation than ought to be taken; to see that there should be crystallized equality between the two, the purchaser and the carrier, so that neither should be injured.[2]

In the 1890s, railroads and water were the only forms of rapid transportation; hence, the movement of many goods from farm to producer and producer to market was dependent on rail. The only competition for rail transportation was steamboats and barges, and water transportation was, of course, limited in that it was dependent upon the continental river system.

The members of the General Assembly, seeing a monopolistic enterprise developing, believed that regulation was needed. The method of regulation, however, was very much at issue during the 1890 Constitutional Convention.

One of the chief arguments among the delegates was whether the Commission's enabling authority should be granted in the Constitution or authorized by statute.

The proponents of the Constitutional provision believed that the Commission should be removed from politics. In the past, as the Commission submitted its reports to the Governor and the General Assembly, acts of reprisal against the Commission were made. These reprisals came in the form of legislation proposing to either abolish the Commission or limit its powers.

A second argument in favor of a Constitutional provision of the Railroad Commission was that such authority had been granted by other state legislatures and their courts had upheld the laws. After examination of the example of other states, the convention delegates concluded that the constitutional approach was the most effective.

Delegates against a Constitutional provision for the Railroad Commission stressed their belief in the omission from the Constitution of those things which could be taken care of by legislation. Delegate Burham told the 1890 delegates:

> . . . there is one other thought that I wish to impress upon this convention and that is, even were there no reason otherwise for not putting in the provisions of the existing law, there is the general argument against it that it is not wise to put into our organic law any thing, no matter how good it may appear, if the same thing can be done by ordinary legislation, because we cannot anticipate, and it may not be a good thing in the future. Leave out of the Constitution that which can safely be left out.[3]

Despite this argument, the Railroad Commission became a Constitutional office and the delegates focused their attention on matters relating to the Commissioners and their duties.

First to be debated was whether the officials should be appointed or elected. This debate seemed to spark most of the rhetoric of the delegates. The advocates of election by popular vote presented three basic points: that other Constitutional officers were elected, especially those with judicial functions; that commissioners' decisions should be accountable to the public; and that the republic form of government necessitates that officials be chosen by election.

The opponents of election of Railroad Commissioners showed a distrust of the political power of the railroad companies. They believed that the rail companies would lend financial support to candidates with favorable viewpoints. The railroads were believed to have great persuasive powers, which could undermine the integrity of the Commission.

The second argument against electing officials was based on tradition. The commissioners, since the beginning of the Railroad Commission, were appointed by the Governor with approval of the Senate. Delegates argued that this method had proven effective and should not be changed. Opponents of election argued that selection of qualified commissioners could not be assured through the election process and that, under the appointment process, the expertise of prospective commissioners could be examined.

The final issue the convention dealt with in regard to the Commission was its powers and duties. Several Constitutional sections, describing the duties of the Commission, were initially offered. The delegates proposing those sections believed certain duties ought to be inherent, should the Commission become a Constitutional office. During the convention, proposals to amend sections presented by the Commerce and Railroad Subcommittee were introduced. They met with limited success.

The opponents of prescribing Constitutional powers felt that specific powers may, in time, be subject to change and that if a change of duties became necessary, amendments could be difficult to make. They believed that, even though the Commission is included in the Constitution, the legislature should specify its duties.

Constitutional Provisions

The Railroad and Commerce Subcommittee report had ten sections approved in the 1891 Constitution. No section has been amended since that time. Section 209 of the Constitution creates the Railroad Commission. It provides for the Commissioners to be elected from three districts, which are subject to change by the legislature. This section also states that the powers and duties of the Railroad Commission should be regulated by law. However, the authors of the Constitution included a provision which gave the Commission its pre-1891 authority, unless otherwise provided by the General Assembly.[4]

The delegates of the Convention compromised on the rail issues. The Commission was included in the Constitution, its members were to be elected by the populace to four-year terms, and its functions were to be prescribed by the General Assembly. The convention geared most of its other provisions in these sections to the operation of railroads, but in Section 218, the Commission was given authority to investigate and establish some specific rates. These Constitutional provisions have not changed since 1891. An amendment was presented in 1972 which would, among other things, abolish the Railroad Commission. It was defeated.[5]

Conclusion

The authors of the 1891 Constitution recognized a growing need to regulate the conduct of rail companies. They believed, however, that certain alleviating changes could take place with the passage of time. This mode of thought was reflected in their final decisions on the creation, organization and activity of the Railroad Commission.

The Constitutional provision was believed to be necessary, if for no other reason than to protect the decisions of the Railroad Commission from the whims of the General Assembly. More significantly, however, the Commission could more easily protect the property and commerce of its citizens if it was provided a solid foundation to begin its work.

The authors of the Constitution also recognized that times were changing, and that the grant of Constitutional duties to the Commission could eventually hamper its effectiveness, as new and unforeseen issues and concerns pertaining to rail transportation developed. For this reason, it was determined that the duties of the Railroad Commission should be prescribed by laws made in the General Assembly.

CHAPTER II

THE RAILROAD COMMISSION AND ITS STATUTES

Statutory Provisions

The first Railroad Commission, as noted above, was established by statute in 1880. The Commission was appointed by the Governor and was granted authority to assess railroad property for tax purposes. Other prescribed duties or powers included examining railroad management, inspecting records, calling witnesses and issuing subpoenas during investigations. Reports on the activities of the Commission were submitted to the Governor.

Several statutory changes in the Railroad Commission preceded the enactment of the 1891 Constitution. These changes concerned geographic representation of the Commissioners, the establishment of definitions of discrimination and extortion by rail carriers, the requirement for rail companies to file reports on activities with the Commission, and the establishing of an annual salary of $2,000 for a Commissioner.

The adoption of the 1891 Constitution provided the General Assembly with authority to establish functions for the Commission. The Commission was to maintain all of its previous power unless changes in the statutes provided otherwise. The 1891 powers and duties of the Railroad Commission remained basically intact until 1916.

The Railroad Commission realized its greatest growth between 1916 and 1934. In 1916, the legislature passed an act which gave the Railroad Commission regulatory authority over express companies, steamboats, telegraph and telephone companies, and all boats and other watercraft propelled by use of oil, gasoline or other means. A 1920 amendment extended the jurisdiction of the Commission to include regulatory authority over natural gas companies and the transportation of natural gas. However, the formation of a Public Service Commission in 1934 relieved the Commission of these duties.[6]

The Public Service Commission was granted power to regulate various activities of electric companies, gas companies, telephone and telegraph companies and transportation companies. The authority of the Public Service Commission to regulate transportation was limited to transportation of persons or property by street, suburban or interurban railways for the public for compensation. The creation of this Commission left the Railroad Commission with authority over intrastate activity of railroads, express companies and barge lines.[7]

The current statutory provisions of the Railroad Commission are incorporated primarily in Kentucky Revised Statutes Chapter 276. Many of these statutes are either rendered ineffective by overriding federal legislation, or Attorney General opinions. The role of the federal government on rail transportation will be discussed in Chapter V.

Current Status of the Railroad Commission

Recently, to clarify its responsibility regarding rail safety and planning, the Railroad Commission requested an opinion of the Attorney General on its duties and powers. The At-

torney General's opinion, dated May 8, 1980, reaffirmed the established interpretation, stating that although the office is created in the Constitution, its duties are prescribed by law.

The letter devotes considerable attention to the federal program, stressing the concepts that the Federal Railroad Administration (FRA) has the responsibility for administering and enforcing all federal rail safety laws; that the United States Department of Transportation must provide financial aid to the states for rail freight assistance programs; and that any state, in order to qualify for such aid, must develop and receive federal approval of a state rail plan.[8]

In 1978, the Attorney General concluded that the Kentucky Department of Transportation (KYDOT) had sole responsibility to implement the Federal Railroad Revitalization and Rehabilitation Act. The authority to develop a state rail plan, it said, belongs to KYDOT. A 1978 Executive Order of Governor Julian Carroll (Executive Order 78-1141) placed this authority in a newly created Rail Division of the Kentucky Department of Transportation.

The Kentucky Railroad Commission statutes also contain some safety provisions. KRS 276.550 authorizes the Kentucky Railroad Commission to enter into an agreement with the Federal Railroad Administration for implementation of the Rail Safety Act. This agreement is subject to the approval of the Secretary of the Kentucky Department of Finance and the Secretary of the Kentucky Department of Transportation. This statute provided a $50,000 appropriation for implementation of the Act.

Chapter 276 outlines additional functions of the Railroad Commission. KRS 276.020 establishes that common carriers are to furnish reasonable service at a fair rate and KRS 276.310 provides for hearings, if railroad rates are claimed to be unjust. Broader powers are granted to the Commission under KRS 276.030(3) to supervise all intrastate rail transportation rates and services. These powers include enforcing safety provisions, examination of rates and requiring of annual reports by railroad companies. The Kentucky Railroad Commission may also appeal to the Interstate Commerce Commission whenever it believes interstate rates are unjust.

The rate regulatory function of the Kentucky Railroad Commission also has some restraints. The trackage of railroad companies is not restricted by state boundaries. In cases when freight is moved across state boundaries, rates are established by the Interstate Commerce Commission in Washington, D.C. The only rate cases actually heard by the Kentucky Railroad Commission would be on freight moved solely within the boundaries of Kentucky. Because the railroad network is an *interstate* system, most rail traffic is *interstate* traffic and thus outside the jurisdiction of the state regulatory commissions.

The safety provisions of Chapter 276 permit the Commission to hold hearings on safety matters. The Commission is limited, however, in its ability to enforce safety measures, and must request the Attorney General to intervene in cases of non-compliance.

The General Assembly has passed only three pieces of legislation relating to the Railroad Commission since 1970. Senate Bill 119, passed in 1974, authorizes the Railroad Commission to involve itself in the Federal Rail Safety Act. As previously mentioned, this provision is subject to approval by the State Departments of Finance and Transportation.

In 1972, a Constitutional amendment was offered to the populace which would have, among other things, abolished the Railroad Commission. In order for such a provision to be placed on the ballot, it must be approved by a three-fifths majority of the members of each House. The proposed amendment in this case was approved by the General Assembly, but failed when submitted to the voters of the Commonwealth.

Senate Bill 323, passed during the 1980 session, would have increased the salary of the Commission Chairman from $3,600 to $10,000, and those of the remaining Commissioners from $3,000 to $9,000, but the legislation was vetoed by the Governor. The veto message declared the salary increase excessive, on the grounds that most of the Commissioners' duties had been transferred to the KYDOT during the 1974 reorganization.[9]

On July 1, 1974, Governor Carroll issued an Executive Order stating that each agency would have to repromulgate any regulations it wished to remain in effect. The Railroad Commission, at the time, failed to repromulgate any regulations, and it has not submitted any regulation for approval since that time. A review of earlier regulations shows that no regulation has been filed since 1968.

Conclusion

Chapters I and II have examined the constitutional and statutory functions of the Kentucky Railroad Commission. The areas of jurisdiction were reviewing of rates and investigation of safety provisions. *There has been no effective attempt to increase the Commission's authority since 1970, other than the 1974 Act, which allows for a cooperative agreement to implement the federal safety provisions, subject to additional state agency approval.*

The only other issues which were passed by the legislature were either rejected by the voters or vetoed by the Governor. One might argue that the populace wishes to retain the Railroad Commission, since it voted against the amendment to abolish. However, incorporated in that amendment to abolish the Commission were additional proposals to make the Superintendent of Public Instruction an appointed office, to allow sheriffs to succeed themselves, and to establish a seven-member State Board of Education. It would thus be difficult to determine whether the amendment's defeat spoke to the Railroad Commission at all.

The lack of legislative attention to the Commission has left it with authority over barge and rail carriers. Such activity is limited to the establishment of intrastate rates for transportation and some responsibility in the safety area. Investigations can be made, hearings held, and complaints acted upon; however, the effectiveness of the Commission in dealing with these rail issues needs to be determined.

The Railroad Commission has evolved from a statutory Commission to a Constitutional one, and it was granted extensive regulatory powers during its peak period in Kentucky state government. However, its duties have been significantly reduced since 1936.

The Commission still performs its rate functions, but federal legislation may significantly reduce this duty. The competition of other modes of transportation, the emergence of other regulatory agencies, and the interstate nature of rail transportation has further reduced the stature of the Commission. Efforts have been made to abolish the Commission, but they have failed. It therefore becomes necessary to examine the effectiveness of the Commission's performance and the rationale for its continued existence in Kentucky state government.

CHAPTER III

ORGANIZATION AND WORK OF THE RAILROAD COMMISSION

Organization

The Constitution of the Commonwealth declares that there shall be three Railroad Commissioners, who shall be elected to four-year terms served concurrently with the Governor. Each Commissioner shall represent a geographic area of Kentucky as defined by the statutes. The Constitution, however, addresses the office of Commissioners and the naming of their functions, while the statutes address specific duties and organization.

Chapter 12 of the Kentucky Revised Statutes confirms that the Kentucky Railroad Commission is to be headed by elected officials. For administrative purposes, the Commission was attached to the Kentucky Department of Transportation during the 1974 reorganization.

The Attorney General of the Commonwealth is required by KRS 15.145 to provide the Railroad Commission an Assistant Attorney General. KRS 15.145(2) states that the Assistant Attorney General shall give all necessary time to the business connected with the Railroad Commission. Such business includes rate litigation and hearings, and advising the Commission or its members as requested. The statute also makes it clear that additional work outside the Commission by the Assistant Attorney General may also be required. Subsection (3) of KRS 15.145 provides for the employment of a stenographer.

The General Assembly enacted legislation in 1948 to provide the Commission with all necessary support services. KRS 276.060 enables the Railroad Commission to hire a secretary and other needed personnel. The Commission is entitled, under KRS 276.060(2), to fix compensation of these employees within the annual appropriation granted by the legislature.

An additional means by which the Railroad Commission has gained support staff is through personal service contracts. It has had contracts approved to hire a part-time attorney and a part-time rate specialist.

The employment of the attorney was questioned by the Personal Service Contract Review Subcommittee in its August 1979 meeting. Many members believed this was a duplication of personnel, since KRS 15.145 allows for the Assistant Attorney General. However, the contract was approved after evidence that the Attorney General's staff was too burdened with numerous other issues to devote proper attention to the Commission was introduced. Finally, Executive Order 79-662, issued by Governor Carroll, approved an employment contract between a private attorney and the Commission. The contract for the rate consultant was uncontested.

The following chart presents the positions within the Railroad Commission and their current salaries.

TABLE 1

COMMISSION EMPLOYEES AND SALARIES

Employees	Salaries	Status
Chairman	$ 3,600	Elected—4 Years
Commissioners (2)	$ 3,000	Elected—4 Years
Executive Secretary	$14,500	Full-Time
Counsel	$ 6,000	Part-Time
Court Reporter	$ 3,000	Part-Time
Rate Consultant	$ 5,000	Part-Time
Assistant Attorney General	N/A	Part-Time

Source: *Kentucky Railroad Commission*; August, 1980

The Executive Secretary is the only full-time employee of the Railroad Commission. This office is in Frankfort. Although the Commissioners may travel to Frankfort for hearings and other matters, they do not reside or work there on a permanent basis. The Commissioners preside over hearings in Frankfort, which, over the past decade, have averaged 12-18 in number per year.

Matters considered by the Commission fall into six distinct classifications: formal complaints; ex parte proceedings; suspension orders; informal complaints; short and long haul orders; and short notice orders. The Commission's rules of practice, promulgated in 1929, define these classifications and establish review procedures to be followed by the Commission.

Formal complaints include grievances filed by shippers alleging unjust rates, unreasonable discrimination or inadequate safety precautions against a rail company. A railroad company desiring to discontinue services, or to remove stations or offices, must file an application or petition. Most changes in rates and charges are initiated by filing tariffs. Hearings are held on all formal complaints involving shippers. Hearings are also held on applications or petitions of railroad companies or new tariff filings, if a protest is filed or if the Kentucky Railroad Commission desires to investigate in the public interest.

Ex parte proceedings concern the required filing of changes with the Commission by the rail company. Examples are rate changes, applications for discontinuance of agencies or services, and application for the retirement of stations, shelter sheds, tracks and stockpens. These matters are not adversary in nature, but when contested by a shipper, often necessitate a formal hearing.

Suspension orders result when an impending new tariff schedule is protested or if the Commission feels that it needs to conduct an investigation on the rate change. If the new tariff is protested by a source other than the Railroad Commission, a protest must be submitted in writing ten days prior to the effective date of the new rates. Under authority granted by KRS 276.170, the Commission may suspend a tariff increase for as long as 210 days.

Informal complaints are proceedings which can be resolved without a hearing. A case usually involves a minor complaint received by the Commission, which intervenes, if possible, to resolve the dispute to the satisfaction of both parties.

On occasion, carriers apply to the Commission for relief from short and long haul

restrictions placed upon them by the Constitution. Such proceedings may require a hearing if the request is protested.

The most frequent orders issued by the Commission have been short notice orders. KRS 276.160 requires railroads to provide at least 30 days' notice before any rates are changed. Should the railroad show cause for altering the rate structure in less than 30 days, an application can be made to suspend this provision.

The Commission's operations also include the investigation and filing of schedules pertaining to rates, classifications, services, rules, regulations and practices covering all intrastate rail, express and water carriers. It also examines and files annual reports of carriers operating intrastate over which it has jurisdiction. The Commission is required to examine the state of repair of all railroad property and to order corrections where conditions are found unsafe. Reports are to be submitted on all intrastate carriers involved in fatal accidents; investigations of same may be initiated by the Commission. The functions and powers of the Commisssion are extensive, but the limitations of staff and budget restrict the number of examinations and investigations which are accomplished.[10]

The records of the work of the Commission are not as detailed as they once were. *The Kentucky Railroad Commission*, LRC Report #71, completed in 1972, was able to document all hearings and orders issued by classification. Currently, the Commission merely groups the number of hearings and orders. The program status report issued to KYDOT, which is used for budget purposes, provides the best data; however, it is not as detailed as the Annual Reports to the Governor during the 1960s.

The recent program status reports reveal larger than anticipated issuance of orders; however, in most cases there are fewer public hearings than projected. This disparity would indicate that rail companies are conducting their affairs with few protests, and that the orders being issued are of an informal nature.

Budget Appropriations

The rail transportation budget, over the past decade, has gone primarily for regulatory purposes within the jurisdiction of the Commission. An appropriation of state funds was made for a safety program in the 1974-76 biennium, and another for rail development in the 1978-80 biennium.

The following table reflects the budget for rail programs during the 1970s. The table is divided into specific expenditure categories.

The appropriations of $50,000 for safety and $420,000 and $720,000 for development are results of federal involvement in rail transportation. These programs have been handled primarily through the Kentucky Department of Transportation. The Railroad Commission does have some safety jurisdiction; however, all agreements regarding safety with the Federal Railroad Administration are subject to approval of Kentucky's Departments of Transportation and Finance.

The budget for the Railroad Commission's regulatory function has risen over the past decade. The growth is not as high as the inflation rate experienced in the '70s, but neither has there been a growth in services provided.

TABLE 2

LEGISLATIVE APPROPRIATIONS FOR RAIL TRANSPORTATION

FY	Regulatory	Safety	Development	Salary Improvement	Total
70-71	38,340	—	—	—	38,340
71-72	40,980	—	—	—	40,980
72-73	42,150	—	—	—	42,150
73-74	43,180	—	—	—	43,180
74-75	47,110	25,000	—	—	72,110
75-76	47,600	25,000	—	—	72,600
76-77	51,600	—	—	1,200	52,800
77-78	51,600	—	—	1,400	53,000
78-79	56,000	—	420,000	—	476,000
79-80	56,000	—	720,000	—	776,000

Source: *The Kentucky Executive Budgets*; 1970-1980.

Conclusion

The budget of the Kentucky Railroad Commission has increased steadily during the 1970s. The increased appropriation has not been accompanied by increased responsibility, however. In fact, annual reports authorized by KRS 276.120 are not as detailed as in the 1960s and actual rate hearings have not been as burdensome as anticipated by the program status reports.

The Kentucky Railroad Commission has only one full-time staff employee in Frankfort. The three Commissioners are not required to work in the capital city on a full-time basis and the staff attorney, rate consultant and stenographer work on a part-time basis. This arrangement makes it impossible for the Railroad Commission to become involved in a safety program as required by its statutes.

The safety program is also regulated by the Federal Railroad Administration (discussed in a later chapter). These federal guidelines will effectively pre-empt state involvement in railroad safety programs.

The Kentucky Railroad Commission has, in reality, a single purpose—the examination of intrastate rates. The safety statutes authorized by the General Assembly cannot be implemented with the Commission's limited budget and personnel. As other rail issues have developed, the Commission has never been delegated the duties for implementation. As will be discussed in the next chapters, the role of the Kentucky Department of Transportation and increased intervention by the Federal Government have had the effect of significantly reducing the role of the Kentucky Railroad Commission.

CHAPTER IV

KENTUCKY DEPARTMENT OF TRANSPORTATION RAIL ACTIVITY

1974 Executive Reorganization

The Kentucky Department of Transportation had no involvement in rail transportation until the 1974 reorganization of state government. The rationale for the establishment of a transportation agency at that time was to facilitate and promote the planning and coordination of all forms of transportation. Under the responsibility of the Department of Transportation were highway, air, water, mass and rail transportation.

Another rationale for the 1974 reorganization appears to have been the federal legislation and funding which had become available to state government. In order to secure federal aid, certain planning requirements were necessary. The reorganization brought these planning functions under the jurisdiction of the departmental planning agencies.

Thus state involvement in rail transportation had developed as a result of federal programs. There are three basic programs which call for state participation. Those programs involve intrastate rate regulation, safety and planning.

The reorganization act transferred the Railroad Commission to the Department of Transportation for administrative purposes. However, explicit railroad programs are not mentioned in the Department of Transportation's organization statutes. Any railroad programs must develop through an appropriation to the Department of Transportation by the General Assembly or by Executive Orders of the Governor.

The 1974 reorganization initiated the Department of Transportation's involvement in rail programs. As discussed above, the General Assembly passed legislation which would allow the Secretary of the department to approve any agreement between the Railroad Commission and the Federal Railroad Administration concerning the implementation of the 1970 Federal Railroad Safety Act. An appropriation of $25,000 for fiscal years 74-75 and 75-76 was also made to aid implementation. In 1974-75, the audit report shows that the Commission received the appropriation, but the ending balance shows $26,000 as unexpended.[11]

The program for rail development was not implemented in Kentucky until the 1978-80 biennium. An appropriation was made for $420,000 in 78-79, and $720,000 in 79-80. The money was placed in the Department of Transportation planning budget.

The money appropriated by the General Assembly was used to match federal money for planning and rail service continuation. The state role in this program is to develop a plan to identify light-density railroad lines in the state. Particular emphasis is to be placed on those light-density lines which may be subject to abandonment. Federal money will be available for rehabilitation of some of the light-density lines whose continued service is considered essential.

Under the Federal Railroad Safety Act, the state may engage in a safety program to aid the federal government in investigation and surveillance of railroad lines and equipment. All programs involving states must be approved and certified by the Federal Railroad Administration.

In order to achieve certification, the state must provide an agency with regulatory jurisdiction over safety, adopt federal safety rules and regulations, and conduct investigations and surveillance prescribed by the federal government as necessary. The necessary state inspectors must be trained and certified in order for the state program to be approved.

The Railroad Commission has overseen rates since its inception in the late 1800s. The General Assembly also provided the Commission with some jurisdiction over safety. Only recently planning has evolved as a state program, and that function was given to the Department of Transportation, by Executive Order. Executive Order 78-331 designates the Department of Transportation as the lead agency for the rail service continuation program, and provides that it shall aid the Railroad Commission in implementing the safety program.[12]

Executive Order 78-331 identified these two rail programs and placed them in the Department of Transportation's jurisdiction. A third program, the rail-highway grade crossing program, had been functioning in KYDOT's Division of Design. Citing these three programs as needing proper coordination of a single organization, Governor Carroll created (Executive Order 78-1141) a Rail Division within the Department of Transportation.

The Rail Division was provided with the following areas of responsibility:

(a) Implementation of a comprehensive Rail Safety Inspection Program, as provided in the Federal Railroad Safety Act of 1970;

(2) Implementation of the recommendations concerning rail service continuation assistance contained in the State Rail Plan, in accordance with the requirements of Title VIII of the Railroad Revitalization and Regulatory Reform Act of 1976, as amended; and

(3) Implementation of the Rail/Highway Grade Crossing Safety Program, as authorized by various Federal or State legislation.[13]

As a result of this order, the Department was to develop and coordinate a rail service continuation plan, seek federal certification of a rail safety inspection program, and implement the rail-highway grade crossing program. The Rail Division within the Department of Transportation became the lead agency for all programs relating to rails, with the exception of rates.

Since Executive Order 78-1141 related to reorganization, it had to be ratified by the General Assembly. Chapter 295 of the 1980 Acts, Section 93, shows that the General Assembly failed to confirm the Executive Order. This action effectively abolished the Rail Division. The General Assembly confirmed its position with its 1980-82 biennial budget, by funding no rail program other than that of the Railroad Commission.

On May 20, 1980, Governor Brown abolished the Rail Division and transferred the Rail/Highway Grade Crossing Program back to the Division of Design (Executive Order 80-391). The rail service continuation program and the inspection programs were abolished, leaving the Commonwealth without means to participate in those federally supported programs.[14] Two months later federal funds anticipated for rehabilitating a line near Lebanon were denied because of Kentucky's lack of compliance with federal law.[15]

On July 30, 1980, Governor Brown ordered several organizational changes within the Office of Transportation Planning. Among the changes was the creation of the Division of Mass Transportation (Executive Order 80-621). This Division was made responsible for those planning functions relating to railroads.[16] The Executive Order permits the Department to submit continued updates of its rail plan and allows for the continued flow of funds to Kentucky from the Federal Railroad Administration, for rail service continuation.

Finally, on August 26, 1980, the Governor redefined the Department of Transportation as the designated agency to handle federal rail program funds. The order (Executive Order 80-692) also formally reinstituted the rail planning function into a division of the Department of Transportation.[17]

Other Regulatory Agencies

The regulation of rates of other utility and transportation functions are placed in other regulatory agencies. The Public Service Commission handles rate cases, as does the Division of Hearings staff within the Department of Transportation, although the work of the latter does not duplicate the rate regulating functions of the Railroad Commission.

An appropriate concern would be whether these regulatory agencies could take over rail rate cases and handle them with the same efficiency as the Railroad Commission, and at no greater costs.

Conclusion

A total rail transportation program has yet to develop in Kentucky. The 1970s witnessed rapid growth of governmental involvement in railroad planning and safety. However, total implementation in Kentucky has been slow to develop.

One source of confusion has been the issuance, abolishment and reinstatement of rail functions by Executive Order. The scope and role of the specific programs appear to have been misunderstood, especially during the recent change of administration.

A particular example is the rail safety program. Currently, all state rail safety statutes are within the Railroad Commission's jurisdiction. But the Commission has not been certified to conduct inspection and surveillance by the federal government and even if federal authority existed, the Commission does not have sufficient staff for such a program.

The Kentucky Department of Transportation had jurisdiction over rail safety at one time and was in the process of obtaining certification from the Federal Railroad Administration. However, the Rail Division was abolished twice, once in 1980 Senate Bill 376 and again by Executive Order 80-391.

In a discussion of the Rail Division before the Interim Joint Committee on Transportation, the Secretary of the Kentucky Department of Transportation pointed out that the Commonwealth of Kentucky had no authority to enforce safety standards. In fact, the federal act does provide that the state Secretary may file for injunctive relief against a railroad company, if a violation is reported to the Federal Government and not acted upon within sixty days after being filed.

A review of the Executive Orders filed from 1978 to the present shows additional confusion over the planning and development function. As mentioned earlier in the chapter, after the issuance of Executive Order 80-391, the Commonwealth was in danger of losing federal funds for railroad rehabilitation and development.

The federal rule in rail transportation now dictates much of the activity of the states. Without a thorough knowledge of the federal guidelines, it has become impossible to develop a solid state program. The numerous Executive Orders dealing with the state rail program are evidence of a lack of complete understanding of the federal government's role. The next chapter will attempt to explain the federal programs in greater detail.

CHAPTER V

FEDERAL PROGRAMS AND EFFECT OF PRE-EMPTION

The Federal Government has become involved in several programs related to rail service in recent years. Such programs include a nationwide rail passenger system, rail safety, planning and development, and highway/rail grade crossing safety programs. The Interstate Commerce Commission has regulated railroad tariffs for many decades.

These federal programs have an effect on the roles of every state's rail programs. Federal law can pre-empt state involvement, permit state participation programs, or limit participation to specific functions, either complementing the federal program, or exceeding the federal requirements. Each federal program will be discussed within the context of permissible state activity.

Rail Safety

The primary purpose of the Federal Railroad Safety Act—passed in 1970 as Public Law 91-458 and amended by Congress in 1980 as Public Law 96-423—was to promote safety in all areas of railroad operations, reduce railroad accidents, reduce death and injuries to persons and reduce property damage caused by accidents involving hazardous materials. Prior to the enactment of the Safety Act, the Federal Government had no regulatory control over design and manufacture of train wheels, maintenance of track and roadbed, or over any industry standards.

The Interstate and Foreign Commerce Committee of the United States Senate, in reviewing the initial 1970 legislation, reported that it did not believe that rail safety would be advanced by subjecting the national rail system to a variety of enforcements in fifty different state judicial and administrative systems. This concern was reflected in Sections 434 and 435 of Title 45, Chapter 13.[18] Section 434 states that laws, rules, and regulations relating to railroad safety shall be nationally uniform to the extent practicable. Section 435 establishes that the Secretary of the United States Department of Transportation shall retain "exclusive authority to assess and compromise penalties." These provisions pre-empt the state from adopting its own laws and regulations and prevent state administrative or judicial systems from assessing penalties.[19]

Changes in the 1980 safety provisions allow the states to seek injunctive relief in United States District Court, if the USDOT does not act on a violation of railroad safety rules within 60 days. It has previously been 90 days. However, in order to have this authority, a state must be certified to participate in the rail safety program.[20]

Federal certification of state programs requires training of qualified inspectors. These state inspectors are used to supplement federal inspectors and the state safety program through a 50 percent federal matching formula. Presently, thirty-four states have certified safety programs, but Kentucky has chosen not to participate. *The decision not to participate has left the burden of track surveillance and equipment inspection entirely in the hands of the four federal inspectors assigned to Kentucky.*

As explained above, the Kentucky Railroad Commission has some safety jurisdiction. The authority of the state is nonetheless limited by two factors. First, the Railroad Commission

has not had the staff nor the funds to conduct adequate inspections. Second, the state laws which are currently on the books have been pre-empted by Section 434 of the Safety Act.

Rail Service Continuation

The rail service continuation programs are commonly referred to as the 3-R and 4-R Acts. The former was established to rehabilitate light-density lines which rail companies had scheduled for abandonment. The inital legislation was geared primarily to rail service in the Northeast corridor of the United States, where rail companies were experiencing financial losses and being forced to abandon service.

The 4-R Act, passed later, and the local Rail Assistance Act of 1978 (Public Law 95-607) expanded the program to other parts of the country. The participation of states required each to prepare an extensive rail plan, to be subsequently updated. This plan was supposed to identify the light-density lines scheduled for abandonment. Through a public hearing process and further planning, each state was to designate any lines which would qualify for and warrant rail service continuation. States were allowed to use federal funds, under this Act, to rehabilitate branch lines which were not slated for abandonment. It permits the use of funds on the Lebanon-to-Kane line, for instance.

The Commonwealth has taken an active part in the rail service continuation program. The planning document has been processed and approved by the Federal Railroad Administration. Funding has also been approved by the FRA, and a segment of track between Lebanon and Greensburg has already received some planning funds, but no program funds have been spent on rehabilitation.

The only federal funds which have been spent for rail service continuation assistance in Kentucky were on a Lancaster branch line. These funds were operating subsidy payments, which continued for approximately nine months. At the end of this period, a determination was made to allow the railroad company to abandon the branch line.

For a time, the status of this rehabilitation program was uncertain. The abolishment of the Rail Division and subsequent Executive Order 80-391, deleting the rail service continuation function, prompted the FRA to review Kentucky's status in this program. The recommendation of the FRA as of July 18, 1980, was to cite Kentucky as deficient in sections of 49 CFR Part 266 and to withhold further assistance until the regulations are followed.[21]

On July 30, 1980, Governor Brown issued an Executive Order reorganizing the Kentucky Department of Transportation. The particular focus of the order was the restructuring of the Office of Transportation Planning, which included creating a Division of Mass Transportation, which would be responsible for the planning function.[22]

On August 26, 1980, Governor Brown issued Executive Order 80-692, citing past executive action abolishing the rail planning function and stating that the rail plan was a viable function, which restored the Kentucky Department of Transportation's authority as the "designated agency" to receive federal funds.[23]

These orders have satisfied the Federal Railroad Administration's objection to our rail planning program. The state rail update has been received by the FRA, and it appears that Kentucky is back in compliance and will continue a state rail planning function.

Rail/Highway Grade Crossing

An additional aspect of the Railroad Safety Act of 1970 is the rail/highway grade crossing program. Section 204(a) of this act provides for study of both eliminating and protecting railroad grade crossings, and protecting pedestrians in densely populated areas along railroad rights-of-way.

Section 204(b) of the legislation directs the Secretary of the USDOT to undertake a coordinated effort toward developing and implementing solutions to grade crossing problems. Federal funds have been made available for this purpose, and Kentucky is participating.

The state involvement is authorized by Executive Order 80-391. The function of rail/highway grade crossing identification was transferred out of the abolished Rail Division to the Division of Design within the Bureau of Highways.

The program is continuing with the state's identifying of potentially dangerous sites and applying for federal aid for construction. Changes to improve these crossings range from the elimination of a grade crossing, by constructing an overpass or an underpass, to the placement of signaling devices to warn motorists and pedestrians of approaching trains.

Rail Passenger Service

For decades now, other modes of transportation have created tremendous competition for rail travel. Rail passenger travel suffered, but it was realized that if service were discontinued, some commuters and intercity users would face serious hardships.

In 1970, the United States Congress passed the Rail Passenger Service Act. This legislation made it profitable for corporations, with the assistance of federal guarantee loans, to institute intercity rail passenger service. As its title suggests, the 1970 Act calls for a national rail passenger system.

AMTRAK, as this national system is commonly known, was created to provide a balanced transportation system by relieving the transportation burden on highway and air travel. The system is particularly geared for travel between highly populated areas.

The federal involvement in passenger service has prevented other rail companies from providing similar services. The only regularly scheduled passenger service provided in Kentucky is through AMTRAK. Initially, AMTRAK operated four routes through Kentucky:

(a) The Floridian, operating over Louisville and Nashville (L & N) trackage between Chicago and Miami. Station stops included Louisville and Bowling Green.

(b) The Cardinal, with service between Chicago and Washington, operating on Chessie (C & O) trackage with stations in Maysville, South Portsmouth and Catlettsburg.

(c) The Hilltopper, operating from Catlettsburg via Charleston and Virginia stations, to Washington.

(d) The Panama Limited, operating over Illinois Central Gulf (IC & G) trackage from Chicago to New Orleans, including a station stop in Fulton, Kentucky.

In October of 1979, the AMTRAK corporation received permission to cancel the Floridian. The long-haul service had been deemed unprofitable, and approximately two years after the initial AMTRAK request, service was discontinued.

At the time of its creation, the Kentucky Railroad Commission was given certain powers over passenger service. These provisions are contained within KRS Chapter 276 and range from issues pertaining to requiring waiting rooms and facilities at terminals, to reports being transmitted to the Attorney General of persons receiving free fares for transportation. These provisions have been rendered irrelevant to passenger service; however, since AMTRAK's affairs are governed by federal law, and the only dealings states are likely to have with AMTRAK are requests for service continuation or service initiation.

Regulation of Rates

The Interstate Commerce Commission has had authority over freight rates for common carrier transportation since 1887. The authority was initiated around the turn of the century when rail transportation was the only means of long-haul overground transportation. As competition from truck and water freight developed, the ICC was given authority to regulate these freight rates as well.

Traditionally, the ICC was concerned with rates on interstate cargo and any other rates which might hamper interstate commerce. Since 1920, the ICC has possessed authority to require a change in *intrastate* rates, if they burden *interstate* commerce. The intrastate rates were established by state regulatory commissions. States established public service commissions, railroad commissions and other regulatory agencies to deal with intrastate rate requests.

In recent years, the United States Congress has expanded the ICC authority over intrastate rates. In 1978, Congress added a provision to grant ICC exclusive authority in two specific instances to prescribe *intrastate* rates. ICC may prescribe intrastate rates when a rail carrier files with an appropriate state authority a protest regarding a changed intrastate rate or a change in classification, rule or practice that has the effect of changing an intrastate rate, which will necessitate an adjustment to the rate charged on similar traffic movements in interstate or foreign commerce. Secondly, the ICC may intervene when a state authority fails to take final action on a rate change by the 120th day after such a filing.[25]

The effect of the latter is to pre-empt the state's authority over intrastate rail whenever the state fails to act. The Kentucky Railroad Commission has not been in violation of the 120th day provision to date, but its authority to hold continuing hearings on a rate case are thereby diminished. Moreover, recent federal legislation could further reduce Kentucky's role in the determination of intrastate rates.

The enactment of Congress of the Staggers Rail Act of 1980 could further restrict the state's, specifically the Kentucky Railroad Commission's, authority to regulate intrastate rates. Section 214 of the Act amended Title 49 Section 11501, of the United States Code, to require states to apply federal regulatory standards and procedures to rate decisions. The states, in order to maintain authority, must be certified by the Interstate Commerce Commission.

This legislation was signed by President Carter on October 14, 1980. Letters have already been submitted to the states notifying them of the requirements to obtain certification. The correspondence also notes that upon enactment of this Act, state jurisdiction over general rate increases was terminated.

The federal government has become involved in virtually all phases of rail programs. The states have been left with the option to participate on particular matters. Should a state

choose not to participate, the affected program will either be administered by the federal government, or abolished in that state.

Conclusion

The Federal Government has initated many of the current policies and programs related to rail transportation. Virtually all state policy regarding railroads must be designed to complement existing federal law.

The interstate nature of most rail transportation and the increasing problems facing the rail industry served as the impetus for such federal involvement. Uniformity of statutes and regulations have left the states with limited choices in the rail transportation area. The state choices are simply whether to participate, and, if so, what level of participation.

Duplication of services is hardly a problem at the state level because of the pre-emptive nature of federal legislation. Safety rules are determined by federal guidelines. State participation may occur, but states must initially report violations to the Federal Railroad Administration for action before seeking their own injunctive relief.

Rail rehabilitation funds authorized by Congress permit states to aid local communities either by retaining rail service or upgrading existing service levels on branch lines. This program could not have been initiated without federal aid, but even with that partial support, it is becoming evident that local governments would need to depend on a financial commitment from the state in order to establish any rehabilitation projects.

As a result of action of the 96th Congress, the regulation of intrastate rates by the state now involves federal certification. The state must adopt guidelines approved by the Interstate Commerce Commission to regulate intrastate rates, and even after such guidelines are approved, all general rate increases will be reviewed by ICC.

The decision left to the states, if participation is desired, is to designate the agency to provide state authority. The primary purpose of the Kentucky Railroad Commission is rate regulation. Because of recent Congressional action—passage of the Staggers Act and the Railroad Safety Act—this function must now be reviewed. Kentucky has chosen not to participate in the federal safety program and guidelines for rate regulation are just being developed.

The Legislative and Executive Branches of Kentucky government must review the total role of the state's rail transportation function. Needs must be determined in the areas of development, safety and regulation, and organizational changes made to implement and fund activities in rail transportation.

CHAPTER VI

FINDINGS AND RECOMMENDATIONS

Rail transportation programs have become more complicated since Kentucky's initial involvement in rates and rights-of-way activity in the late 1800s. Federal programs now involve safety, track rehabilitation, transportation planning and providing of passenger service. The Commonwealth must decide whether to participate in any or all of these programs.

The main concern of this study, as outlined by House Concurrent Resolution 105, has been to determine whether any duplication of services occurs in the Kentucky Department of Transportation and the Kentucky Railroad Commission's safety and planning programs.

Finding Number One

The Kentucky Department of Transportation and the Kentucky Railroad Commission do not have duplicate functions regarding rail planning and safety.

The rail safety program is under the direction of the Federal Railroad Administration in Washington, D.C. The Kentucky Railroad Commission has jurisdiction over safety as authorized by KRS Chapter 276. However, as explained in Chapter V of this study, the federal jurisdiction over safety renders any Commission statutes ineffective. Finally, the Executive Orders issued by Governor Brown demonstrate a policy of non-participation in safety matters by the Kentucky Department of Transportation.

Since the safety statutes of the Kentucky Railroad Commission have little effect, the only function of the Railroad Commission is rate and service regulation. The Department of Transportation has no authority over railroad regulations, but does hold hearings on motor carrier rates. Again, with regard to regulation, there is no duplication between the services provided by the Railroad Commission and the Department of Transportation.

Government involvement in rail planning is a relatively new thing: the 3-R and 4-R Acts passed by Congress in the early 1970s initiated the concept. In Kentucky the state planning role was assigned to the Department of Transportation. The Railroad Commission does not have the staff or budget to initiate planning activities for a single mode.

The basic service provided by the Kentucky Railroad Commission is a review of rates. Yet the Public Service Commission and the Department of Transportation are also involved in establishing rates. The General Assembly should examine the budget of all rate-making commissions and determine whether railroad rates could be incorporated into a single rate-reviewing agency.

Recommendation Number One

The General Assembly, in its interim discussions, should decide whether it desires state certification of rate regulation by the federal government, as required by the 1980 Staggers Act. If so, it must decide which agency should have the regulatory authority. Criteria for such a determination should be based on existing budgets and projected additional workload of the affected commissions.

Finding Number Two

Railroad planning and safety functions have been subjected to constant reorganization in Kentucky since the beginning. An examination of the Executive Orders issued reveals that much confusion has surrounded state safety and planning policies, thus prohibiting smooth implementation.

A review of administrative action taken shows constant change in the railroad planning program and implementation as well as the abolishment of safety programs. These rail programs involved federal aid, yet the state administrative officials have failed to ascertain the state and federal roles in rail transportation.

An example of the constant shuffling of the rail planning program supports this claim. The following is a chronological review of events concerning Kentucky's role in state rail planning.

- May 1978—Governor Carroll issues Executive Order 78-331, authorizing the Department of Transportation to receive funds for rail service continuation from the Federal Railroad Administration.
- November 1978—Governor Carroll issues Executive Order 78-1141, creating a Rail Division within the Department of Transportation, one function of which is rail service continuation.
- 1979—Kentucky receives federal money to begin rehabilitation on the Lebanon to Greensburg track under the rail service continuation program.
- April 1980—General Assembly fails to ratify Executive Order 78-1141, effectively abolishing the Rail Division.
- May 1980—Governor Brown issues Executive Order 80-391, abolishing the Rail Division and two of its functions, one of which is rail service continuation.
- June 1980—Kentucky requests additional federal funds for completion of the Lebanon-Greensburg rehabilitation project.
- July 1980—Federal Railroad Administration cites Kentucky as deficient in Part 266 of the rail service continuation program and refuses to grant funding request.
- July 1980—Governor Brown issues Executive Order 80-621, placing the previously abolished planning function in the Division of Mass Transportation.
- August 1980—Governor Brown issues Executive Order 80-692, designating the Kentucky Department of Transportation as the agency to receive rail service continuation funds from the federal government, again placing the planning functions in the Division of Mass Transportation.

The creation, abolishment and reestablishment of the rail planning function has been primarily by executive action. The history of the railroad safety program is similar. The General Assembly does not appear to be involved in policy decisions, with the exception of failing to ratify Executive Order 78-1141, which was contained in a voluminous 1980 Reorganization Act.

Recommendation Number Two

The General Assembly should examine the executive actions and policies relating to railroad programs and review the rail safety and planning programs to determine whether the executive decisions have been appropriate.

Finding Number Three

While funds have been allocated in previous fiscal years for railroad safety and development, Kentucky's safety program was never certified by the federal government, and railroad development programs have been limited to the planning of one south-central Kentucky project and providing operating expenses for one central Kentucky branch line.

As Chapter III of this study shows, the General Assembly appropiated $50,000 for rail safety in 1976-78 and $1.3 million for rail development in 1978-80. The General Assembly has not received formal reports on these programs, nor word of their implementation. Policy toward state involvement has been extremely flexible in these areas and a legislative review seems warranted.

Recommendation Number Three

The General Assembly should examine previous rail transportation allocations and implementation problems and determine whether further action by Kentucky with regard to rail safety and planning is needed.

House Concurrent Resolution 105 called for examination of duplication of rail safety and planning programs between state agencies. The present study concluded that no duplication exists. However, it was determined that a solid legislative or executive policy in these areas has failed to develop. The study has attempted to explain the rail transportation program and the participation programs in which Kentucky could become involved. The action needed at this time is a strong legislative review of the rail policy options and appropriate recommendations to the Governor or the next session of the General Assembly.

FOOTNOTES

1. *Official Report of the Debates*, Constitutional Convention, 1890, Vol. 4, p. 4986.

2. *Official Report of the Debates*, p. 4984.

3. *Official Report of the Debates*, p. 5014.

4. *The Kentucky Constitution*, LRC Informational Bulletin No. 112 (Frankfort, 1976), p. 30.

5. *The Kentucky Constitution*, p. 41.

6. *The Kentucky Railroad Commission*, LRC Research Report No. 71 (Frankfort, May, 1972), p. 3.

7. *The Kentucky Railroad Commission*, p. 4.

8. Opinion of the Attorney General, 80-255, May 8, 1980 (Frankfort).

9. *Journal of the Senate of the General Assembly of the Commonwealth of Kentucky*, Regular Session of 1980, Volume II (Frankfort, Ky.), p. 2168.

10. *The Kentucky Railroad Commission*, pp. 7-9.

11. *Railroad Commission Audit Report*, Auditor of Public Accounts, June 30, 1975 (Frankfort).

12. Executive Order of the Governor, 78-331, May 2, 1978 (Frankfort).

13. Executive Order of the Governor, 78-1141, November 20, 1978 (Frankfort).

14. Executive Order of the Governor, 80-391, May 20, 1980 (Frankfort).

15. Letter from Federal Railroad Administration to Kentucky Department of Transportation, July 18, 1980.

16. Executive Order of the Governor, 80-621, July 30, 1980 (Frankfort).

17. Executive Order of the Governor, 80-692, August 26, 1980 (Frankfort).

18. Federal Railroad Safety and Hazardous Materials Transportation Control Act of 1970, House Report 91-1194 (Washington, D.C.), p. 4105.

19. United States Code, Chapter 45, sec. 434-435, p. 455.

20. Staggers Act of 1980, Report of the Committee on Conference on S 1946; Report Number 96-1430, September 30, 1980, U.S. Government Printing Office, Washington, D.C., 1980.

21. Letter from Federal Railroad Administration.

22. Executive Order of the Governor, 80-391.

23. Executive Order of the Governor, 80-692, August 26, 1980 (Frankfort).

24. Kentucky Rail Plan 1978, Commonwealth of Kentucky, Department of Transportation (Frankfort), p. II 31-32.

25. U. S. Code Annotated, Title 49, Chapter 115, sec. 11501 (Washington, D.C.).

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U.S. Code, Chapter 45, sec. 434-435, p. 455.

U.S. Code Annotated, Title 49, Chapter 115, sec. 11501, Washington, D.C.

APPENDICES

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APPENDIX 1

GENERAL ASSEMBLY

COMMONWEALTH OF KENTUCKY

REGULAR SESSION 1980

House Resolution No. 105

March 24, 1980

The following bill was reported to the Senate from the House and ordered to be printed.

A CONCURRENT RESOLUTION directing the Legislative Research Commission to study the shared responsibility of the Railroad Commission and Department of Transportation regarding rail safety and planning programs.

WHEREAS, the Kentucky Railroad Commission is statutorily empowered to ensure the safe operation of trains and to plan the future development of railways as provided in KRS 276.550; and

WHEREAS, in the recent past the Railroad Commission has not been able to fulfill its statutory function with regard to safety and planning due to budget limitations; and

WHEREAS, as a result the administration of both safety and planning programs was transferred in 1978 from the Railroad Commission to the Kentucky Department of Transportation by Executive Order of the Governor; and

WHEREAS, the transfer of these functions has never been ratified by the General Assembly as provided in KRS 12.025(a) nor have the statutes empowering the Railroad Commission with these responsibilities been repealed; and

WHEREAS, the present situation, where the responsibility for the rail safety and planning programs resides with one agency which the funding for these programs resides in another prevents the effective management of these programs as evidenced by the soaring number of

train derailments;

NOW, THEREFORE,

Be it resolved by the House of Representatives of the General Assembly of the Commonwealth of Kentucky, the Senate concurring therein:

1 Section 1. The Legislative Research Commission is
2 directed to study the shared responsibility of the Rail-
3 road Commission and Department of Transportation regard-
4 ing rail safety and planning programs.
5 Section 2. That copies of the study be transmitted
6 to the Director of the Legislative Research Commission,
7 the President Pro Tempore of the Senate and the Speaker
8 of the House of Representatives by October 1, 1981.
9 Section 3. Staff services to be utilized in
10 completing this study are estimated to cost $7,000.
11 These staff services shall be provided from the regular
12 Commission budget and are subject to the limitations and
13 other research responsibilities of the Commission.

APPENDIX 2

JULIAN M. CARROLL
GOVERNOR

EXECUTIVE ORDER
78-331
May 2, 1978

Secretary of State
Frankfort
Kentucky

Designation of State Agency to
Administer and Coordinate Rail Service Plan

WHEREAS, the United States Department of Transportation Act, as amended (Pub. L. 94-210, §803, February 5, 1976, 90 Stat. 130, 49 U.S.C. 1654(j)(2)), provides that a State is eligible to receive rail service assistance from the Federal Government if the State establishes an adequate plan for rail services in such State which is administered and coordinated by a designated State Agency; and

WHEREAS, regulations promulgated in implementation of the aforesaid Act (49 CFR 266.1(f)) set forth that the "designated State agency", as such term is used in the Act, means the State Agency designated by the Governor:

NOW, THEREFORE, I, JULIAN M. CARROLL, Governor of the Commonwealth of Kentucky, by virtue of the authority vested in me as set forth above, do hereby designate the Department of Transportation of the Commonwealth of Kentucky as the State Agency for administering and coordinating the plan for rail service in the Commonwealth of Kentucky and, in addition, such Department is designated and directed to cooperate with all other State Agencies, including the Kentucky Railroad Commission, under KRS 276.550, to take all practicable steps to improve transportation safety and to reduce transportation related energy utilization and pollution.

This Order supersedes the previous designation of the Kentucky Department of Transportation as the designated State Agency set forth in a

JULIAN M. CARROLL
GOVERNOR

EXECUTIVE ORDER

78-331

May 2, 1978

Secretary of State
Frankfort
Kentucky

letter dated August 27, 1976, to the Federal Railroad Administration, and this Order shall become effective immediately.

JULIAN M. CARROLL
Governor

DREXELL R. DAVIS
Secretary of State

CLINTON H. NEWMAN II
Assistant Secretary of State

APPENDIX 3

JULIAN M. CARROLL
GOVERNOR

EXECUTIVE ORDER

78-1141

November 20, 1978

Secretary of State
Frankfort
Kentucky

RELATING TO REORGANIZATION

Department of Transportation
Rail Division

WHEREAS, public officials must constantly seek improvements in the quality of state services and in their administration provide for the protection and safety of the citizens of the Commonwealth; and

WHEREAS, the railroad systems operating within the Commonwealth increasingly transport Hazardous Materials; and

WHEREAS, the rails and roadbeds have undergone deterioration to the point that Rail Accidents are more probable; and

WHEREAS, there has been an increasing rate of Rail Accidents in the Nation as well and in the Commonwealth; and

WHEREAS, Executive Order 78-331 dated May 2, 1978, has designated the Department of Transportation to be the state agency for administering the 1976 Railroad Revitalization and Regulatory Reform Act as provided for in Title VIII, P.L. 94-210; and

WHEREAS, federal assistance under this Program is on a federal-state-local sharing basis; and

WHEREAS, federal assistance requires the establishment of a State Rail Plan and other qualifying criteria outlined in Section 804 of the Act; and

WHEREAS, pursuant to KRS 276.550, the Kentucky Railroad Commission has been authorized to administer the Federal Railroad Safety Act of 1970 (45 USC 421, et sequitur); and

JULIAN M. CARROLL
GOVERNOR

EXECUTIVE ORDER

78-1141

November 20, 1978

Secretary of State
Frankfort
Kentucky

WHEREAS, for proper coordination a single organizational unit should administer and supervise certain aspects of both these Acts as well as other rail-related responsibilities of the Kentucky Department of Transportation:

NOW, THEREFORE, I, JULIAN M. CARROLL, Governor of the Commonwealth of Kentucky, pursuant to the authority vested in me by KRS 12.025, and in order for the Commonwealth of Kentucky to qualify for and administer the federal assistance provided for in these Acts, hereby order and direct the establishment of a Rail Division within the Department of Transportation through the following reorganization:

1. The Rail Division within the Department of Transportation is hereby created. The Rail Division shall be headed by a Director who will be appointed by the Secretary in accordance with KRS Chapter 12.050 and shall be responsible to the Secretary of Transportation.
2. The Rail Division shall have the following responsibilities:
   a. Implementation of a comprehensive Rail Safety Inspection program as provided for in the Federal Railroad Safety Act of 1970;
   b. Implementation of the recommendations concerning rail service continuation assistance contained in the State Rail Plan as developed by the Office of Transportation Planning in accordance with the requirements of Title VIII of the Railroad Revitalization and Regulatory Reform Act of 1976 as amended;

JULIAN M. CARROLL
GOVERNOR

EXECUTIVE ORDER

78-1141

November 20, 1978

Secretary of State
Frankfort
Kentucky

c. Implementation of the Railway-Highway Grade Crossing Safety Programs as authorized by various Federal or State legislation; and

d. All other rail-related duties as may be assigned by the Secretary, Kentucky Department of Transportation.

3. All positions which have primary responsibility for rail inspection within the Office of Highway Safety Programs and the Division of Systems Planning, Office of Transportation Planning shall be transferred to the Rail Division. All positions which have primary responsibility for Railway Highway Grade Crossing Safety Programs within the Utilities Section, Division of Design, Bureau of Highways shall be transferred to the Rail Division.

The Secretary of the Department of Finance, the Commissioner of the Department of Personnel and the Secretary of Transportation are directed to take such action to provide for the hiring of personnel, funds, equipment, and do all things necessary and required to carry out the terms of this Order.

This Order shall become effective December 1, 1978.

Julian M. Carroll

JULIAN M. CARROLL, Governor
Commonwealth of Kentucky

Drexell R. Davis

DREXELL R. DAVIS
Secretary of State

APPENDIX 4

JOHN Y. BROWN, JR.
GOVERNOR

EXECUTIVE ORDER

80-391

May 20, 1980

Secretary of State
Frankfort
Kentucky

RELATING TO REORGANIZATION

Abolition of Rail Division
Department of Transportation

Pursuant to the authority vested in me by KRS 12.025, I, John Y. Brown, Jr., Governor of the Commonwealth of Kentucky, do hereby direct the following reorganization:

1. The Rail Division within the Department of Transportation is hereby abolished. Executive Order 78-1141, which established the Division is declared void.

2. The Railway-Highway Grade Crossing Safety Program is transferred to the Division of Design, Bureau of Highways. All personnel, funds and equipment assigned to this program are transferred to the Division of Design.

3. The rail safety inspection program and the rail service continuation program assigned to the Division by Executive Order 78-1141 are hereby abolished. All positions relating to these programs are hereby abolished.

4. The Secretary of Finance and the Commissioner of Personnel shall take all necessary steps to implement this Order.

This Order shall be effective April 16, 1980.

JOHN Y. BROWN, JR., Governor
Commonwealth of Kentucky

FRANCES JONES MILLS
Secretary of State

APPENDIX 5

Suite 440-A
1720 Peachtree Road N. W.
Atlanta, Georgia 30309
July 18, 1980 (404) 881-2717

Mr. Frank R. Metts
Secretary, Department of
Transportation
State Office Building
Frankfort, Kentucky 40622

Dear Mr. Metts:

Thank you very much for your letter transmitting the annual update of the Kentucky Rail Plan for FY 79-80.

I have received a copy of Executive Order 80391, Commonwealth of Kentucky. Paragraph 1. of this Order voided Executive Order 781141; paragraph 3. of the same Order discontinued the "Rail Service Continuation Program" effective April 16, 1980.

Since the Executive Order abolished the organization that was certified to implement the Title VIII programs, it appears that the State of Kentucky is deficient in sections of 49 CFR Part 266 (copy enclosed) captioned "Assistance to States for Local Rail Service." It is my understanding that the Commonwealth of Kentucky will apply for the remaining grant money very soon. No grants can be approved unless the enclosed rules and regulations are followed. I call your immediate attention to Section 266.5, with special emphasis on Section 3. in its entirety.

Mr. Metts, our office will work with you in any way possible to assist you. Also, you have the planning and engineering section of the State Administrator's office, Federal Highway Administration in Frankfort to help you should you need their expertise.

Very truly yours,

Mac E. Rogers
Director
Office of Federal Assistance

Enclosure

JOHN Y. BROWN, JR.
GOVERNOR

EXECUTIVE ORDER

80-621

July 30, 1980

Secretary of State
Frankfort
Kentucky

c. The Division of Programming which shall be headed by a Director. The Division shall assume duties primarily performed by the Division of Transportation Facilities Planning, the programming section created by Executive Order 74-483 and others assigned by the Secretary.

3. The Divisions of Transportation Facilities Planning, Statewide Transportation Systems Planning and Urban and Regional Planning are hereby abolished. All personnel, funds and equipment shall be transferred as provided herein.

4. The Division of Environmental Systems and the Division of Aeronautics, established previously, shall continue as administrative units assigned to the Office of Planning and Programming.

5. The Secretary of Finance and Commissioner of Personnel shall take all necessary steps to effectuate this Order.

This Order shall be effective July 15, 1980.

John Y. Brown, Jr.
Governor

Frances Jones Mills
Secretary of State

APPENDIX 6

JOHN Y. BROWN, JR.
GOVERNOR

EXECUTIVE ORDER

80-621

July 30, 1980

Secretary of State
Frankfort
Kentucky

RELATING TO REORGANIZATION
DEPARTMENT OF TRANSPORTATION
OFFICE OF PLANNING AND PROGRAMMING

Page

WHEREAS, the Office of Transportation Planning is responsible for the long-range planning for all forms of transportation within the Commonwealth; and

WHEREAS, the Secretary of Transportation has recommended a reorganization of the Office of Transportation Planning and the restructuring of the Divisions within this Office to provide a more coordinated means of planning and programming,

NOW, THEREFORE, I, John Y. Brown, Jr., Governor of the Commonwealth of Kentucky pursuant to KRS Chapter 12.025 do hereby order and direct the following reorganization:

1. The Office of Transportation Planning will hereafter be known as the Office of Planning and Programming.

2. The following divisions are hereby established within the Office:

a. The Division of Mass Transportation which shall be headed by a Director. The Division shall assume those duties heretofore performed by the Division of Urban and Regional Planning, those relating to railroads performed by the Rail Section of the Division of Statewide Transportation Systems Planning, and others assigned by the Secretary.

b. The Division of Highway Systems which shall be headed by a Director. The Division shall assume those duties performed by the Division of Statewide Transportation Systems Planning, excluding those relating to railroads, and others assigned by the Secretary.

APPENDIX 7

JOHN Y. BROWN, JR.
GOVERNOR

EXECUTIVE ORDER

80-692

August 26, 1980

Secretary of State
Frankfort
Kentucky

RELATING TO REORGANIZATION

ASSIGNMENT OF FUNCTIONS AND DUTIES TO ADMINISTER AND COORDINATE RAIL SERVICE PLAN TO DIVISION OF MASS TRANSPORTATION

WHEREAS, by Executive Order 78-331 dated May 2, 1978, the Governor of the Commonwealth of Kentucky designated the Department of Transportation as the State Agency to administer and coordinate the Rail Service Plan as required by the United States Department of Transportation Act, as amended by the 1976 Railroad Revitalization and Regulatory Reform Act, (Pub. L. 94-210, Sec. 803, February 5, 1976, 90 Stat. 130, 49 U.S.C. 1654 (j)(2)) and as required by regulations promulgated in implementation of said Act (49 CFR 266.1 (f)); and

WHEREAS, by Executive Order 78-1141 dated November 20, 1978, the Governor of the Commonwealth of Kentucky established a Rail Division within the Department of Transportation with the functions and duties of administering and coordinating the aforesaid Rail Service Plan; and

WHEREAS, by Executive Order 80-391 dated May 20, 1980, the Governor of the Commonwealth of Kentucky abolished the Rail Division within the Department of Transportation along with the functions and duties of administering and coordinating the aforesaid State Rail Plan; and

WHEREAS, it has been determined that the responsibility of performing the functions and duties of administering and coordinating the aforesaid State Rail Plan should be performed by the Division of Mass Transportation in the Office of Planning and Programming within the Department of Transportation:

JOHN Y. BROWN, JR.
GOVERNOR

EXECUTIVE ORDER

80-692

August 26, 1980

Secretary of State
Frankfort
Kentucky

NOW, THEREFORE, I, John Y. Brown, Jr., Governor of the Commonwealth of Kentucky, pursuant to the authority vested in me by KRS 12.025, do hereby direct that the Kentucky Department of Transportation be the "designated State agency" in accordance with 49 CFR 266.1(f) and that the Division of Mass Transportation shall be responsible for the day to day functions and duties of administering and coordinating the plan for rail service in the Commonwealth of Kentucky and, in addition, such Division is designated and directed to cooperate with all other State agencies, including the Kentucky Railroad Commission, under KRS 276.550, and also such Division shall have the responsiblity of performing the functions and duties necessary to implement the recommendations concerning rail service continuation assistance contained in the State Rail Plan as developed by the Office of Planning and Programming in accordance with the requirements of Title VIII of the Railroad Revitalization and Regulatory Reform Act of 1976 as amended.

John Y. Brown Jr.
JOHN Y. BROWN, JR., Governor
Commonwealth of Kentucky

Frances Jones Mills
FRANCES JONES MILLS
Secretary of State

Eugene Harrell
EUGENE HARRELL
Assistant Secretary of State