Section 214 of the Staggers Rail Act: Is It Working as Congress Intended?

DAVID H. BAKER*

* The author is an associate with the law firm of Holland & Knight and practices law in the firm's Washington office. He received his B.A. from Hamilton College and his J.D. from George Washington University.

I. INTRODUCTION

The purpose of this article is to examine the implementation of Section 214 of the Staggers Rail Act of 1980[1] and the impact of this Section on the traditional state regulation of intrastate rail rates. The thesis of this article is that the Interstate Commerce Commission ("ICC" or "Commission") has interpreted Section 214 in a manner contrary to the intent of the drafters of the legislation. The few court decisions to date[2] interpreting Section 214 have failed to conclusively resolve the issue of how far the ICC may go in directing state regulation of intrastate rail rates. Accordingly, it is recommended here that either Supreme Court review or further Congressional action is needed to resolve this issue.

The article will briefly review state regulation over rail rates prior to enactment of the Interstate Commerce Act, the various amendments to the Act as they pertain to state intrastate rail rate regulation and the background of Section 214 generally. The article will address in greater detail the more significant ICC and court decisions involving Section 214 with an emphasis on how far the ICC may go in directing the states rail rate regulation. The article will conclude with a discussion of the apparent conflict between the Sixth Circuit[3] and the D.C. Circuit,[4] on this issue and the possibility of Supreme Court review or the need for legislative change.

II. ENACTMENT OF SECTION 214 OF THE STAGGERS RAIL ACT OF 1980- 49 U.S.C. SECTION 11501

A. PAST PRACTICES

1. PRIOR TO INTERSTATE COMMERCE ACT

Under the Commerce Clause of the United States Constitution[5] Congress has the power to "regulate commerce among the several states." While in the early 1800's many states enacted statutes which purported to

1. Pub. L. No. 96-448, 94 Stat. § 1898 (codified as amended in scattered sections of 45, 49 U.S.C.).
2. This article was completed in the summer of 1985.
3. Kentucky Util. Co. v. ICC, 721 F.2d 537 (6th Cir. 1983).
4. Utah Power & Light Co. v. ICC, 747 F.2d 721 (D. C. Cir. 1984), *reh'g denied*, 764 F.2d 865 (D.C. Cir. 1985).
5. U.S. CONST. art. I, § 8, cl. 3.

regulate intrastate and interstate transportation,[6] by the latter part of the 19th century there were a number of federal legislative enactments dealing with interstate rail transportation including the Garfield Act of 1866[7] and the precursor to the Livestock Transportation Act of 1906.[8] After the Supreme Court's decision in *Wabash Rail Company v. Illinois*,[9] which held that a state may not regulate charges for carriage within its own boundaries of goods brought from outside the state or destined to points outside the state, it became apparent that the federal power over interstate rail transportation was quite broad, if not exclusive.[10] With the passage of the Interstate Commerce Act in 1887,[11] exclusive federal jurisdiction over interstate rail transportation was established. However, section 1 of the original Act expressly reserved jurisdiction over intrastate rail rates to the states.[12]

2. *Shreveport and Transportation Act of 1920*

Through a series of court decisions and amendments to the Interstate Commerce Act, the Commission began to gradually acquire jurisdiction over certain aspects of intrastate rail commerce. In the *Shreveport* rate case of 1914,[13] the Supreme Court held that the antidiscrimination provisions of the Interstate Commerce Act made it unlawful for railroads to maintain intrastate rates which discriminated against interstate commerce. The Court thus concluded that the Commission was authorized to order the removal of these discriminatory intrastate rates, although such rates had previously been considered to be exclusively within the state's jurisdiction. The Supreme Court's holding in Shreveport was enacted into law by Section 416 of the Transportation Act of 1920.[14]

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6. *See*, ILL. CONST., art. VII; *see* also the so called "Granger cases" headed by Munn v. Illinois, 94 U.S. 113 (1877).

7. Garfield Act of 1866, 14 Stat. 66 (1866).

8. Act of March 3, 1873, ch. 252, 17 Stat. 584, *repealed by*, Livestock Transportation Act of 1906, ch. 3594, 34 Stat. 607.

9. 118 U.S. 557 (1886).

10. *Id.*

11. 24 Stat. 379 (1887).

12. *Id.*. Section 1 provided in pertinent part as follows: The provisions of this Act shall not apply: To the transportation of passengers of property, as to the receiving, delivering, storage, or handling of property, wholly within one state and not shipped to or from a foreign country or to any state or territory as aforesaid.

13. Houston & Tex. Ry. v. U.S., 234 U.S. 342 (1914).

14. 41 Stat. 484 (1920) (codified at 49 U.S.C. § 13(4) (1980)). Section 13 of the Interstate Commerce Act, which then governed intrastate rail rates, was amended to provide that:

> (4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any *undue* or *unreasonable advantage*, *preference*, or *prejudice* as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any *undue*, *unreasonable*, or *unjust discrimination* against interstate or foreign

Although the Commission was granted authority to establish intrastate rates where the rates were discriminatory or unreasonably interfered with interstate commerce, the Commission was not granted unlimited authority over intrastate rates. Rather, the states continued to have some autonomy over intrastate rail traffic.

3. *TRANSPORTATION ACT OF 1958*

The Transportation Act of 1958 expanded the Commission's authority over intrastate rail rates by further extending section 13 of the Interstate Commerce Act.[15] Under the 1958 amendments, the Commission was given authority to institute an investigation into an intrastate rail rate even if it was being considered by the state commission at the same time.[16] A carrier petition under Section 13[17] was to be handled expeditiously as opposed to waiting for the state commission to act. The 1958 amendments[18] were designed to expedite the authorization of general revenue *ex parte* increases in the several states, which often lagged behind authorization by the Commission at the interstate level by several years.

4. *RAILROAD REVITALIZATION AND REFORM ACT AMENDMENTS*

Further amendments to Section 13 resulted from the enactment of the 4R Act in 1976.[19] Under the new provisions of the Act, the Commission was permitted to authorize an intrastate rail rate if a rate proceeding was pending before the state commission and the state commission did not act within 120 days of the commencement of that rate proceeding.[20] The state thus retained primary jurisdiction over the rates if it acted within 120 days.[21] With the call for new legislation in the late 1970's, the states'

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commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. (emphasis added)

15. Pub. L. No. 85-625, 72 Stat. 568 (1958). The 1958 amendments added the following language to Section 13:

That upon the filing of any petition authorized by the provisions of paragraph (3) hereof to be filed by the carrier concerned, the Commission shall forthwith institute an investigation as aforesaid into the lawfulness of such rate, fare, charge, classification, regulation, or practice (*whether or not theretofore considered by any State agency or authority and without regard to the pendency before any State agency or authority of any proceeding relating thereto*) and shall give special expedition to the hearing and decision therein. (emphasis added)

16. *Id.*

17. *Id.*

18. *Id.*

19. Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (codified as amended in scattered sections of 45, 49 U.S.C.).

20. *Id.*

21. The new language of section 13 provided:

role was to be greatly curtailed.

B. NEED FOR CHANGE

One of the premises of enactment of new federal rail legislation[22] in the late 1970's was that the carriers were facing a severe capital shortfall and in deteriorating financial condition.[23] Excessive regulation of both interstate and intrastate rail rates was widely perceived as the principal cause of the railroads' problem.[24] The House Committee on Interstate and Foreign Commerce noted in its report in May of 1980[25] that intrastate rail traffic was under a different regulatory scheme than interstate traffic and that as a result the average revenue to variable cost ratio for intrastate traffic was 120 percent as compared to 136 percent for interstate traffic.[26] The House Committee went on to note that:

> if the intrastate ratio had been equal to the interstate ratio in 1977 the railroads would have earned $400,000,000 in additional revenues.[27]

Thus Congress perceived a need to bring the State's rail regulatory authority in line with the Interstate Commerce Commission's regulations.[28]

C. CONGRESSIONAL RESOLUTION

On October 14, 1980, President Carter signed into law the Staggers Rail Act of 1980,[29] with an effective date of October 1, 1980. Section 214 of the Staggers Act[30] radically changed the relationship between State Commissions and the Interstate Commerce Commission as to regulation

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> The Commission has exclusive authority to prescribe an intrastate rate for transportation provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title when—
> (A) a rail carrier files with an appropriate State authority a change in an intrastate rate, or a change in a classification, rule or practice that has the effect of changing an intrastate rate, that adjusts the rate to the rate charged on similar traffic moving in interstate or foreign commerce; and
> (B) the State authority does not act finally on the change by the 120th day after it was filed.

22. Staggers Rail Act of 1980, *supra* note 1.
23. *See*, Section 2 of Pub. L. No. 96-448, 94 Stat. 1913 (1980).
24. *Id.*
25. H.R. REP. NO. 96-1035, 96th Cong., 2nd Sess., at 61.
26. *Id.*, at 61.
27. *Id.*, at 61.
28. H.R. Rep. No. 96-1430, 96th Cong., 2nd Sess., at 106; *reprinted in*, 1980 U.S. CODE CONG. & AD NEWS, 4110, 4138 which noted:

> The conferees' intent is to ensure that the price and service flexibility and revenue adequacy goals of the Act are not undermined by state regulation of rates, practices, etc., which are not in accordance with these goals. Accordingly, the Act preempts state authority over rail rates, classifications, rules and practices. States may only regulate in these areas if they are certified under the procedures of this section.

29. Staggers Rail Act, *supra* note 1.
30. 94 Stat. 1913 (1980).

of intrastate rail rates. The avowed purpose of these changes was, to bring state practices in line with federal practices so as to avoid (1) regulatory delay by the state commissions[31] and (2) the use of standards different than those used by the Interstate Commerce Commission.[32]

Section 214 of the Staggers Act substantially modified 49 U.S.C. Section 11501 of the Interstate Commerce Act.[33] Under revised Section 11501(b), a state commission may only exercise jurisdiction over intrastate rail rates in accordance with the provisions of the Interstate Commerce Act.[34] Pursuant to revised Section 11501(b), state commissions were required to submit to the Commission by January 31, 1981, standards and procedures in accordance with the Interstate Commerce Act.[35] Within 90 days thereafter, the Commission was to certify the State Commissions if the Commission determined that "such standards and procedures are in accordance with the standards and procedures applicable to regulation of rail carriers by the Commission . . ." pursuant to the Act.[36] Unfortunately, neither the Commission nor the States were able to comply with this 90 day time limitation. Congress somewhat presaged the Commission's ability to implement this program by noting in Section 214 of the Staggers Rail Act that the existing standards and procedures "shall be deemed to be certified by the Commission . . ." until the Commission could issue a decision certifying or denying certification for the individual states.[37]

A carrier may appeal the decision of a state commission to the ICC on the ground that the standards and procedures applied by the state commission were not in accordance with the Interstate Commerce Act. Shippers are not provided with a similar remedy. Arguably, appeals must be taken within 20 days of service of the state commission decision, since an appeal of right must be filed within 20 days under federal standards and procedures.[38] However, a good argument can also be made that an appeal constitutes a petition to reopen which may be filed at any time,[39] or a new petition before the Commission, which presumably may also be filed at any time.

Under revised Section 11501, the Commission must take final action on any such petition "within 30 days after the date it is received."[40] If the

31. H.R. REP. No. 96-1035, *supra* note 25, at 61.
32. *Id.*
33. 49 U.S.C. § 11501 (1980).
34. 49 U.S.C. § 11501(b)(1) (1980).
35. 49 U.S.C. § 11501(b)(2) (1980).
36. 49 U.S.C. § 11501(b)(3)(A) (1980).
37. 49 U.S.C. § 11501(b)(3)(B) (1980).
38. 49 C.F.R. § 1115.2 (1985).
39. *See* 49 C.F.R. § 1115.4 (1985).
40. 49 U.S.C. § 11501(c) (1980).

Commission determines that the state commission standards and procedures are not in accordance with the Interstate Commerce Act, the Commission is to "determine and authorize the carrier to establish the appropriate rate . . ."[41]

It is generally perceived that through the revised certification process, the Commission has much greater authority over state intrastate rail rates than ever before. However, it appears that Congress envisioned the Commission to be an appellate tribunal in state rate cases, as opposed to a trier of fact. If that is the case, the Commission's authority is limited to determining whether the state agency utilized the proper standards in reaching its conclusions. As long as the evidence supports the state's findings, the Commission could not set state agency findings aside. The extent to which the Commission may overrule the state's findings is at the center of the controversy on Section 214. The decisions discussed below will deal with this issue in greater detail.

III. Ex Parte No. 388, State Intrastate Rail Rate Authority

A. *Commission Certification Process*

In response to the Congressional mandate in Section 11501(b), the Commission instituted Ex Parte No. 388, *State Intrastate Rail Rate Regulation—PL 96-448*.[42] In response to this notice, 40 states filed for certification.[43] By decision served April 21, 1981, the Commission certified conditionally each state which had expressed its intention to exercise jurisdiction consistent with the law and to do so in a timely fashion.[44] This conditional or provisional certification was to expire June 29, 1981. On June 30, 1981, the Commission extended the conditional or provisional certification an additional 90 days—until October 19, 1981.[45] Petitions by Conrail and the Florida rail carriers to revoke the provisional certifications in Indiana and in Florida respectively were rejected by Commission order served September 3, 1981.[46]

B. *State Implementation*

The majority of the 40 provisionally certified state commissions filed various implementation rules with the Commission in the fall of 1981. The Commission concluded that it still did not have enough information upon

41. *Id.*
42. 45 Fed. Reg. 74571 (1980).
43. State Intrastate Rail Rate Auth., (I.C.C. served Apr. 21, 1983) 48 Fed. Reg. 17161 (1983).
44. *Id.* at 3.
45. State Intrastate Rail Rate Auth., (I.C.C. served June 30, 1981).
46. State Intrastate Rail Rate Auth. (I.C.C. served Sept. 3, 1984).

which to base its final certification decisions.[47] To aid the states in the certification process, the Commission provided an outline or model of what, at a minimum, the state filing should contain.[48] In issuing this decision, the Commission for a third time extended the provisional certification of the 36 remaining states seeking certification (Maine, Mississippi, North Carolina, and Rhode Island of the original 40 withdrew their requests to be certified).[49]

On May 11, 1982, the Commission announced that it was assuming jurisdiction over intrastate rail transportation in six states which had specifically requested that the Commission assume such jurisdiction[50]—California, Connecticut, Delaware, Mississippi, Nevada, and North Carolina.

The Commission did not assert jurisdiction over intrastate rail rates in Alaska, Arizona, Hawaii, Maine, Massachusetts, Rhode Island, South Dakota, Vermont, or the District of Columbia[51] because certification was not sought by these states nor was a request made for the Commission to assume jurisdiction. Thus, theoretically there is neither federal nor state regulation of intrastate rail movements in these jurisdictions. Arguably common law principles are applicable to movements within the states.

As a result of the Commission's continuing extensions of the conditional certification, the Illinois Central Gulf Railroad challenged an Indiana Public Service Commission decision reducing their switching charges on the basis that the conditional certification of the State Authority was invalid under the Staggers Act.[52] The 7th Circuit affirmed the Commission's action of certifying states on a continuing basis.[53] Nonetheless, the Court admonished the Commission for allowing the states to continue regulating intrastate rates without conformity to federal standards and prolonging conditional certificates.[54] The Commission seems to have taken this decision to heart and began to issue certification decisions for a number of

47. State Intrastate Rail Rate Auth., (I.C.C. served Feb. 8, 1982) 47 Fed. Reg. 5786 (1982).

48. *Id.* at Appendix.

49. *Id.* at 1. The new deadline for revised standards and procedures by the states was set at April 9, 1982. *Id.*, at p. 9. However a fourth extension was granted on April 9, 1982 to file revised standards and procedures. State Intrastate Rail Rate Auth.—Pub. L. No. 96-448, (I.C.C. served April 9, 1982).

50. State Intrastate Rail Rate Auth., (I.C.C. served May 11, 1982) 47 Fed. Reg. 20220 (1982).

51. *Id.* at 2.

52. Public Service Commission of Indiana, No. 29020 (I.C.C. served January 18, 1983).

53. Illinois Cent. Gulf R.R. v. ICC, 720 F.2d 958 (7th Cir. 1983), *reh'g denied*, 1984.

54. *Id.* at 963. As the situation exists now, many states are regulating intrastate rail carriers without having established that they are doing so in conformity with federal standards. While we are not prepared at this time and on this record to say that the conditional certification scheme is now invalid, we believe it appropriate to expedite the certification process and bring an end to conditional certification.

state authorities.[55]

C. COURT CHALLENGES TO CERTIFICATION

1. ILLINOIS

In its first certification decision (August 5, 1982), the Commission merely moved from a "conditional" or "provisional" certification for the Illinois Commerce Commission to a "tentative conclusion" that the Illinois Commerce Commission had met the requirements for certification.[56] The Commission, however, sought further comment on the extent to which a state must adopt each and every federal exemption under Section 10505.[57] In this tentative certification of the Illinois Commerce Commission's standards and procedures, the Commission noted that the Illinois plan appeared to apply section 10505 criteria.[58]

On January 27, 1983, the Commission certified the state of Illinois to exercise jurisdiction over intrastate rail rates based on the conclusion that the states need not follow Commission regulations and precedents in all subject matters.[59]

Despite this general language, the Commission changed its position on the extent to which the states may deviate from the federal exemptions under Section 10505.[60] The language of the decision indicates that unless conditions in a state could be shown to be unique,[61] a state may not deviate from a federal exemption of rail traffic.[62] Accordingly, the Commission concluded that Illinois must modify its plan to comply with Com-

55. State Intrastate Rail Rate Auth.—Pub. L. No. 96-448 (I.C.C. served Oct. 6, 1982), the Commission assigned a sub number to each of the 37 states then seeking certification and individual certification decisions began to be issued shortly thereafter. To date, approximately 21 states have received final certification. Office of Proceedings in the late summer of 1985.

56. State Intrastate Rail Rate Auth., 365 I.C.C. 855, 856 (1982).

57. *Id.* at 856-857.

58. *Id.* at 857. In its tentative certification of the Illinois Commerce Commission's standards and procedures, the Commission stated:

> Section 11501(b) does not appear to require state adoption or endorsement of every ICC exemption. The requirement for certification is that the states apply the same Section 10505 criteria. The Illinois plan clearly indicates that it will do so . . . . Recognizing that we may have an opportunity to review a state's failure to follow an interstate exemption, we conclude that the Illinois position that it will not automatically follow an interstate exemption is not a bar to certification.

59. State Intrastate Rail Rate Auth., 367 I.C.C. 149 at 151 (1983). In that decision the Commission noted:

> . . . this does not mean that states have to follow each Commission regulation and every Commission precedent in all subject matters. This would in essence deprive a state of any jurisdiction and/or discretion over intrastate rates, rules and practices. The Staggers Act does not require preemption to that extent.

60. *Id.* at 152.

61. *Id.* at 154.

62. *Id.* at 152.

mission guidelines.[63]

In a strongly worded dissent, Commissioner Simmons, joined by Chairman Taylor, noted that the so-called standard for exemption is Section 10505, not Commission rulings under Section 10505.[64] Much of the dissent focussed on the different conditions which exist between intrastate and interstate traffic.

The Illinois Commerce Commission appealed the Commission's decision to the United States Court of Appeals for the District of Columbia Circuit[65] and sought a stay from the Commission, pending judicial review. By Commission decision served March 4, 1983, the Commission denied the stay request and extended the due date for modifications to the Illinois rules until July 1, 1983.[66]

The Commission's decision was affirmed by the D.C. Circuit in *Illinois Commerce Commission v. ICC*.[67] In that decision, the Court concluded that a federal exemption is a "standard or procedure that bound the State regulators."[68] Significantly, Judge Swygert refused to adopt the broad interpretation of the term "standards and procedures" proffered by the intervenor railroads.[69] He noted, "the only issue before us is whether 'standards or procedures' should be interpreted broadly enough to include federal exemptions."[70] The court concluded: "In view of the overriding importance of the exemption provisions, it was reasonable for the ICC to conclude that the statute required states to give immediate and automatic effect to federal exemptions."[71]

Judge Antonin Scalia, a noted administrative law expert, dissenting from the three member panel hearing the case, rejected the majority's view that total preemption of state regulation was mandated by Congress.[72] Scalia then proceeded to discuss the legislative history of Section 214 of the Staggers Rail Act and surmised that the determination of the exemptions under the Act is not a standard, but rather the final deter-

63. *Id.* at 154. The pertinent language stated:
Because we conclude that a state must follow our exemptions as to rates, classifications, rules, practices, Illinois must make appropriate modifications to its plan as submitted.

64. *Id.* at 155. Judge Simmons noted:
I also see no logical necessity for automatic extension of an exemption found appropriate for interstate movements to the same category of intrastate traffic. The transportation conditions within an individual state can be significantly different than those of the Nation as a whole with respect to a particular traffic segment.

65. No. 83-1120 (D.C. Cir. 1983).

66. State Intrastate Rail Rate Auth., No. 96-448, (I.C.C. served March 4, 1983).

67. Illinois Commerce Comm'n v. ICC, 749 F.2d 875 (D.C. Cir. 1984).

68. *Id.* at 883.

69. *Id.*

70. *Id.*

71. *Id.* at 884.

72. *Id.* at 887.

mination to be made.[73]

In light of the 2-1 split, the Illinois Commerce Commission petitioned the U.S. Supreme Court for review, but the petition was denied on October 7, 1985.[74] Thus, the D.C. Circuit decision remains the final word on this issue for the time being.

2. *FLORIDA*

The Florida Public Service Commission (PSC) also opposed the Commission's efforts to require that it adopt each and every federal exemption developed under Section 10505.[75] The posture of the Florida litigation was somewhat different than that of the Illinois litigation. In the Commission's March 18, 1983 Florida certification decision, it noted that it tentatively found that Florida had met the basic requirements for certification, but required that Florida adopt the federal exemptions in lockstep fashion.[76]

The Florida PSC filed a petition for review of the Commission's tentative certification decision with the United States Court of Appeals for the 11th Circuit on April 29, 1983.[77] The appeal was taken prior to the issuance of a second order, reviewing Florida's subsequent submissions, as in the Illinois case. The Florida railroads moved to dismiss the Florida PSC Petition for Review before the Eleventh Circuit on the basis that it was not a final order. Although the motion was originally carried with the case,

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73. *Id.* at 889. Judge Scalia, in what is probably the most piercing of all of the judicial analyses of Section 214 and the meaning of standards and procedures, notes:

> The question before us whether a Commission class-of-traffic exemption—that is, a Commission determination under 49 U.S.C. § 10505 that a particular category of interstate traffic (such as boxcar or export coal traffic) shall be exempt from one or more provisions of the Act (*e.g.*, rate regulation)—constitutes an internal 'standard or procedure' of the Commission. It seems to be obvious that it does not. A Commission exemption—exemption from rate regulation, for example—is in no sense a standard by which the validity of a rate is determined, but is rather the determination itself, in effect approving all rates for the subject commodity . . . the mere existence of some generality in a determination is not alone enough to make it a standard, since the same is obviously true of the carrier 'rules' and 'classifications' that the Commission approves. . . . What is meant by a standard is a principle of of general application regarding degree of competition, revenue adequacy, service needs or other elements of the national transportation policy which will, when applied to particular facts, determine the legitimacy of railroad behavior. Protypical examples are the 'formulas or procedures' for determining variable costs and the 'standards and procedures for establishing adequate revenue levels' that the Commission is required to adopt. [citations omitted] To confuse such a standard with an exemption is to call a criterion a conclusion or a test an outcome.

74. Illinois Commerce Comm'n v. I.C.C., 749 F.2d 875 (D.C. Cir. 1984), *cert. denied*, 54 U.S.L.W. 3223 (Oct. 7, 1985).

75. State Intrastate Rail Rate Auth.—Florida, (I.C.C. served March 18, 1983). 48 Fed. Reg. 11798 (1983).

76. *Id.*

77. No. 83-3268, (11th Cir. 1983).

on January 25, 1984, just prior to scheduled oral argument, the Eleventh Circuit granted the motion to dismiss without prejudice to the Florida PSC to file another Petition for Review upon issuance of a final Commission order.[78]

On July 1, 1985, the Florida PSC, in part in response to the D.C. Circuit's decision on interstate exemptions, gave up the struggle to regulate its intrastate rail rates and requested that the Commission assume jurisdiction over intrastate freight rates.[79] Thus, the issue of federal exemptions is over in Florida.

In a proceeding involving similar issues in Colorado[80] the Commission specifically ruled that "the [federal] boxcar exemption is in effect in the State of Colorado . . ." and authorized the three petitioning railroads to cancel all boxcar tariffs.[81] Chairman Taylor dissented, noting that although he is opposed to the automatic extension of interstate exemptions to intrastate movements, and opposed to the federal boxcar exemption decision, the states are required to abide by federal rules.[82] In light of the D.C. Circuit's decision in *Illinois Commerce Commission v. ICC*[83] the Colorado decision was probably correctly decided as the law currently exists.

3. *Texas*

The state of Texas may be the least enthusiastic of all the states about the Commission's increased authority as a result of Section 214 of the Staggers Act. On December 12, 1980, the state of Texas filed suit against the Commission in the United States District Court for the Western District of Texas seeking a declaratory judgment that Section 11501 of Title 49 was unconstitutional.[84] Judge Nowlin of the District Court granted the government's request for summary judgment, denied Texas' request for summary judgment and dismissed the case with prejudice.[85]

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78. Florida PSC v. ICC, 724 F.2d 1460, at 1462 (11th Cir. 1984). In granting the motion, the Court noted:

> . . . judicial action at this time could severely disrupt the administrative process. The March 18 Order provides a schedule for interested parties to comment on Florida's standards and procedures. When the agency makes its final determination of Florida certification, it may rely on concerns expressed in these comments. Until the final decision is rendered, the Court cannot know either whether failure to adopt federal exemptions will result in denial of certification or what other grounds for denial the agency may use . . . .

79. State Intrastate Rail Rate Auth.—Florida, (I.C.C. served August 15, 1985).

80. Three Colo. Railroads—PUC, No. 39744 (I.C.C. served May 31, 1984).

81. *Id.* at 2.

82. *Id.* at 4.

83. Illinois Commerce Comm'n v. ICC, 749 F.2d 875 (D.C. Cir. 1984).

84. Texas v. ICC, No. A-80-OA-487, (W.D. Tex. Austin Div., November 3, 1983).

85. *Id.*

The state of Texas appealed that decision along with support by the National Association of Regulatory Utility Commissions ("NARUC") and the state of Kansas, both of whom intervened in support of Texas. The Fifth Circuit, by Judge Wisdom in *State of Texas v. ICC*, affirmed the District Court and noted that the "Act is in nature a preemptive statute. If the state wishes to continue regulating, it must do so in accordance with federal policy."[86] The Court noted that the preemption of state law is implicit in the goals and operations of the Staggers Act.[87] Therefore Texas' challenge to the statute was rejected. However, the Court expressly avoided the issue of the extent to which certified state agencies must follow policies and decisions of the Commission.[88]

In related proceedings, the Commission decertified the Railroad

86. Texas v. ICC, 730 F.2d 339 (5th Cir. 1984).

87. *Id.* at 347.

88. *Id.* at 347-348. In addition, the state of Texas raised four constitutional objections to Section 214 of the Staggers Act. Because two of the objections are common to a number of the certification cases, including Illinois and Florida, they merit more detailed discussion here.

First, Texas asserted that the preemptive scheme set forth in Section 214 of the Staggers Act exceeded Congress' authority under the commerce clause. The court, in rejecting this argument, noted that it must give great deference to a Congressional finding that a regulated activity substantially affects interstate commerce so long as there is any rational basis for such a finding. Once this basis is found, the Court's only remaining function is to inquire as to whether there is a reasonable connection between the regulatory means selected and the asserted ends. In this instance, the Court concluded that it is well established that the regulation of intrastate railroad rates has a direct and substantial effect on interstate commerce. Further, the Court concluded that there is a reasonable connection between preempting independent state rail regulation and overall deregulation of rail ratemaking.

The second argument relied upon by the state of Texas, and raised in the Illinois and Florida litigation, concerns the effect of the 10th amendment upon the Commission's actions under Section 214. Texas argues that Section 214 intrudes upon the sovereignty of the states under the 10th amendment. The 10th Amendment provides as follows:

> The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively, or to the people.

The court concluded that Section 214 is not an unconstitutional intrusion upon the sovereignty of the states. The Court noted that even under the most liberal construction of this argument, as expressed by the Supreme Court in National League of Cities v. Usery, 426 U.S. 833 (1976) it could not reach such a conclusion.

Judge Wisdom rejected the argument that Section 214 gives the ICC direct control over state standards and procedures, in effect regulating the states in their traditional role of governing their internal economics. The Court noted that Section 214 preempts state law, but gives the states the option either to continue regulation in compliance with federal law or to cease independent regulation altogether. The Court held:

> Because the states have this option, because there is no affirmative coercion of the states by the federal government, the Act does not implicate the two principal concerns underlying 10th Amendment jurisprudence: political accountability and separation of powers.

The Court's opinion emphasized that "Congress may not act in such a manner as to impair 'the States' integrity or their ability to function effectively in a federal system. Fry v. U.S., 421 U.S. 542 (1975). Thus, the Court appears to suggest that while Section 214 of the Staggers Act does not in itself violate the 10th Amendment, compulsive action, presumably by the Commis-

Commission of Texas, effective May 20, 1984.[89] By Commission decision served April 20, 1984,[90] Texas' application to be certified to regulate intrastate rail rates, classifications, rules and practices was denied. At the same time, the Commission revoked the provisional certification that was granted to Texas during the pendency of this application for certification.[91] The Commission noted that because Texas refused to comply with federal law as expressed by Commission decisions, both rulemaking and adjudicatory, in particular, the rail contract rules,[92] the Commission concluded that Texas standards and procedures "are wholly deficient in that it is unwilling to regulate intrastate rail rates in accordance with federal law".[93] Furthermore, the Commission concluded it would be contrary to the spirit of Section 11501 to continue provisional certification where Texas had so grossly ignored and violated federal standards.[94] Under the Commission's decision, the Railroad Commission of Texas was directed to wrap up all existing proceedings to the maximum extent feasible during the 30 day period following issuance of the Commission's decision and to transfer any cases that could not be completed to the Commission.[95] Further, the Railroad Commission of Texas was directed not to commence any new proceedings.[96]

On June 21, 1985, the D.C. Circuit issued its decision affirming the

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sion, whereby State agencies are stripped of all authority to make findings of fact or conclusions of law, might violate the 10th Amendment.

The Court concluded that Section 214 of the Staggers Act is "facially constitutional". The State of Texas sought Supreme Court review of the Fifth Circuit decision. However, the Supreme Court denied *certiorari* on October 9, 1984 (105 S. Ct. 267 (1984)). Subsequent court review of an actual decision rendered by the Railroad Commission of Texas and overturned by the Commission, conceivably could find that the Commission was applying the Act in a manner which would contravene the limits of the 10th amendment. Such a case is pending before the D.C. Circuit in Aluminum Company of America v. ICC, No. 84-1491. However, for the time being it appears that Texas has lost the battle.

89. State Rail Rate Auth.—Texas, (I.C.C. served April 20, 1984) 49 Fed. Reg. 17106 (1984).

90. *Id.* at 1.

91. *Id.* at 3.

92. *See*, Docket No. 39670, Docket No. 39661, Docket No. 39658, Docket No. 39657 relating to contract rate filings. *See also*, discussion of contract rate filings in Railroad Commission of Texas v. ICC, 765 F.2d 221, 224, fn. 1 (D.C. Cir. 1985).

93. State Rail Rate Authority, *supra* note 89, at 21.

94. *Id.*

95. *Id.*

96. *Id.* at 21. On May 14, 1984, the Railroad Commission of Texas filed a petition for review of the Commission's decision in Ex Parte No. 388 (Sub No. 31) with the United States Court of Appeals for the District of Columbia Circuit, No. 84-1180. By Order served May 22, 1984, the Commission denied the Railroad Commission of Texas' (RCT) request for stay of this decision pending judicial review. State Intrastate Rail Rate Auth.—Texas, (I.C.C. served May 22, 1984). The D.C. Circuit subsequently denied Texas' request for stay also. No. 84-1180 (D.C. Cir. May 18, 1984).

ICC decision to deny certification to the Railroad Commission of Texas.[97] Judge Starr, writing for a unanimous panel, rejected all of Texas' arguments and notes that the Court's decision "does not forever leave Texas behind, as it were, with the train having pulled out of the station; to the contrary, Texas may resubmit new standards and procedures to the ICC, and if the new submission is adequate, then the RCT will join the growing ranks of certified state authorities."[98] The Court concluded "the upshot of all of this is that Texas now must demonstrate compliance with federal law *before* it may regulate."[99]

IV. Court Interpretation of State Regulation of Intrastate Rates and Practices Since Staggers

There are also four recent state agency decisions which have worked their way through the appellate courts and now provide some guidance in determining the extent of the Commission's authority over state intrastate rate determinations. These decisions are from the Third, Sixth, Seventh and D.C. Circuits and deal with the interpretation of standards and procedures under Section 11501.

A. Illinois Central Gulf Rail Company v. ICC

The first appellate decision to issue on the interpretation of "standards and procedures" under Section 11501 was a Seventh Circuit decision, *Illinois Central Gulf Rail Company v. ICC*.[100] In this case, Union Carbide shipped 143 cars of coal via the Illinois Central Gulf Railroad within the state of Kentucky. Because of extremely cold weather, Union Carbide had difficulty unloading the coal and kept the cars in excess of the free time specified in its average demurrage agreement with the railroad.[101] The railroad assessed demurrage charges and Union Carbide paid the charges. On December 18, 1980, Union Carbide filed a complaint with the Kentucky Railroad Commission seeking a refund of the penalty portion of the demurrage charges on the basis that such charges were unreasonable in light of the extreme weather conditions and its diligence in unloading the coal.[102] The Kentucky Commission agreed and

97. Railroad Comm'n v. ICC, 765 F.2d 221 (D.C. Cir. 1985).

98. *Id.* at 226.

99. *Id.* In addition, Starr reviewed the Railroad Commission of Texas' failure to comply with Commission standards as to suspension of rates, jurisdiction, contract rate disclosure, and refiling of tariffs. Starr concluded that these problem areas will alone be sufficient to demonstrate that the ICC's denial of certification to Texas was neither arbitrary nor capricious.

100. Illinois Cen. Gulf R.R. v. ICC, 702 F.2d 111 (7th Cir. 1983).

101. *Id.* at 112.

102. *Id.* at 113.

ordered the railroads to return nearly $160,000 in demurrage charges.[103]

The Illinois Central Gulf Railroad filed a Petition for Review with the Commission arguing that the Kentucky Commission's decision not to enforce the average demurrage agreement was inconsistent with ICC standards and procedures.[104] The Commission affirmed the Kentucky Railroad Commission noting that the "Kentucky Commission's decision is within the limits of the discretion remaining to the states."[105] Curiously, the Commission took the position that because the Interstate Commerce Act does not specifically require the enforcement of average demurrage agreements, the Section 11501 requirement that a state exercise jurisdiction "exclusively in accordance with the provisions of this subtitle" is inapplicable, and that whether demurrage agreements are upheld rests within the discretion of the State Commission.[106]

The Seventh Circuit overruled the Commission, holding that "consistent rulings of the ICC must necessarily be incorporated and adhered to by State Commissions exercising jurisdiction pursuant to the Staggers Act".[107] The Court never indicates whether it views average demurrage agreements as a "standard procedure or practice", nor defines these terms, but rather indicates that: ". . . [w]hether the ICC's insistence in honoring average agreements is considered a 'standard', 'procedure', or 'practice', it should have been applied by the Kentucky Commission."[108]

Thus, the first decision to interpret the meaning of "standards and procedures" and "exclusively in accordance with the provisions of the Interstate Commerce Act" somewhat sidesteps the issue of the meaning of these terms. However, the actual effect of the decision was to imply a rather broad interpretation to these terms, because the case dealt with neither a statutory provision nor a regulation, but rather a Commission interpretation through case law. Presumably if state agencies had to comply with Commission case law, they would have little or no discretion.

B. KENTUCKY UTILITIES CO. V. ICC

In the next significant Court decision, *Kentucky Utilities Co. v. ICC*,[109] the Sixth Circuit vacated an ICC ruling and ordered that the State Commission's tariff be reinstated. In this case Kentucky Utilities filed a complaint with the Kentucky Railroad Commission challenging the

103. *Id.*
104. *Id.*
105. Docket No. 38727, Illinois Central Gulf R.R., Petition to Review Order of Kentucky Railroad Commission, Order served December 28, 1981.
106. Illinois Central Gulf, *supra* note 100, at 114.
107. *Id.* at 115.
108. *Id.* at 116.
109. Kentucky Util. Co. v. ICC, 721 F.2d 537 (6th Cir. 1983).

reasonableness of the Louisville and Nashville's (L & N) rate on an intrastate movement of coal. The Kentucky Railroad Commission heard the case, considered federal standards, including the then applicable ton/ton mile formulation and prescribed a rate 20 cents per ton less than that requested by the L&N.[110] Shortly after the issuance of the Railroad Commission's decision, the ICC issued its decision rejecting the ton/ton mile methodology as a cost formula.[111] The railroad then sought review of the Kentucky Commission's decision before the ICC.[112]

The Commission, in its review of the State Commission's decision, noted that sufficient consideration was not given to how these rate prescriptions would assist the L&N to achieve revenue adequacy.[113] The Commission further found that because the rate set by the KRC was "only 8 percentage points above" the level at which the ICC could assert jurisdiction over a rate case, the Kentucky Railroad Commission order was set aside. Finally, the Commission found that the railroad's original proposal was not excessive and approved the carrier's rates.[114]

The Sixth Circuit concluded that because the Commission failed to formulate its own benchmark ratemaking standard, no meaningful state certification could occur and therefore under Section 11501(b)(3), the standards and procedures of the Kentucky Railroad Commission "shall be deemed to be certified by the Commission."[115]

The Court rejected the Commission's argument that because the rate was only 8 percentage points above the then jurisdictional threshold of 165 percent, the rate could not be found to be unreasonable.[116] As the Court noted, the Commission implied that such a relationship between the revenue to variable cost ratio of the proposed Kentucky rate and the statutory threshold was evidence that the rate was unreasonably low and could not promote the Staggers Act goal of revenue adequacy.[117] The Court highlighted that the revenue to variable cost ratio was to serve as a jurisdictional threshold in the determination of market dominance and not

110. *Id.* at 541-542.

111. Coal Rate Guidelines—Nationwide, (I.C.C. served December 21, 1981).

112. *Kentucky Util. Co.*, *supra* note 109.

113. *Id.*

114. *Id.*

115. *Id.* at 544. As the court noted:

> Properly understood, the Court here merely finds that the ICC's dereliction of its initial responsibility under the Staggers Act to formulate a polestar ratemaking standard for use in certified state standards has established the standards employed by the KRC as the applicable rate formula herein, limiting the scope of the Commission's inquiry to the issue of whether the Kentucky standards were applied "in accordance with the provisions of this subtitle."

116. *Id.*

117. *Id.*

as a test for reasonableness.[118]

The Court went on to reject the Commission's summary approval of the proposed rates.[119] In this instance, the Court decided deference should not be given to the Commission's decision because of the lack of evidence and the application of law to fact.[120] Further, just because 30 days is a short time within which to make a rate determination, does not mean that the Commission can simply approve the rate proposed by the carrier.[121] The Court concluded that the Commission's decision must be vacated, and rather than remanding it to the Commission for further action, the Court ordered the Kentucky Railroad Commission decision reinstated.[122]

Obviously, this decision will be relied upon by shippers seeking to challenge intrastate rail rates. Without an administratively final and judicially approved standard of rate reasonableness, it can be argued that the Commission has no polestar standard for ratemaking and thus the State Commission should be given greater discretion in this area.[123] Further, the Sixth Circuit's decision will make it more difficult for the Commission simply to reject a State Commission's determination and approve the proposed rate increase filed by the carriers. Now, the Commission will have to make a more detailed determination as to the reasonableness of the rate.

C. WHEELING-PITTSBURGH STEEL V. ICC

In *Wheeling-Pittsburgh Steel v. ICC*,[124] the Public Service Commission of West Virginia prescribed a maximum reasonable rate on intrastate coal movements not to exceed a revenue to variable cost ratio of 175 percent.[125] The Public Service Company (PSC) found the existing rates to be unreasonable and directed that refunds be paid. The Chesapeake and Ohio Railroad petitioned the ICC for review of the PSC order. The Commission set aside the PSC order on the grounds that:

(1) The order did not give sufficient consideration to revenue adequacy;

(2) The order lacked a rationale for establishing a revenue to variable cost ratio of 175 percent;

and (3) The order failed to allow the Commission to review the PSC's anal-

118. *Id.*

119. *Id.* at 544. As the court noted "judicial deference is extended only to reasoned agency decisions."

120. *Id.* at 544-545.

121. *Id.* at 545.

122. *Id.*

123. *Id.* at 546.

124. Wheeling-Pittsburgh Steel v. ICC, 723 F.2d 346 (3rd Cir. 1983).

125. *Id.* at 356.

ysis of basic costing matters.[126]

The Commission, as in the *Kentucky Utilities* case,[127] simply adopted the rates instituted by the carriers as the appropriate rate.[128] In dictum, the Court noted that the Staggers Act "did not fundamentally reallocate federal and state ratemaking authority . . . but rather, it appears that Congress, by rejecting federal preemption of intrastate rates, intended to preserve this traditional sphere of state competence."[129] The *Wheeling-Pittsburgh Steel* case, along with the *Kentucky Utilities* case, provides some basis for arguing that Section 214 has not totally preempted state intrastate ratemaking.

The Court here interprets the term "standards and procedures" to encompass "standards and procedures promulgated and interpreted in decisions and orders of the ICC as well as those standards or procedures expressly incorporated in the Interstate Commerce Act."[130] This broad interpretation of the terms standards and procedures is consistent with the Seventh Circuit's view of terms which went so far as to include average demurrage agreements as standards and procedures. The Third Circuit concluded that "[o]n questions of law as to whether state authorities have complied with these standards and procedures, the Commission's review is *plenary*."[131] (emphasis added)

The Commission's proposed stand alone cost guidelines were promulgated subsequent to the PSC's determination.[132] The Court determined that because the PSC did not have the benefit of the Ex Parte 347 standards, it must conclude that its February 10 order did not meet federal standards for calculating costs or computing maximum reasonable rates.[133] Accordingly, the Court enforced that portion of the Commission's order holding that the rates did not meet federal standards.[134] However, the Court rejected the Commission's cursory approval of the rates instituted by the C&O.[135] Similar to the *Kentucky Utilities* case, the

126. *Id.* at 350-351.
127. *Kentucky Util. Co.*, *supra* note 109.
128. Wheeling-Pittsburgh Steel, *supra* note 124, at 351.
129. *Id.* at 354-355.
130. *Id.* at 354-355.
131. *Id.* at 355.
132. *Id.* at 355.
133. *Id.* at 356.
134. *Id.*
135. *Id.* at 357. The case was remanded to the ICC. No. 82-3122, (3rd Cir. 1984), Order issued February 6, 1984. On remand, the Commission reopened the proceeding and requested comments on a number of issues including whether the proposed coal rate guidelines should be applicable to the decision, the relationship between Section 11501 rate prescriptions and the general rate reasonableness standards of the Act, the applicability of the Long Cannon factors to rate reasonableness determinations under Section 11501, and whether the case should be remanded to the PSC. Docket No. 38973, order served Feb. 7, 1984. NARUC and the Public

Commission acted without articulating any standard for the appropriate rates.

C. UTAH POWER & LIGHT COMPANY V. ICC

While the three Court of Appeals decisions discussed above can be interpreted in a consistent manner, the D.C. Circuit's recent decision in *Utah Power & Light Company v. ICC*[136] conflicts with the Sixth Circuit's decision in *Kentucky Utilities* and perhaps portions of the Third and Fifth Circuit decisions. The *Utah Power* case involved a movement of coal from a mine in Utah to a power plant in Salt Lake City.[137] Utah Power & Light maintained that the existing rate of $5.97 per ton was unreasonably high.[138] The Utah Public Service Commission agreed with the shipper and ruled that the railroads had market dominance, that the Denver and Rio Grande Railroad was revenue adequate and that the subject rates were unreasonably high.[139] The Utah Commission ordered the railroads to reduce the rates and to pay refunds to the shipper.[140] The railroads filed a Petition for Review of the Utah PSC decision with the Interstate Commerce Commission.[141] The ICC reversed the Utah PSC and held that the rates and issues were reasonable.[142] The shipper then filed a Petition for Review of the ICC's decision with the United States Court of Appeals for the District of Columbia Circuit.[143]

One of the bases of the Petition for Review was that the ICC exceeded its appellate jurisdiction by unlawfully conducting a *de novo* review of the record compiled before the Utah Public Service Commission.[144] The Court noted that the shipper had asserted that the standard of ICC review of state agency action was similar to that of a court reviewing federal agency action based on the Sixth and Seventh Circuit's decisions discussed above.[145] The Court rejected this argument.[146]

Service Company of Indiana requested that a rulemaking proceeding be instituted so that all members of the public could participate in the determination of these matters. However, the Commission denied the request for rulemaking. Docket No. 38973 (Sub No. 1), order served Aug. 10, 1984. The case on the merits is still pending on remand.

136. Utah Power & Light Co. v. ICC, 747 F.2d 721 (D.C. Cir. 1984).
137. *Id.* at 723.
138. *Id.* at 724.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 725.
143. *Id.*
144. *Id.*
145. *Id.* at 732.
146. *Id.* at 732-733. Judge MacKinnon wrote:

The exact scope of the ICC's authority over the decisions of State Commissions is not

Judge MacKinnon concluded that the decision was in agreement with the Third Circuit in *Wheeling-Pittsburg Steel Corp. v. ICC*.[147] However, the Third Circuit noted only that the Commission's powers were plenary as to questions of law.[148] It did not go as far as Judge MacKinnon and give the ICC power to review all factual matters. It appears that Judge MacKinnon is seeking to bolster his decision by trying to make it seem consistent with the Third Circuit.[149]

If Judge MacKinnon's views were adopted by the Supreme Court, they would clearly emasculate the state's authority over intrastate rail rates. By giving the Commission broad and unlimited power both as to questions of law and questions of fact, and permitting the Commission to start over and prepare a new record, the state commission's record building and decision making process would be an exercise in futility.

The decision by Judge MacKinnon appears to place the D.C. Circuit somewhat at odds with that of the Sixth Circuit in *Kentucky Utilities Company v. ICC*.[150] The Sixth Circuit expressly noted that it was not the intent of Section 11501 to have a "*de novo* rate hearing."[151] However the D.C. Circuit stated: "we cannot agree with such construction of the Staggers Act, which denies the oversight responsibility of the ICC so clearly envisioned by Congress."[152]

V. CONCLUSION

It seems inconsistent for Congress to have so clearly enunciated a program whereby states would seek certification from the ICC so that they could act in the first instance on intrastate rail rate matters and then, per-

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spelled out in the statute. The legislative history leaves little doubt, however, that the ICC was vested with powers to act as broadly as it would have enjoyed had it been the administrative agency of first instance.

. . . This first opportunity that resides in the states must be taken seriously by the ICC. When a state agency has acted, however, the authority of the ICC in its reviewing capacity is expansive, bounded only by the limitations of the Staggers Act and the traditional tests of administrative rationality.

147. *Id.* at 734.

148. *Wheeling-Pittsburgh Steel*, *supra* note 124 at 355.

149. *Utah Power & Light*, *supra* note 136 at 734. Judge McKinnon noted:

We agree with the Wheeling-Pittsburgh Court and also consider that the ICC, while conducting its Section 11501 review, may choose to limit its review to the record compiled before the state agency, or *start over if it considers the case so requires*. (emphasis added)

150. *Id.* at 734, fn. 18.

151. *Id.*

152. *Id.* Petitioner Utah Power and Light Company sought rehearing and rehearing *en banc*. The three judge panel agreed to rehear the case and accepted responses to the Petition for Rehearing from the ICC. Utah Power & Light Co. v. ICC, 764 F.2d 865 (D.C. Cir. 1985). The panel, however, ultimately dismissed the Petition for Rehearing and affirmed its original decision. To date, no petition for *writ of certiorari* has been filed. Thus, it is likely that the case on the merits will proceed on remand before the Commission.

mit the ICC to conduct a second full hearing on the issue, including compiling a new record.[153] In the opinion of this writer, there does not appear to be any support in the legislative history, or a review of the Section 214 amendments to 49 U.S.C. § 11501, to support this interpretation of how far the Commission may go in directing state regulation of intrastate rail rates. Indeed, it would appear that the D.C. Circuit's view would in effect result in a federal statute regulating the states as states in a area of traditional state economic regulation. Accordingly, the conflict between the D.C. Circuit and the Sixth Circuit should be resolved by the Supreme Court, or if the Supreme Court refuses to hear this matter, by further legislative action.

There are a number of legislative proposals to further amend or fine tune the Staggers Rail Act of 1980. The most recent proposals expressly deal with the issue of the extent of the Commission's appeallate review of state intrastate rail decisions. S. 477,[154] introduced by Senator Andrews on February 20, 1985 and H.R. 1190,[155] introduced by Congressman Tauzin on February 21, 1985 provide that the Commission's review of state agency decisions be limited to normal appellate review, similar to 5 U.S.C. § 706, as opposed to *de novo* review.[156] Further, a shipper as well as a carrier would be permitted an appeal.[157] It may well be that if the Supreme Court does not act on this issue by early 1986, 49 U.C.S. § 11501 will be clarified by further Congressional action. In the interim, a split exists in the Circuits thus causing a great deal of uncertainty as to how state intrastate rail rate challenges will be conducted.

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153. *Utah Power and Light Co.*, *supra* note 136, at 734.
154. S. 477, 99th Cong. 1st Sess. (1985).
155. H.R. 1190, 49th Cong. 1st Sess. (1985).
156. *Id.* at Section 9(b).
157. *Id.* at Section 9(a).