COMMONWEALTH OF KENTUCKY
OCCUPATIONAL SAFETY AND HEALTH
REVIEW COMMISSION

KOSHRC #1729-88

SECRETARY OF LABOR
COMMONWEALTH OF KENTUCKY — COMPLAINANT

VS.

LOUISVILLE GAS AND ELECTRIC COMPANY — RESPONDENT

DECISION AND ORDER

The Recommended Order of the Hearing Officer in the above-styled action, was called for review by the Commission, June 2, 1989, for the purpose of further study of the jurisdictional issue. Both parties have filed briefs in support of their positions.

This action arises from a willful citation issued to Respondent, Louisville Gas and Electric Company, [hereinafter LG&E], by Complainant, Secretary of Labor, for alleged violations of the Occupational Safety and Health Act which subjected Respondent's employees to hazardous conditions in that they performed repairs to a leaking gas line without appropriate personal protective equipment and precautionary measures. The willful citation included a $7,200 proposed penalty for the four grouped violations.

LG&E contested the citation and in their answer to the complaint, plead that KOSH lacked jurisdiction over work performed by LG&E employees on natural gas pipelines due to the Federal Department of Transportation's preemption in this area under the National Gas Pipeline Safety Act (NGPSA) of 1968.

Pursuant to section 4(b)(1) of the Occupational Safety and Health Act of 1970, OSHA shares responsibility for employees' safety and health with other federal agencies. The purpose of this section is to provide comprehensive protection to all employees while avoiding duplication of employees' safety and health regulations. The effect of section 4(b)(1) is to limit the authority of OSHA to regulate those working conditions of employees which are subject to regulation by another federal agency.

Section 4(b)(1) does not apply to those working conditions of employees which are addressed by the standards or regulations developed by the states which operate their own Occupational Safety and Health program under section 18 of the Occupational Safety and Health Act (Plan States). OSHA, however, does encourage Plan States to adopt, whenever possible, the federal OSHA position on preemption by another federal agency.

Although a State Plan's authorizing legislation may contain language concerning preemption by federal agencies, not all of these state provisions are identical to section 4(b)(1). Even in those instances where the preemption language of the state law is the same as section 4(b)(1) of the Occupational Safety and Health Act, this language is subject to interpretation by the state courts, and may result in different jurisdictional arrangements in each of the Plan States. Regardless of whether Plan States have language analogous to section 4(b)(1), the authority of the state to enforce its regulations where a federal agency also regulates, would be subject to the constraints of the Supremacy Clause of the U.S. Constitution.

Because acceptance of a state plan removes federal preemption, the state may grant its own Occupational Safety and Health Division more extensive jurisdiction than that enjoyed by federal OSHA. United Airlines, Inc. v. The California Occupational Safety and Health Appeals Board, 654 P2d 157, 1982 OSHD ¶26,323.

Kentucky is a Plan State and the Kentucky Labor Cabinet, under the direction of the Secretary, is the state agency to administer the plan (KRS 338.181). The Cabinet may require the assistance of other state agencies and may enter into agreements with other state agencies and political subdivisions for administration of the plan (KRS 338.041).

The Labor Cabinet did enter into such agreements with the Public Service Commission in 1972, 1973 and 1974. Additionally, in 1977, Executive Order #77-573, effective June 30, 1977, reorganized the governmental structure to vest the Labor Cabinet's Division of Compliance with jurisdiction over occupational safety and health as it pertained to compliance by regulated public utilities. (See, West Kentucky 2-Way Radio, Inc., KOSHRC #368 (1978), which assigned all active OSHA cases previously handled by the Kentucky Public Service Commission to the Kentucky Commissioner of Labor pursuant to Executive Order #77-573).

Executive Orders are subject to confirming legislation. Although Executive Order #77-573 was not enacted in this manner, its contents were to be enacted in the 1978 Legislature in Senate Bill 289, KRS 338.041(3). Section (3) which contained the gist of Executive Order #77-573 was omitted from the statute. The legislative intent was that the Kentucky Labor Cabinet would retain exclusive jurisdiction over all matters pertaining to occupational safety and health; hence,

jurisdiction through the omission of the Public Service Commission from the statute. The statute presently reads that the Labor Cabinet's program administers "all matters pertaining to occupational safety and occupational health . . ." (KRS 338.041(1)). (Emphasis added). KRS 338.021 also does not provide for preemption of KOSH jurisdiction by another state agency, (P.S.C.), only by a federal agency. Federal OSHA approved the transfer of responsibility for public utilities from the Kentucky Public Service Commission to the Kentucky Labor Cabinet on January 29, 1980.

The issue in this case is whether KOSH is preempted from enforcing its regulations over an industry which is regulated by another federal agency other than OSHA. At p. 5 of the Recommended Order, the Hearing Officer states that the answer hinges upon whether the inter or intrastate transportation of gas is involved, and if it is intrastate, then whether Respondent's operations are covered by pre-existing regulations of the U.S. Department of Transportation.

The Kentucky Public Service Commission classifies LG&E as one of five Class A local distributing companies according to their interpretation of KRS 278.504. See, In the Matter of: An Investigation of the Impact of Federal Policy on Natural Gas to Kentucky's Consumer and Suppliers, P.S.C. Administrative Case #297, (May 29, 1987). KRS 278.504(3) defines a local distribution company as "any utility or any other person, other than an interstate pipeline or an intrastate pipeline engaged in transportation or local distribution of natural gas and the sale of natural gas for ultimate consumption, . . ." The law is well-stated that an agency's own interpretation of their regulations and laws are usually afforded great deference by

reviewing courts.

The Complainant states that the Natural Gas Safety Standards do not apply to intrastate pipelines when a state agency certifies that it has adopted and is enforcing DOT standards. Kentucky has obtained its certification. In support of this statement is 49 USCA §1674(a) which states that the DOT's authority "to prescribe safety standards and enforce compliance shall not apply to intrastate pipeline transportation when the safety standards and practices applicable to same are regulated by a state agency. . . which submits. . . an annual certification. . .". In accordance with this federal law and Kentucky state law, the regulations governing intrastate pipelines are administered by the P.S.C. and the regulations addressing employee safety and health are administered by the KOSH Division of Compliance.

We find that the P.S.C.'s classification of the Respondent as a Class A local distribution company, as well as the location of the leaking gas line in question, indicate that Respondent's employees were working on an intrastate line. The fact that Respondent obtains its gas from an interstate hook-up to distribute same intrastate, does not constitute a "tangible nexus" which would involve the application of the DOT's regulations pursuant to the Commerce Clause (Article I, Section 8, U.S. Constitution) and the Supremacy Clause (Article VI, U.S. Constitution).

We take exception to the Recommended Order of the Hearing Officer at p. 7, where she states that the Complainant did not specify whether the pipeline in question involved the intra or interstate transportation of gas. To the contrary, the Complainant has always

maintained that the Respondent does not distribute gas interstate. The Hearing Officer's conclusion that the evidence of record is so hazy that she must--more or less flip a coin--and draw the line in favor of preemption is too speculative and not based upon adequate factual findings.

Granted, at times it is difficult to distinguish between inter and intrastate transportation. In those instances, the Supremacy Clause of the U.S. Constitution will apply and override any state regulations causing snags in the orderly operation of commerce. As set forth in KRS 278.504(4), intrastate commerce includes the "production, gathering, treatment, processing, transportation and delivery of natural gas entirely within the Commonwealth which is not subject to the jurisdiction of the federal energy regulatory commission under the natural gas act or the natural gas policy act of 1978".

The NGPSA authorizes the Department of Transportation to set minimum Federal safety standards for the transportation of gas by pipeline either in or affecting interstate or foreign commerce. We find that the Act is designed to ensure pipeline integrity and safety of property and the public with employees receiving only incidental protection, if any.

The parties have cited numerous Federal Review Commission and U.S. Court of Appeals decisions in support of their respective preemption positions. However, before this Commission, these decisions are considered advisory in nature. City Cleaning Services, Inc., KOSHRC #691 (1980).

As stated before, Section 4(b)(1) does not apply to those working conditions of employees which are addressed by the standards or

regulations adopted by Plan States operating their own Occupational Safety and Health program. We find that the scenario depicted in this case clearly falls within the purview of the Kentucky Labor Cabinet's authority.

THEREFORE, WE CONCLUDE that jurisdiction is properly vested in this Commission and hereby VACATE the Recommended Order of the Hearing Officer and REMAND same for a hearing on the merits.

FOR THE MAJORITY:

William H. Shields
Chairman

Charles E. Braden
Commissioner

RUH, COMMISSIONER, DISSENTING:

My preliminary criterion of evaluation for this dissenting opinion and vote was the majority's expression that they must protect the worker from injury in their working conditions. Their ideology and reasoning projected them as lawmakers and not the interpreters of the facts regarding the jurisdiction over working standards.

The main and most important point of evaluation should have been the jurisdiction of the Complainant (Labor Cabinet) over the natural gas pipeline as it relates to interstate and intrastate transportation of natural gas when regulations governing safety and

health at the worksite have been promulgated by the Federal Department of Transportation.

The Respondent stated they used and complied with Federal DOT rules and that their operation was totally interstate. The Complainant did not give solid and sound proof of their jurisdiction as it pertains to intrastate and interstate transportation of natural gas. They do not deny that their regulations may be preempted where interstate transportation is concerned. This commissioner agrees fully to that question of authority by the Labor Cabinet.

We do not have the authority to write or inject our own jurisdiction when another agency has covered this area by regulation. My opinion is that the KOSH Review Commission should follow the dictates of KRS 338.021(1)(b) when exception is not proved. It is our duty to decide according to the facts alleged and proved. It is the providence of the Review Commission to declare the law, not to give it.

It has been strongly held that a judgment given by one who is not the proper forum is of no force. We should not be blind to the plain meaning of the statute. This case clearly falls within its borders. This commissioner finds the law and circumstances so vague that he must agree with the decision of the Hearing Officer, thereby, dissenting with the majority of the Commission.

Carl J. Ruh
Commissioner

DATED: October 27, 1989

Copy of the foregoing Order has been served upon the following parties in the manner indicated:

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This 27th day of October, 1989.

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