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HENRY MCMASTER
ATTORNEY GENERAL

December 14, 2006

The Honorable W. Greg Ryberg
Member, South Carolina Senate
Post Office Box 142
Columbia, South Carolina 29202

Dear Senator Ryberg:

We received your letter requesting an opinion of this Office concerning the imposition of county road maintenance fees on commercial vehicles that operate interstate. In your letter, you state:

> Under the general authority granted by the legislature under S.C. Code 1976 § 4-9-30(5), some 23 counties in the state have provided by ordinance for a road maintenance or vehicle fee. The rates of these fees vary from $8 to $30, but each is an annual fee on vehicles in the county. The county ordinances that provide for these fees that I have examined all impose the fee - although using slightly different language - on vehicles "registered in the county." Each fee is un-apportioned and does not vary be the amount of time a vehicle may spend in the county during the year or the number of miles it may travel there.

According to your letter, your position is that "It is not appropriate . . . for heavier commercial vehicles (generally those with a gross weight or gross combined weight over 26,000 pounds) that travel interstate, for these are registered at the state level under the apportionment system known as the International Registration Plan (IRP)." You explain:

> Fleets based in South Carolina are registered for the IRP by the state Department of Motor Vehicles, and are assessed a statewide property tax (under S.C. Code 1976 Title 12, Art. 23) by the state Department of Revenue. The vehicles in such fleets are not registered at the county level and do not appear on county tax rolls.
>
> By their own terms, therefore, the county ordinances that authorize the road maintenance fees seem to exclude vehicles

Request Letter

> registered under the IRP. Yet at least some counties are charging motor carriers county road maintenance fees and the like, for vehicles at terminals or other carrier facilities located in these counties. Not only does this charge appear to be beyond the authority granted the counties under their own ordinances, but it may also violate the Commerce Clause of the U.S. Constitution.

**Law/Analysis**

In your request, you gave us general information on ordinances passed by several South Carolina counties, which impose road maintenance on both resident and nonresident motor carriers. Based on this information, you asked that we address the constitutionality of these ordinances. We were not given specific ordinances to review and were not asked to address specific ordinances. Thus, this opinion aims to give you general information as to the constitutionality of the ordinances you describe, but will not address the constitutionality of any specific ordinance. Furthermore, in rendering this opinion, we keep in mind that an ordinance is a legislative enactment and therefore, is presumed constitutional. Town of Scranton v. Willoughby, 306 S.C. 421, 422, 412 S.E.2d 424, 425 (1991). Our Supreme Court "has held that a duly enacted ordinance is presumed constitutional; the party attacking the ordinance bears the burden of proving its unconstitutionality beyond a reasonable doubt." City of Beaufort v. Baker, 315 S.C. 146, 153, 432 S.E.2d 470, 474 (1993). Moreover, "[w]hile this Office may comment upon potential constitutional problems, it is solely within the province of the courts of this State to declare an act unconstitutional." Op. S.C. Atty. Gen., October 17, 1991. While we do not address the constitutionality of a particular ordinance in this opinion, if we were to do so, such an ordinance would remain enforceable until declared otherwise by a court.

The Commerce Clause contained in article I, section 8 of the United States Constitution affords Congress the power to regulate commerce among the several states. Although phrased as a grant of power to Congress, "the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon, 511 U.S. 93, 98 (1994). The Supreme Court has stated that a fee or tax imposed by a state does not violate the Commerce Clause if "the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

In your letter, you point us to the United States Supreme Court case of American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266 (1987) to support your belief that these ordinances are unconstitutional due to their violation of the Commerce Clause. In that case, the Court considered the constitutionality of an axle tax and marker tax, referred to as "flat taxes" by the Court, imposed by the State of Pennsylvania. Id. According to the Court's opinion, Pennsylvania imposed these

taxes to fund improvements and maintenance of Pennsylvania highways and bridges. Id. at 270. The twenty-five dollar marker tax was imposed only on out-of-state vehicles weighing over a certain amount. Id. at 273-74. The axle tax was imposed on both in-state and out-of-state trucks and truck tractors over a certain weight. Id. at 274. The amount of the tax depended upon the number of axles. Id. However, trucks traveling less than 2,000 miles in Pennsylvania were entitled to a rebate on the axle tax and truckers applying for a trip permit allowing them to travel in Pennsylvania for a period of five days for a lower amount were exempt from the axle tax. Id.

After examining these flat taxes with regard to the Commerce Clause, the Court determined they

> penalize some travel within the free trade area. Whether the full brunt, or only a major portion, of their burden is imposed on the out-of-state carriers, their inevitable effect is to threaten the free movement of commerce by placing a financial barrier around the State of Pennsylvania. To pass the "internal consistency" test, a state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." Armco Inc. v. Hardesty, 467 U.S., at 644, 104 S.Ct., at 2623. If each State imposed flat taxes for the privilege of making commercial entrances into its territory, there is no conceivable doubt that commerce among the States would be deterred.

Id. at 284. The Court continued on to name several states adopting similar fees and stated:

> Such taxes can obviously divide and disrupt the market for interstate transportation services. In practical effect, since they impose a cost per mile on appellants' trucks that is approximately five times as heavy as the cost per mile borne by local trucks, the taxes are plainly discriminatory. Under our consistent course of decisions in recent years a state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the Commerce Clause.

Id. at 285-86. Specifically with regard to the axle tax, the court concluded it "has a forbidden impact on interstate commerce because it exerts an inexorable hydraulic pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" Id. at 286-87 (quoting U.S. Const., art. I, § 8, cl. 3). Accordingly, the Court held the flat taxes were invalid due to their violation of the Commerce Clause.

Nevertheless, the Court acknowledged occasions in which similar flat taxes may be valid despite their potential violation of the Commerce Clause. "[T]he Commerce Clause does not require

the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens." Id. at 296. The Court in that case did not find such administrative burdens because the out-of-state vehicles were registered under the IRP, which uses mileage figures to apportion a motor carrier's registration fee among its IRP jurisdictions. Id. at 297. Furthermore, such figures are also used to collect fuel taxes and to calculate axle tax rebates. Id.

According to your letter, the road maintenance fees in question are imposed on both vehicles registered in South Carolina and those located at terminals and carrier facilities in South Carolina. Because the fees apply to both residents and nonresidents alike, they do not appear to be facially discriminatory. However, to evaluate their compliance with the Commerce Clause, we consider the four factors presented by the Court in Complete Auto Transit, Inc. You informed us that the decision to impose the county road maintenance fee on a motor carrier is determined by whether that motor carrier is either registered in a county or is located at a terminal or other carrier facility within a county. Because the motor carrier is located within a county and presumably uses county roads, a court most likely would conclude a substantial nexus exists with the State of South Carolina and the particular county imposing the road maintenance fee. We also believe a court would find the road maintenance fee is related to the service provided by the county imposing the fee. Although we have not reviewed any of the ordinances to which you refer, we presume based on your letter that the funds generated by the road maintenance fees will be used by the counties for the repair and maintenance of its roads.

Despite finding these two factors favor the conclusion that these ordinances comply with the Commerce Clause, the constitutionality of these fees comes into question with regard to whether they are fairly apportioned and not discriminatory. In your letter, you state the ordinances establish a flat fee on vehicles regardless of how much those vehicles travel on a particular South Carolina county's roads. Based on Scheiner, a court would need to evaluate the statistics relating to how much a resident motor carrier travels on the particular county's roads as opposed to how much a nonresident motor carrier travels that county's roads in order to determine what proportion of the fee the nonresident pays in relation to its travel. Because this type of analysis requires a factual determination, only a court, not this Office, can make such a determination. Op. S.C. Atty. Gen., August 4, 2006 ("[O]nly a court, not this Office, may serve as a finder of fact and conclusively determine the outcome of a factual issue."). However, we imagine the proportion paid by the nonresident is higher than that paid by a resident. If such is the case and following the Supreme Court's determination in Scheiner, these fees would create a heavier burden on nonresident motor carriers than on resident motor carriers. Furthermore, in our opinion, should other South Carolina counties and counties in other states imposed similar fees, commerce not just within the South Carolina, but among the states could be deterred. Accordingly, the fees would fail the internal consistency test as set forth in Scheiner. Based on our understanding of the road maintenance fees described in your letter, and our reading of Scheiner, we opine that a court could find such fees unconstitutional under the Commerce Clause. However, as we previously noted, this opinion is limited in that we do not address a particular county's ordinance imposing such a fee. We also add,

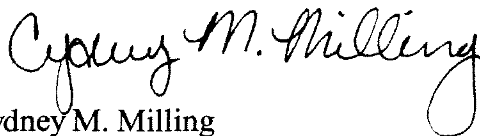
ultimately only a court may declare the particular ordinance invalid upon finding it unconstitutional.

Nonetheless, should a court find these fees unconstitutional, it must, as the Court in Scheiner did, determine whether the imposition of the road maintenance fee on nonresident motor carriers is the only practicable means of collecting revenues from those nonresidents using the particular county's roads. Unfortunately, we do not have much information to evaluate the administrative burden that would be created to determine the amount of time or miles a particular nonresident motor carrier operates on a particular county's roads. Therefore, we cannot comment on the practicality of creating a graduated fee scale. Furthermore, we believe the determination of whether a graduated fee scale would be practical necessitates an examination of fact, which is beyond the scope of this Office. Op. S.C. Atty. Gen., July 5, 2006 (stating an examination of facts is beyond the scope of an opinion of this Office). Thus, while we believe the imposition of the fees you describe sparks constitutional concerns, such concerns may be overcome by a court's finding that such fees provide the only practicable means for counties to collect revenue from nonresident users of their roads.

**Conclusion**

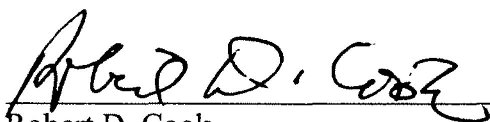
We begin with the presumption that an ordinance, as a legislative act, is constitutional. However, based on the information provided in your letter regarding the road maintenance fees, we believe a court could find such fees place a heavier burden upon nonresidents engaged in interstate commerce than it does upon residents. If a court comes to this conclusion, it will likely hold such fees unconstitutional as a violation of the Commerce Clause. However, we also note that should a court determine the ordinance establishing a county's road maintenance fee is unconstitutional, it may nevertheless find that the method of imposing such a fee is the only practical means of collecting revenue from the nonresidents using a particular county's roads. This, however, is a matter only a court can decide. In addition, we caution that until such time as a court declares these ordinances unconstitutional they continue to carry the force of law.

Very truly yours,



Cydney M. Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



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