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November 24, 2006

Public Utilities Commission of Ohio

Attn: Docketing Division

180 East Broad Street

Columbus, OH 43215-3793

Re: Arctic Express, Inc.
Case No. 06-881-TR-CVF

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PUCO

Dear Sir or Madam:

Enclosed please find four (4) copies of Respondent's Brief in the above-captioned matter, the original of which was filed with your office via facsimile this date. Copies of the Brief have also been forwarded via facsimile and U.S. Mail to Assistant Attorney Generals Reilly and Margard.

Thank you for your attention to this matter. Please do not hesitate to contact me with any questions or concerns regarding the same.

Very truly yours,



David A. Ferris

DAF/baf
Enclosure

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BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

In re:)
Notice of Preliminary Determination,)
Arctic Express, Inc.,)
Case No. 3202303486C,)
Request for Administrative Hearing.)

Case No. 06-881-TR-CVF

RECEIVED-BOOKETING B.
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PUCO

POST-HEARING BRIEF OF RESPONDENT

The respondent, Arctic Express, Inc. (the "Respondent"), through counsel, hereby submits its post-hearing brief in the above-captioned matter.

STATEMENT OF FACT

The Respondent is a motor carrier conducting highway transportation for hire in interstate commerce. On February 14, 2006, the Public Utilities Commission of Ohio ("PUCO") conducted a field inspection of Respondent's vehicle, which was at the time being operated by driver William Lindgren ("Lindgren"). At all times relevant to this case, Lindgren was an employee of Respondent. The field inspection gave rise first to an inspection report charging Respondent with violations of certain federal motor carrier safety regulations (the "FMCS Regulations") and subsequently to a Notice of Apparent Violation and Intent to Assess Forfeiture, which assessed certain fines against Respondent. Respondent timely requested an administrative hearing in this matter.

The inspection reports charged Respondent with Lindgren's alleged violations of 49 CFR §§ 177.823(a) and 172.326(c)(1), both of which pertain to marking of vehicles carrying hazardous materials with hazardous materials identification numbers (See, Staff Exhibit 1). At the time of accepting the load for transport, the vehicle at issue was properly placarded and marked with applicable hazardous materials identification numbers by Lindgren (See, Transcript

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at 82-83), all in compliance with applicable FMCS Regulations. At the time of the inspection, the vehicle remained properly placarded (*See*, Transcript at 24), but three (3) of the four (4) identification numbers had been lost due to rainy and windy conditions during transit (*See*, Transcript at 83). The PUCO did not inquire of the shipper, Lindgren, or any other person as to the initial status of the hazardous materials identification numbers or an explanation for their absence at the time of inspection (*See*, Transcript at 35).

The inspection report also noted two (2) alleged violations of 49 CFR § 393.75(a)(2), pertaining to tire tread, and one (1) alleged violation of 49 CFR § 177.817(e), pertaining to maintenance of shipping documents for hazardous materials shipments (*See*, Staff Exhibit 1). With respect to the former, Lindgren testified that despite the right tire's appearance due to excess material left over from the retread process, the tire was in acceptable condition and not in violation of the FMCS Regulations (*See*, Transcript at 86). Lindgren testified further that separation of the right side tire from the rim would have rendered that tire incapable of holding air, but it was holding air and properly inflated at the time of the inspection (*See*, Transcript at 86). The inspector, on the other hand, testified that he did not recall any particulars about the vehicle on the day of the inspection (*See*, Transcript at 40). Neither the inspector's testimony nor the inspection report described the violation alleged on the left side tire, although the inspector testified it was not a significant issue (*See*, Transcript at 42). As to the latter of the alleged violations, the inspector waited to inspect the shipping documents until they were handed to him by Lindgren, along with Lindgren's log book and medical certificate (*See*, Transcript at 35, 94-95). Lindgren testified that he kept the shipping documents in his driver's side door pocket, and that all the hazardous materials shipping documents were located on top of all other documents comprising the packet (*See*, Transcript at 81).

Upon receiving the inspection report, Tom Forbes ("Forbes") of the PUCO completed the form identified as Staff Exhibit 3 in this case (*See*, Transcript at 54). Forbes did not testify at the hearing in this matter. This form requires subjective determinations by the person completing it (*See*, Transcript at 72), and PUCO did not present any evidence at the time of hearing as to these determinations. In addition, PUCO omitted from testimony or evidence other factors comprising PUCO's file and considered in assessing the forfeiture. Staff Exhibit 3 was used to assess the forfeitures in this case against Respondent. One criterion comprising Staff Exhibit 3 is the history of the carrier that is the subject of potential forfeitures (*See*, Transcript at 69). History is determined using only PUCO results from hazardous materials inspections conducted in Ohio during the past twenty-four (24) months (*See*, Transcript at 68). Even then, a carrier cannot have a history unless it has been subjected to at least ten (10) hazardous materials inspections in Ohio during that period of time (*See*, Transcript at 68). Statistics comprising the federal Safety Net, although considered significant by PUCO and used to rate safeness of carrier operations (*See*, Transcript at 10-11), are not used by PUCO to determine a carrier's history for purposes of assessing state forfeitures.

At all times relevant and with respect to all violations alleged in this case, Lindgren was familiar with the applicable FMCS Regulations (*See*, Transcript at 81). Lindgren's knowledge was consistent with training, monitoring and disciplinary procedures implemented and enforced by Respondent (*See*, Transcript at 101-104). Lindgren complied with these FMCS Regulations and was without knowledge of any violation committed by him or Respondent. Indeed, Lindgren testified that he took reasonable steps to ensure compliance with the FMCS Regulations cited (*See*, Transcript at 82-83). Specifically, he placed the hazardous materials shipping documents on top of all other shipping documents and affixed all requisite placards and

hazardous materials identification numbers at the time of accepting the shipment for transit. Despite Lindgren's compliance, the PUCO erroneously concluded that violations had occurred, and proceeded to assess forfeitures. No fines were assessed with respect to the alleged tire violations, despite their resulting in the vehicle being placed out of service (*See*, Staff Exhibit 4). The fine arising from alleged omission of the identification numbers exceeded that relating to placement of the shipping documents (*See*, Staff Exhibit 4), despite the shipping documents being the primary source of information for emergency personnel during an emergency (*See*, Transcript at 28).

ANALYSIS AND ARGUMENT

1. Neither Lindgren nor Respondent committed the violations alleged in this case.

A thorough review of the testimony comprising this case confirms the following. At the time of accepting the shipment for transport, Lindgren placed the hazardous materials shipping documents on top of all other documents. He placed them in a spot directly accessible to him at all times during transit. Upon being approached by the inspector and asked for the shipping document and other items, he handed everything to the inspector in the proper format. The inspection report provided to the driver and the notice assessing the civil forfeiture alleged that the documents had not been tabbed, but Lindgren indicated he noticed the lack of tabs and, therefore, placed the hazardous materials shipping documents on top. The inspector testified he did not recall particulars of the inspection and was relying on the inspection report. Lindgren, on the other hand, remembered the inspection and the fact that the hazardous shipping documents were on top.

Upon accepting the shipment for transport, Lindgren also affixed the proper placards and four (4) of the five (5) hazardous materials identification numbers on the vehicle. He placed the

fifth extra identification number in the cab of the vehicle. Lindgren placed these items in accordance with the applicable FMCS Regulations, but by the time of the inspection, three (3) of the four (4) hazardous materials identification numbers had fallen off due to wind and rain. Lindgren took all reasonable steps to comply with the applicable FMCS Regulations and was in compliance at the onset of his trip. The inspector noted he did not remember the inspection itself or the vehicle at issue. Lindgren did remember the vehicle and testified that at the time of the inspection, one (1) identification number remained affixed to the vehicle, thereby providing additional evidence of compliance with the marking requirements.

The loss of these identification numbers due to an Act of God does not constitute a violation, and in fact relief from certain FMCS Regulations is already expressly in place where non-compliance results from inclement weather or other unforeseen road hazards. *49 CFR 395.1* To the extent this Commission determines otherwise, compliance was an impossibility given the conditions through which the vehicle had to travel. Even if this Commission goes one step further and determines that Lindgren committed a knowing violation of the FMCS Regulations at issue, any such violations would have been unforeseen and unpreventable by Respondent, as shown by the testimony introduced by Respondent during the hearing. Specifically, Respondent's President, Richard Durst, testified as to training programs, monitoring, disciplinary procedures, and bonus and merit pay incentives all implemented by Respondent as a reasonably adequate means of ensuring compliance by all drivers with the FMCS Regulations (*See*, Transcript at 101-104, 113).

2. If it is determined that the violations occurred, neither Lindgren nor Respondent had knowledge, or could have reasonably been expected to know, of the violations.

Respondent testified that it provides training, monitoring, and disciplinary procedures reasonably adequate to ensure compliance with all applicable FMCS Regulations. Where a

motor carrier takes reasonable steps to confirm compliance by its drivers with applicable FMCS Regulations, it cannot be claimed that the motor carrier knew or should have known of any subsequent violation by its driver. In addition, Respondent could not have foreseen or prevented violations of the type and nature alleged in this case.

This is especially so in the case of Respondent, where Lindgren testified that he knew of the FMCS Regulations at issue and took the necessary steps to comply with them. The PUCO failed to present any evidence that Respondent's training, monitoring or disciplinary procedures were inadequate or that the driver did not have adequate knowledge of the FMCS Regulations at issue. To the contrary, the inspector testified that although his role includes inspection of motor carrier terminals and shipper facilities for violations of FMCS Regulations, he failed to investigate Respondent or the shipper identified in the shipping documents prior to attributing the alleged violations to Respondent. The PUCO also failed to present any explanation as to why it did not cite Lindgren for alleged violations that, had they occurred, would have been in the direct control of Lindgren and not Respondent.

3. Notwithstanding the foregoing, the method used to determine the forfeitures in this matter is unlawful, arbitrary and capricious.

In calculating a forfeiture amount, the FMCS Regulations require that the charging agency consider the nature, gravity of the violation and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice and public safety may require. 49 CFR 386.81. Generally, the PUCO failed to present testimony or evidence as to many of the factors required in 49 CFR 386.81 or other FMCS Regulations. In this case, the PUCO failed to present any testimony or evidence from anyone with personal knowledge as to how the forfeitures were assessed or what subjective determinations or considerations were made during the process. The person testifying

for the PUCO acknowledge still other factors were considered, such as the type of hazardous materials, the amount, weight, class, and classification number of hazardous materials, and other bits and pieces of information (*See*, Transcript at 49-50), but again failed to present any testimony or evidence as to these factors, other than as to weight. Even if it were determined that sufficient evidence and testimony were given by PUCO, the PUCO fails to consider the factors required in calculating forfeitures. Respondent's history is determined using only hazardous materials inspections occurring in the State of Ohio, and then, only in comparison to other motor carriers having ten (10) or more such inspections. This results in a history that does not accurately compare Respondent to all motor carriers conducting this type of transportation and fails whatsoever to consider federal Safety Net information, which PUCO by its own admission considers significant.

Finally, PUCO's forfeiture methodology fails to afford Respondent equal protection and due process under the law. In instances of a motor carrier that has not had ten (10) hazardous materials inspections in the State of Ohio, or whose history is within the better fifty percent (50%) of motor carriers referenced in determining history, that motor carrier gets a "free pass," and the forfeiture is waived. This waiver occurs regardless of any other factors comprising Staff Exhibit 3. Accordingly, in determining the forfeiture assessed against Respondent, PUCO relied on factors that in many instances are meaningless and result in no fine for violations of the FMCS Regulations. In other words, two motor carriers may be guilty of the exact same violation, with the exact same severity and threat to the general public, and depending on history, one may be fined while the other is not.

4. The PUCO has failed to afford Respondent due process and equal protection under the law.


Given the foregoing, PUCO has failed to afford Respondent due process and equal protection under the law, in that the standards used in determining knowledge of any alleged violations and the forfeiture were unlawful, arbitrary and capricious.

CONCLUSION

Consistent with this brief and the testimony and exhibits comprising the hearing in this matter, all charges and forfeitures against Respondent should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify a copy of this POST-HEARING BRIEF OF RESPONDENT was served this 24th day of November, 2006, via fax and ordinary U.S. Mail, upon Stephen A. Reilly and Werner L. Margard, III, Assistant Attorney Generals, 180 E. Broad Street, 9th Floor, Columbus, OH 43215.


David A. Ferris