

1 BEFORE THE PUBLIC UTILITIES COMMISSION OF OHIO

2 - - -

3 In the matter of :
4 the Request for :
5 Administrative : Case No. 09-607-TR-CVF
6 Hearing by Sweeney :
7 Services, Inc. :
8 - - -

8 PROCEEDINGS

9 Before Gregory Price, Hearing Examiner, at the
10 Public Utilities Commission of Ohio, 180 East
11 Broad Street, Columbus, Ohio, Hearing Room 11C,
12 on Tuesday, December 1, 2009, at 10:00 a.m.

13 - - -

14
15
16
17
18
19
20
21 ARMSTRONG & OKEY, INC.
22 222 East Town Street, 2nd Floor
23 Columbus, Ohio 43215-5201
24 (614) 224-9481/(800) 223-9481
25 Fax (614) 224-5724
- - -

1 APPEARANCES:

2 Richard Cordray, Ohio Attorney General
3 Duane Luckey, Section Chief
4 By Thomas G. Lindgren and Stephen A.
5 Reilly
6 Assistant Attorneys General
7 180 East Broad Street, 6th Floor
8 Columbus, Ohio 43215

9 On behalf of the Staff of the Public
10 Utilities Commission of Ohio.

11 Ferris & Ferris, LLP
12 By David A. Ferris
13 6797 North High Street, Suite 214
14 Worthington, Ohio 43085

15 On behalf of the Respondent.

16 - - -
17
18
19
20
21
22
23
24
25

INDEX TO WITNESSES

- - -

STAFF'S DIRECT CROSS REDIRECT EXAMINATION

Tom Forbes	7	25		
By Examiner			27	

John Canty	29	47	51	
By Examiner				46,48

- - -

INDEX TO EXHIBITS

- - -

STAFF'S	ID'd	AD'd
1 - Driver/Vehicle Examination Report	14	53
2A - Photo of vehicle	20	53
2B - Photo of cargo tank	20	53
2C - Close-up photo of cargo tank and inspection dates	20	53
2D - Photo of specification plate	21	53
2E - Photo of specification plate	21	53
2F - Photo of ultimate destination	21	53
2G - Photo of front of vehicle	22	53
2H - Photo of rear of vehicle	22	53
2I - Photo or right side of vehicle	22	53
2J - Photo or right door of vehicle	22	53
2K - Shipping paper	22	53
2L - Shipping paper	22	53
2M - Shipping paper	22	53
2N - Driver's CDL license	22	53
2O - Driver's CDL license	22	53
3 - Forfeiture Assessment	34	53
4 - Notice of Apparent Violation and Intent to Assess Forfeiture	41	53
5 - Notice of Preliminary Determination	43	53
6 - July 20, 2009 letter from David Ferris with attachment	45	53

1 Tuesday Morning Session,
2 December 1, 2009.

3 - - -

4 HEARING EXAMINER PRICE: Good
5 morning. The Public Utilities Commission has
6 set for hearing at this time and this place Case
7 No. 09-607-TR-CVF being in the matter of the
8 request for administrative hearing by Sweeney
9 Services, Inc.

10 My name is Gregory Price. I'm the
11 Attorney Examiner assigned to preside over
12 today's hearing.

13 Let's begin by taking appearances,
14 starting with the Staff.

15 MR. LINDGREN: On behalf of the
16 Commission Staff, Ohio Attorney General Richard
17 Cordray and Duane Luckey, chief of the public
18 utilities section, by Thomas Lindgren and
19 Stephen Reilly, Assistant Attorneys General, 180
20 East Broad Street, 6th Floor, Columbus, Ohio
21 43215.

22 HEARING EXAMINER PRICE: Mr. Ferris?

23 MR. FERRIS: On behalf of the
24 Respondent, Sweeney Services, Inc., David A.
25 Ferris, Ferris & Ferris, LLP, 6797 North High

1 Street, Suite 214, Worthington, Ohio 43085.

2 HEARING EXAMINER PRICE: Thank you.

3 Do we have any preliminary matters to discuss
4 before we take our first witness? Seeing none,
5 the Staff may call your first witness.

6 MR. LINDGREN: Thank you, Your
7 Honor. The Staff calls Tom Forbes to the
8 stand.

9 HEARING EXAMINER PRICE: Mr. Forbes?
10 (Witness sworn.)

11 - - -

12 TOM FORBES

13 called as a witness on behalf of the Staff,
14 being first duly sworn, testified as follows:

15 HEARING EXAMINER PRICE: Please be
16 seated and state your name and business address
17 for the record.

18 THE WITNESS: Tom Forbes,
19 F-o-r-b-e-s, 180 East Broad Street, 4th Floor,
20 Columbus, Ohio 43215.

21 HEARING EXAMINER PRICE: Thank you.
22 Mr. Lindgren?

23 MR. LINDGREN: Thank you.

24 - - -
25

DIRECT EXAMINATION

By Mr. Lindgren:

Q. Mr. Forbes, where are you employed?

A. By the Public Utilities Commission of Ohio, transportation department, compliance division.

Q. And what are your duties with the compliance division?

A. I review inspection reports and compliance reviews and prepare assessment charts, enter fine amounts and send fine letters to Respondents, conduct settlement conferences with the Respondents, answer technical questions. I conduct enough inspections to maintain my certifications, attend in-service training, and testify at hearings.

Q. Do you sometimes conduct motor vehicle inspections as part of your employment?

A. Yes, sir.

Q. And what sort of training have you received to do motor vehicle inspections?

A. I attended the North American Level 1 driver and vehicle inspection course, hazardous materials inspection course, cargo tank inspection course, other bulk package

1 inspection course, compliance reviews, and Level
2 6 radioactive inspection course.

3 Q. Thank you. What certifications do
4 you hold?

5 A. I maintain a certification in each
6 of the items that I attended the training for.

7 Q. Thank you. Mr. Forbes, do you
8 recall performing any motor vehicle inspections
9 on May 20 of 2009?

10 A. Yes, sir.

11 Q. And do you recall inspecting a
12 vehicle owned by Sweeney Services of New
13 Concord, Ohio, on that date?

14 A. Yes, sir.

15 Q. Do you recall what prompted you to
16 conduct this inspections?

17 A. It was a hazardous materials
18 inspection. When the vehicle went by me, it was
19 placarded on all four sides, and I took what was
20 called a HINT inspection, or headquarter's
21 interest for hazardous materials, and followed
22 the vehicle and stopped it for an inspection.

23 Q. Where did this stop and inspection
24 take place?

25 A. In Hocking County. The stop took

1 place on State Route -- just off State Route 664
2 near mile post 10. The driver turned on to a
3 county road when I activated my overhead lights.

4 Q. Thank you. What did you do after
5 you had stopped this vehicle?

6 A. I contacted the driver and spoke to
7 him and asked for documentation, including his
8 driver's license, medical card, shipping paper,
9 hazardous material permits, asking him where he
10 was coming from or to and if he had a log book
11 or maintained a log book, which he did not. He
12 had all of the information I asked for organized
13 in a folder. He handed me the folder and his
14 driver's license.

15 Q. Thank you. Did you determine what
16 this vehicle was carrying on that date?

17 A. Yes. He provided me with a shipping
18 paper at that time, and it was transporting
19 petroleum distillate.

20 Q. Thank you. Is that considered a
21 hazardous material?

22 A. Yes, sir.

23 Q. What did you do after you reviewed
24 the documents the driver provided you?

25 A. I told the driver I was going to set

1 down the documents in my vehicle. I would be
2 right back with him to complete the inspection.
3 While walking back, I glanced down at his
4 driver's license and noticed that he only had a
5 hazardous materials endorsement and not a tank
6 endorsement. I come back up and questioned the
7 driver about it, and he said he did not believe
8 he needed a tank endorsement.

9 Q. What happened after that?

10 A. I finished the vehicle inspection,
11 and other than the tank endorsement issue there
12 were no other defects noted on the inspection.
13 He asked if we could call his boss, that he felt
14 he knew why he did not need a tank endorsement.
15 Neither myself or the driver's cell phone would
16 work at the location we were sitting, so he
17 asked if we could move to a school that was on
18 top of the hill, which we did.

19 We went up to a Logan City School.
20 His cell phone worked at that location and mine
21 did not. He contacted Mr. Sweeney. He first
22 spoke to Mr. Sweeney and then I later spoke to
23 Mr. Sweeney. Mr. Sweeney felt that they did not
24 need a tank endorsement. I told Mr. Sweeney
25 that I felt they did, but what I would do is I

1 would contact the lieutenant over commercial
2 driver's licenses with the highway patrol and if
3 he said they did not need a tank endorsement, I
4 would finish the inspection and send their
5 driver down the road.

6 However, if he said they did need a
7 tank endorsement, a violation would be listed
8 and we were going to have to figure out how to
9 proceed.

10 Q. And so how was this issue resolved?

11 A. I contacted Lieutenant Regal at the
12 State Highway Patrol, explained to him the GVWR
13 of the vehicle I had stopped.

14 MR. FERRIS: Your Honor, I'm going
15 to object to his testimony as to what the State
16 trooper may or may not have said based on
17 hearsay.

18 HEARING EXAMINER PRICE: Mr.
19 Lindgren?

20 MR. LINDGREN: None, Your Honor.

21 HEARING EXAMINER PRICE: Sustained.

22 Q. Mr. Forbes, did you end up -- you
23 ended up -- did you end up citing this vehicle
24 for any violations?

25 A. I noted a violation on the

1 inspection report for failure to have a cargo
2 tank endorsement -- or a tank endorsement,
3 excuse me.

4 Q. So did you determine that this
5 vehicle was required to have, or the driver was
6 required to have the endorsement?

7 A. Yes, sir.

8 Q. Thank you.

9 HEARING EXAMINER PRICE: Can you
10 explain why the driver was required to have an
11 endorsement.

12 THE WITNESS: It is a tank greater
13 than 119 gallons that's permanently or
14 temporarily attached to the vehicle. In this
15 case, it was a specification cargo tank, a 406
16 specification cargo tank of 600 gallon
17 capacity. The exception -- the thousand gallon
18 exception that Mr. Sweeney referred to when I
19 spoke to him dealt with portable tanks, and this
20 is a cargo tank.

21 HEARING EXAMINER PRICE: How did you
22 know it's a specification 406 cargo tank?

23 THE WITNESS: There's a
24 specification plate on the vehicle, which I did
25 take a photograph of.

1 HEARING EXAMINER PRICE: Thank you.

2 Q. Mr. Forbes, how was this tank
3 attached to the vehicle?

4 A. I don't know on this particular
5 tank. I don't recall how it was attached to the
6 vehicle. I can tell you how they are typically
7 attached to the vehicle.

8 Q. How are they typically attached?

9 MR. FERRIS: Objection, Your Honor.
10 He's offering opinion testimony at this point in
11 time, not factual testimony.

12 HEARING EXAMINER PRICE: I don't
13 know the relevance of how they're typically
14 attached to the vehicles. Sustained.

15 MR. LINDGREN: Thank you.

16 Q. Mr. Forbes, did you prepare any
17 reports during or after your inspection of this
18 vehicle owned by Sweeney Services?

19 A. Yes. Upon completion of the
20 inspection, a report was prepared and provided
21 to the driver.

22 MR. LINDGREN: And may I approach
23 the witness?

24 HEARING EXAMINER PRICE: You may.

25 MR. LINDGREN: Let the record

1 reflect that I am handing the witness what has
2 been marked for identification as Staff Exhibit
3 1.

4 HEARING EXAMINER PRICE: Noted.

5 (EXHIBIT HEREBY MARKED.)

6 Q. Mr. Forbes, is this the document you
7 just mentioned?

8 A. Yes. This is the inspection report
9 that I completed.

10 Q. And what is the purpose of this
11 report?

12 A. To document the inspection and any
13 violations noted to both the carrier, the
14 Federal Motor Carrier Safety Administration, and
15 the Public Utilities Commission.

16 Q. Did you prepare this report?

17 A. I did.

18 Q. Is everything in it accurate?

19 A. Yes, sir.

20 Q. Has this report been altered in any
21 way since you prepared it?

22 A. No, sir.

23 Q. Thank you. What did you do after
24 you -- what did you do with this report after
25 you prepared it?

1 A. I electronically transmitted it to
2 the Public Utilities Commission and the Safety
3 Net System of the Federal Government where we
4 deposit our electronic driver vehicle inspection
5 reports.

6 Q. Thank you. Is this a report that is
7 typically kept by the Public Utilities
8 Commission in the ordinary course of its
9 business?

10 A. Yes, sir.

11 Q. Thank you. In looking over this
12 report, could you briefly explain what each
13 section reflects.

14 A. Yes. Starting in the upper
15 right-hand corner, there's a report number. The
16 first four digits of it is my unit number, then
17 the number 300, and then the sequential number
18 of inspections that I performed. There is an
19 inspection date and certification date listed, a
20 time started and time ended for the inspection,
21 the level of inspection meaning it was a full
22 inspection, in this case a Level 1 inspection.
23 It was a hazardous material bulk package
24 inspection.

25 The next line below that on the left

1 lists Sweeney Services' name and information.

2 At that time they did not have a DOT number;
3 the driver's name, driver's license number, and
4 date of birth.

5 In the next line down was the
6 location, origin, destination, bill of lading
7 number, and commodity.

8 The next line down lists the vehicle
9 identification information. It was a 2004 Ford
10 truck. It lists its license number, unit
11 number, VIN number, gross vehicle weight
12 rating. It was issued a CVSA inspection decal
13 for passing the inspection. Brake adjustments
14 were not applicable because of the types of
15 brakes.

16 In the next box it lists the
17 violation that was listed, 383.93(B)(3), no tank
18 vehicle endorsement on CDL. The driver has only
19 hazardous material endorsement.

20 The next block shows it was hauling
21 a flammable material. It was placarded it was a
22 specification cargo tank, specification 406.
23 There was nothing listed in the special checks.

24 The next block contains my
25 inspection notes. There was nothing listed in

1 the Special Studies Field; and in the Locally
2 Defined Fields it defines the hazardous
3 material that was being transported, the
4 driver's address, the fact that I did take
5 photos and who the shipper was.

6 The next box declares the driver out
7 of service until the vehicle is no longer a CMV
8 or he has a tank endorsement.

9 The remainder of it is just notices
10 to the driver or motor carrier.

11 Q. Thank you. What happened to this
12 truck after you had completed your inspection?

13 A. We were sitting at a school when we
14 spoke to Mr. Sweeney and made other phone calls,
15 and I did not feel it would be appropriate to
16 place this vehicle hauling a flammable liquid
17 out of service at a school. I felt the risk
18 outweighed any benefit. So through talking to
19 the driver and the passenger, I ascertained
20 where they were going. They were going off of
21 Goose Creek Road, which was further out 664. I
22 offered to escort them to Goose Creek Road so
23 they could unload the vehicle and told them even
24 though it was unloaded, it's still a cargo tank,
25 it requires a tank endorsement.

1 The passenger come up with the idea
2 that if they filled the tank with water it's no
3 longer a hazardous material vehicle, it's under
4 26,000, it would not require a CDL, and they
5 could continue their trip which ultimately is
6 what was done. They went to the well,
7 off-loaded their product while I typed up my
8 inspection report, then they went to a stream
9 and put water in the tank and was able to
10 continue home because it's no longer a
11 commercial motor vehicle. It doesn't meet the
12 size requirement and it is not transporting
13 hazardous material.

14 HEARING EXAMINER PRICE: Where did
15 they put the hazardous material?

16 THE WITNESS: In an oil well.

17 HEARING EXAMINER PRICE: In an oil
18 well, okay.

19 Q. Thank you. I believe you said you
20 took some photos in the course of this
21 inspection; is that correct?

22 A. Yes.

23 MR. LINDGREN: May I approach the
24 witness again?

25 HEARING EXAMINER PRICE: You may.

1 MR. LINDGREN: Let the record
2 reflect that I'm handing the witness what has
3 been marked for identification as Staff's
4 Exhibits 2-A through 2-O.

5 (EXHIBITS HEREBY MARKED.)

6 HEARING EXAMINER PRICE: So marked.

7 Q. Mr. Forbes, do you recognize these
8 documents?

9 A. Yes, sir.

10 Q. And can you explain what they are?

11 A. These are photographs that I took
12 during the inspection process of the Sweeney
13 Services vehicle reference this inspection
14 report, meaning Staff Exhibit 1.

15 Q. And do these photographs accurately
16 depict what you saw in the course of your
17 inspection?

18 A. Yes, sir.

19 Q. Do these photographs appear to have
20 been altered in any way?

21 A. No, sir.

22 Q. And what did you do with these
23 photographs after you took them?

24 A. They were electronically up-loaded
25 to the photographs that were at the Public

1 Utilities Commission of Ohio.

2 Q. Are these photographs a type of
3 record that is regularly kept by the Public
4 Utilities Commission in the ordinary course of
5 its business?

6 A. Yes, sir.

7 Q. Thank you. Mr. Forbes, would you go
8 through each photograph, beginning with 2-A, and
9 briefly explain what each photograph represents.

10 A. Photograph 2A is a picture of the
11 vehicle that was inspected that day, Sweeney
12 Services vehicle, and it also has a picture of
13 the driver sitting in the vehicle.

14 Photograph 2B shows the cargo tank
15 on the vehicle, the placarding on the left side
16 and the cargo tank inspection dates near the
17 left front of the vehicle, or of the tank.

18 Photograph 2C is a close-up picture
19 of the cargo tank inspection dates depicting all
20 dates are within the test requirements.

21 HEARING EXAMINER PRICE: Excuse me,
22 which test requirements?

23 THE WITNESS: For cargo tank motor
24 vehicles.

25 HEARING EXAMINER PRICE: So these

1 are inspections that were performed as required
2 of a cargo tank?

3 THE WITNESS: Yes, sir.

4 HEARING EXAMINER PRICE: Okay.

5 A. Photograph 2D is the specification
6 plate showing it was manufactured by Mid-State
7 Tank Company of Sullivan, Illinois. The third
8 item down shows it being a DOT spec 406 tank as
9 well as the original test date of it, and the
10 second item is the manufacturer's serial
11 number. Roughly halfway down it shows a water
12 capacity of 600 gallons.

13 Photograph 2E is another spec plate
14 that's attached to the vehicle that shows load
15 rates and maximum pay loads and the date of
16 manufacturing as being 4-46-06.

17 Photograph 2F is the ultimate
18 destination we ended up at where the product was
19 off-loaded into the well. That was just a way
20 to document my ending location where the
21 inspection was finalized.

22 HEARING EXAMINER PRICE: This was
23 the consignee, though. This is where it was
24 intended to go all along?

25 THE WITNESS: Yes. This was its

1 original.

2 HEARING EXAMINER PRICE: It was not
3 a random oil well that you found?

4 THE WITNESS: No, and it was not
5 put in this tank; it was put in the actual
6 wellhead.

7 HEARING EXAMINER PRICE: Thank you.

8 A. 2G shows the front of the same
9 vehicle including the license plate.

10 2H shows the rear of the same
11 vehicle including the license plate.

12 2I shows the right side of the
13 vehicle including the placard and the necessary
14 hoses.

15 2J shows the right door.

16 2K, L, and M are copies of the same
17 shipping paper. 2L was blurry. I took three
18 pictures to make sure I could read what was on
19 there.

20 And 2N and 2O were photographs of
21 the driver's CDL showing that he only had an H
22 endorsement or hazardous endorsement, and it was
23 a class C CDL as being what was required for
24 this vehicle.

25 Q. Thank you. Mr. Forbes, do you

1 recall if this tank was bolted to the truck?

2 A. I do not.

3 Q. Thank you. What caused you to make
4 the conclusion that this was a cargo tank and,
5 therefore, the driver was required to have a
6 tank vehicle endorsement?

7 A. A combination of the specification
8 plates that are shown in photographs 2D, 2E.

9 MR. FERRIS: Your Honor, I'm going
10 to object. The witness already testified that
11 he himself didn't make that determination, so I
12 don't think he had any personal knowledge as to
13 whether or not this was a cargo tank or portable
14 tank.

15 HEARING EXAMINER PRICE: Overruled.
16 Please proceed.

17 A. A combination of the specification
18 plates and I also reviewed the hazardous
19 materials table to verify that this material
20 that was being transported was allowed in that
21 package, and a DOT 406 tanker is an acceptable
22 package for this material.

23 Q. Thank you. Was this an independent
24 determination that you made based on your
25 professional training?

1 A. Yes.

2 Q. Thank you.

3 MR. LINDGREN: Thank you. I have no
4 further questions at this time.

5 HEARING EXAMINER PRICE: I just want
6 to clarify something. This was an intrastate
7 shipment, is that correct?

8 THE WITNESS: Yes.

9 HEARING EXAMINER PRICE: Originated
10 in Zanesville?

11 THE WITNESS: New Concord, I
12 believe. Yes, New Concord.

13 HEARING EXAMINER PRICE: And the
14 termination was in Ohio?

15 THE WITNESS: South Bloomingville,
16 Ohio.

17 HEARING EXAMINER PRICE: And the
18 destination was a petroleum wellhead; is that
19 correct?

20 THE WITNESS: Yes, an oil well.

21 HEARING EXAMINER PRICE: Thank you.
22 Mr. Ferris?

23 - - -

24

25

CROSS-EXAMINATION

By Mr. Ferris:

Q. Mr. Forbes, you indicated that you conduct enough inspections throughout the year to maintain your certification to conduct inspections.

A. Yes, sir.

Q. And how many inspections is that?

A. You are required to conduct 32. Eight of those have to be cargo tank and eight have to be hazardous materials. I typically conduct about 50.

Q. Throughout the entire year?

A. Yes, sir.

Q. Now, when we were going through Exhibit 1 you talked about the brake adjustments and you said that those were not applicable. Why are those not applicable?

A. Because the vehicle did not have air brakes on it.

Q. Okay. This form, Exhibit 1, again, is it a standard form that's used by the PUCO?

A. Yes.

Q. And are there parts of the form that stay the same and then other parts that you fill

1 in?

2 A. There is a computer program that I
3 open up and I fill in boxes, basically, with the
4 inspection information. The headers and the
5 logos do stay the same. The general field, such
6 as location or highway and county, stay the
7 same, and then I fill in the boxes with the
8 appropriate response.

9 Q. So, for instance, when you said
10 cargo tank 406, is that a box that you fill in
11 with 406?

12 A. Yes, sir.

13 Q. And where do you fill in the
14 specification for a portable tank?

15 A. In that same box you can choose
16 "other."

17 Q. Okay. And so in that instance it
18 would say -- what would it say then?

19 A. It would say "other."

20 Q. So it would say "cargo tank: other"?

21 A. Yes, sir.

22 MR. FERRIS: I don't have any
23 further questions right now, Your Honor.

24 HEARING EXAMINER PRICE: Thank you.
25 Mr. Forbes, I have some questions.

1 THE WITNESS: Yes, sir.

2 HEARING EXAMINER PRICE: You said
3 that you stopped this vehicle as part of a HINT
4 inspection?

5 THE WITNESS: Yes, sir.

6 HEARING EXAMINER PRICE: And HINT
7 inspection means?

8 THE WITNESS: Headquarter's
9 interest, in this case a hazardous materials
10 inspection.

11 HEARING EXAMINER PRICE: So all
12 hazardous material vehicles were part of your
13 headquarter's interest?

14 THE WITNESS: Yes, sir.

15 HEARING EXAMINER PRICE: This is not
16 a random inspection?

17 THE WITNESS: Absolutely not.

18 HEARING EXAMINER PRICE: You
19 observed no violations?

20 THE WITNESS: There was no
21 violations observed. This vehicle was in
22 impeccable shape.

23 HEARING EXAMINER PRICE: Do you have
24 any idea how many hazardous motor vehicle
25 carriers are permitted to operate in this state?

1 THE WITNESS: No, I do not.

2 HEARING EXAMINER PRICE: Hundreds?

3 THE WITNESS: Thousands.

4 HEARING EXAMINER PRICE: So with a
5 hazmat inspection you can inspect any hazmat
6 material at any time. Is that your testimony?

7 THE WITNESS: Yes, that's correct.

8 HEARING EXAMINER PRICE: Thank you.
9 You're excused. I'm sorry. You are not
10 excused. Redirect, Mr. Lindgren?

11 MR. LINDGREN: Not at this time,
12 Your Honor, but we would like to reserve the
13 right to call him in rebuttal.

14 HEARING EXAMINER PRICE: Thank you.
15 Now you're excused. The Examiner needs to take
16 a two-minute break.

17 (Off the record.)

18 HEARING EXAMINER PRICE: Back on the
19 record. Mr. Lindgren?

20 MR. LINDGREN: Your Honor, my
21 colleague, Mr. Reilly, is going to call the next
22 witness, I believe, but --

23 HEARING EXAMINER PRICE: I was too
24 quick. Let's go off the record.

25 MR. LINDGREN: Thanks.

1 (Off the record.)

2 HEARING EXAMINER PRICE: Mr. Reilly?

3 MR. REILLY: Your Honor, I would
4 call John Canty.

5 (Witness sworn.)

6 HEARING EXAMINER PRICE: Please be
7 seated and state your name and business address
8 for the record.

9 THE WITNESS: John J. Canty,
10 C-a-n-t-y, Public Utilities Commission of Ohio,
11 180 East Broad Street, Columbus, Ohio 43215.

12 HEARING EXAMINER PRICE: Thank you.
13 Mr. Reilly?

14 MR. REILLY: Thank you, Your
15 Honor.

16 - - -

17 DIRECT EXAMINATION

18 By Mr. Reilly:

19 Q. Good morning, Mr. Canty.

20 A. Good morning.

21 Q. How long have you been employed with
22 the Public Utilities Commission of Ohio?

23 A. A little over 20 years.

24 Q. And what's your current position
25 with the Commission?

1 A. I am the assistant chief of the
2 compliance division in the transportation
3 department.

4 Q. And how long have you been in that
5 position?

6 A. Approximately 15 years.

7 Q. And what are some of your duties as
8 assistant chief of the transportation department
9 -- assistant chief compliance of the
10 transportation department?

11 A. I supervise the employees who are
12 responsible for reviewing the inspection reports
13 that come in from the field. They review the
14 violations and assess the violations. We mail
15 out the notices to the appropriate parties.

16 Q. So you're familiar with the
17 Commission's method for assessing whether a
18 commercial motor vehicle violation exists?

19 A. Yes.

20 Q. And that's performed under your
21 general supervision. Is that what you said?

22 A. Yes, that's correct.

23 Q. And then in your position do you
24 also come into contact with how the Staff
25 determines its recommendation of what a

1 particular commercial motor vehicle civil
2 forfeiture should be?

3 A. Yes.

4 Q. And that determination also comes
5 under your general supervision; is that not
6 correct?

7 A. Yes.

8 Q. Mr. Canty, I would like to talk to
9 you just a little bit now about the process.
10 You mentioned the process and what the Staff
11 does very briefly. I'd like to talk to you
12 about the process the Commission goes through or
13 the Staff goes through in determining whether a
14 commercial motor vehicle violation exists in a
15 little more detail; all right? Would you
16 describe that process for us?

17 Let me back up for just a second.
18 On the witness stand up there there is what is
19 marked for identification purposes as Staff
20 Exhibit No. 1. Do you see that?

21 A. Yes, I do.

22 Q. Have you seen that type of report
23 before?

24 A. Yes. This is a standard inspection
25 report.

1 Q. Now, I believe you previously
2 mentioned that the Staff reviews inspection
3 reports and then makes determinations based on
4 those inspection reports as to violations.

5 A. Yes.

6 Q. And the inspection reports you were
7 referring to, one of those is what is now marked
8 for identification purposes as Commission
9 Exhibit No. 1; is that correct?

10 A. Yes.

11 Q. Okay. Tell us, after the Staff gets
12 an inspection report, such as what's been marked
13 for identification as Commission Exhibit No. 1,
14 would you walk us through what happens after
15 that.

16 A. Yes. The inspection reports are
17 assigned to the various compliance officers for
18 their review. I believe that this inspection
19 report was assigned to a compliance officer by
20 the name of Michael Hines. He would have
21 reviewed this inspection report and any
22 violations, any photos, any other documents that
23 go along with that that would have been
24 submitted by the investigator.

25 We have a couple of documents that

1 we use in determining what the fine would be.
2 We have an assessment chart which groups the
3 violations into various categories by point
4 value. We have an assessment matrix that we
5 use, which is essentially an Excel spread sheet.
6 You plug the values into the spread sheet and it
7 computes the amount and fine.

8 Q. All right. So the determination
9 the Staff makes of whether a violation exists is
10 upon a review of what has been marked for
11 identification, for example, as Staff Exhibit
12 No. 1, and in that process they look at pictures
13 or whatever else might have been submitted and
14 that, such as what has been marked for
15 identification as Staff Exhibit No. 2; is that
16 correct?

17 A. Correct.

18 Q. Now, after a determination is made
19 that a violation exists, what happens?

20 A. The compliance officer would review
21 the assessment chart to find the proper point
22 value for the violations that are on the
23 inspection report, and would then plug them into
24 the matrix considering all the factors that are
25 on the matrix; and as I said before, the spread

1 sheet pretty much computes the total of the
2 forfeiture as you get down to the bottom of the
3 spread sheet.

4 Q. Thank you, Mr. Canty.

5 MR. REILLY: Your Honor, may I
6 approach?

7 HEARING EXAMINER PRICE: You may.

8 MR. REILLY: Thank you.

9 (EXHIBIT HEREBY MARKED.)

10 Q. Mr. Canty, I'm going to hand you
11 what has been marked for identification purposes
12 as Staff Exhibit No. 3. Have you seen this --
13 let me ask you, have you seen this type of
14 document before?

15 A. Yes.

16 Q. Can you tell me what it is?

17 A. Yes. The title of it is Forfeiture
18 Assessment. This is the matrix that I was
19 referring to. It is essentially a printout of
20 the spread sheet that we plug the values into.
21 It has -- it is a typical forfeiture assessment
22 matrix, the type that we use every day. It is
23 particular to this case and has the inspection
24 report No. 9436300270 filled into the report
25 number box, completed by Mike Hines. It has the

1 inspection report date as well as the date
2 assessed and the company name, Sweeney Services.

3 Q. And what has been marked for
4 identification purposes as Staff Exhibit No. 3
5 is the forfeiture assessment matrix for this
6 case; is that correct?

7 A. That's correct.

8 Q. And this would have been performed
9 under your general supervision, correct?

10 A. Correct.

11 Q. All right. Mr. Canty, just look at
12 this document. You described the top third of
13 it. On the bottom third there is columns that
14 begin, moving from left to right, Violation
15 Code/Description. Do you see that?

16 A. Yes.

17 Q. Would you describe -- would you
18 explain for us what is listed under Violation
19 Code/Description.

20 A. Yes. It has 383.93(B)(3) for the
21 violation code. The description is no tank
22 endorsement.

23 Q. And that would be the violation
24 assessed in this case?

25 A. Yes. That would correspond with the

1 violation that is listed on Staff Exhibit 1.

2 Q. Moving down in that column, the next
3 item I see is Nature Gravity. Do you see that?

4 A. Yes.

5 Q. Would you tell us what that is.

6 A. Yes. That is the nature and gravity
7 is 0 to 10 points. It the point value for each
8 violation that I was referring to earlier that
9 we get from the charts that we maintain that
10 lists the violations by categories and has the
11 point value. So the value of 3 was entered here
12 on the spread sheet because that is the value
13 from the nature and gravity chart that would go
14 on here.

15 Q. Moving on down, the next one is
16 Extent of Violation. Do you see that?

17 A. Yes.

18 Q. Would you tell us what that is?

19 A. That can be a value of a negative 10
20 to positive 10. In the standard inspection that
21 would just be a value of zero. That would not
22 affect the ultimate point value or the final
23 amount of the fine, as well as the next column,
24 next couple of columns down, Actual Harm, zero
25 to 20 points; Other Circumstances, negative 10

1 to positive 10. Actual harm, obviously, would
2 be if there was some type of incident or
3 hazardous materials release. Other
4 circumstances could be property damage,
5 evacuations, any number of other circumstances.
6 In this case this was a pretty standard
7 violation, if I can call it standard violation.
8 There's no value put in these boxes for any of
9 those.

10 The next column down is the Subtotal
11 Points which basically is just adding up the
12 four previous rows, so the subpoint -- subtotal
13 of the points is 3 which is labeled as box (A).

14 Q. Okay. And the next column down is
15 Material Hazard. What is that?

16 A. Yes. Material hazard, that takes
17 into consideration the type of material. The
18 next column down, it's box (C), amount of
19 material, those two values would come off of our
20 chart that we maintain. It's particular to the
21 type of material being transported as well as
22 the amount. Obviously, a more hazardous
23 material would have a higher point value, and a
24 larger amount of material would have a higher
25 point value. In this particular case, the point

1 value for the material was 1.1 and for the
2 amount of material is .4.

3 The next column down is another
4 Subtotal. At that point you're taking the value
5 of the subpoints above, the box, or I guess
6 that's actually row (A), multiplying that times
7 row (B) and (C), so it would be three times 1.5
8 which gives you a value in row (D) of 4.5.

9 Q. And actually in row (D) where it
10 says Subtotal Points, it gives you a little
11 formula for doing that, doesn't it?

12 A. Yes, it does. It says subtotal
13 points equals A times the value of B plus C.

14 Q. Now, moving on down it says
15 Respondent culpability. What's involved with
16 that?

17 A. Yes, row (E), Respondent
18 culpability, that would take into consideration
19 the culpability of the responsible party,
20 whether it was a willful act. That could
21 exacerbate that point value. In this case it is
22 just a point value of 1, a standard point
23 value.

24 The same for the next row down (F),
25 the Respondent history, 1, 2, or 4. This takes

1 into consideration the history of the hazmat
2 violations the carrier has in the Public
3 Utilities Commission, the hazmat violations that
4 have occurred in the State of Ohio. And as it
5 says there in row (F) that value can be 1, 2, or
6 4. The standard value would be 1 for a carrier
7 who has either no history with us or what we
8 would consider an average history. I believe in
9 the case of Sweeney Services they don't have any
10 history with us, so that would be a point value
11 of 1.

12 Q. All right. And then the box labeled
13 Total Points, do you see that?

14 A. Yes.

15 Q. What's that involve? What's
16 involved there?

17 A. Row (G) is the final point value,
18 which you're taking the values in rows (D), (E),
19 and (F) and multiplying them together. The
20 previous subtotal amount in row (D), as we
21 discussed before, is 4.5. You would multiply
22 that times the value of (E) and (F) which is 1
23 times 1 times 4.5 which obviously gives you a
24 value of 4.5.

25 Q. And then there is the last box in

1 the column is Forfeiture Assessed Amount. Do
2 you see that?

3 A. Yes.

4 Q. And what is involved with that box?

5 A. In that you're figuring up the final
6 assessment, the dollar amount of the assessment.
7 You're taking the point value from the row
8 above, from row (G) and multiplying that times
9 100. That's the base amount for a hazmat
10 violation. So it would be 4.5 times 100, and
11 the value would be \$450.

12 Q. Now, is this method for calculating
13 the fine consistent with the recommended fine
14 and penalties schedule of the Commercial Motor
15 Vehicle Safety Alliance, do you know?

16 A. Yes, it is.

17 Q. And is the penalty that was assessed
18 in this case by Staff, is that consistent with
19 the schedules and the recommended fines of the
20 Commercial Motor Vehicle Safety Alliance for
21 this type of violation?

22 A. Yes.

23 Q. Now, after the Staff determines that
24 a violation existed, that a penalty ought to be
25 assessed for the violation and what that penalty

1 should be, what happens?

2 A. Then we send out a Notice of Intent
3 to Assess Civil Forfeiture to the responsible
4 party. In this case it would have been sent to
5 Sweeney Services advising them that we intend to
6 assess the company a fine of \$450 for the
7 violation. At that point the company has the
8 option of either paying that or requesting a
9 conference.

10 MR. REILLY: Your Honor, may I
11 approach?

12 HEARING EXAMINER PRICE: You may.

13 (EXHIBIT HEREBY MARKED.)

14 Q. Mr. Canty, let me hand you what's
15 been marked for identification purposes as Staff
16 Exhibit No. 4. Would you tell me what that is,
17 please?

18 A. Yes. This is a Notice of Apparent
19 Violation and Intent to Assess Forfeiture in the
20 case that we're discussing regarding Sweeney
21 Services. This is dated June 12, 2009, and as I
22 said before, it advises the company that we
23 intend to assess them \$450 for this violation.

24 Q. And this is the Notice of Apparent
25 Forefiture that's involved in this case; is that

1 correct?

2 A. Yes, it is.

3 Q. That's the one you were just
4 referring to when you described what happens
5 after the Staff makes several decisions on
6 whether a penalty should be assessed; is that
7 correct?

8 A. Yes.

9 Q. Now, could you tell us again what
10 happens after Sweeney Services, or any other
11 carrier, receives a Notice of Apparent
12 Violation?

13 A. The responsible party, in this case
14 Sweeney Services, could either pay the
15 forfeiture or they could request a conference to
16 be held with our compliance staff.

17 Q. And do you know what happened in
18 this case?

19 A. Yes. They requested a conference.

20 Q. All right. And what happens if a
21 case is not resolved in a conference, such as
22 the one you just mentioned?

23 A. We then, following the conference,
24 send out a notice advising the Respondent of our
25 determination from the conference. In this

1 case, I believe we sent out a notice advising
2 Sweeney Services that we intended to, we still
3 intended to assess them \$450 and would recommend
4 that amount to the Commission to be assessed
5 against the company.

6 Q. And does that notice have any
7 particular name?

8 A. Yes. That is called a Notice of
9 Preliminary Determination.

10 MR. REILLY: May I approach the
11 witness, Your Honor?

12 HEARING EXAMINER PRICE: You may.

13 MR. REILLY: Thank you.

14 (EXHIBIT HEREBY MARKED.)

15 Q. Mr. Canty, let me hand you what's
16 been marked for identification purposes as Staff
17 Exhibit No. 5. Would you tell me what that is,
18 please?

19 A. Yes. That is the Notice of
20 Preliminary Determination sent to Sweeney
21 Services or their attorney, Mr. David Ferris,
22 dated July 6, regarding the same case. It
23 states a conference was held and Staff has made
24 a preliminary determination that the company
25 should still be assessed the \$450.

1 Q. And that's the Notice of Preliminary
2 Determination involved in this case; fair?

3 A. Yes, it is.

4 Q. Just before we leave this document,
5 I'd like to talk about it just a little bit. If
6 you would move up to the Regarding Clause on
7 this document.

8 A. Yes.

9 Q. It's Re: it says Notice of
10 Preliminary Determination and underneath that
11 there's what's called a case number. Do you see
12 that?

13 A. Yes.

14 Q. And where does that case number come
15 from?

16 A. That is the case number that comes
17 from the original inspection report that was
18 conducted in the field way back in May. That
19 report number, I believe, is generated
20 sequentially from the computer program when the
21 investigator begins his investigation.

22 Q. So that would be the report number
23 from what has been marked for identification
24 purposes as Staff Exhibit No. 1?

25 A. Yes.

1 Q. What happens after the Notice of
2 Preliminary Determination goes out?

3 A. Again, the company has the option to
4 either pay the forfeiture or request an
5 administrative hearing.

6 Q. Do you know what happened in this
7 case?

8 A. In this case, they requested an
9 administrative hearing.

10 (EXHIBIT HEREBY MARKED.)

11 MR. REILLY: May I approach, Your
12 Honor?

13 HEARING EXAMINER PRICE: You may.

14 MR. REILLY: Thank you.

15 Q. Mr. Canty, let me hand you what's
16 been marked for identification purposes as Staff
17 Exhibit No. 6. Could you tell me what that is?

18 A. Yes. This is a letter from Mr.
19 Ferris directed to the docketing division of the
20 PUCO. It is dated July 20, 2009, regarding the
21 notice of preliminary determination in the case
22 that we are here for. And in this letter Mr.
23 Ferris is requesting an administrative hearing
24 for this case.

25 Q. And, in fact, this letter from

1 Mr. Ferris contains attached to this letter a
2 copy of the Notice of Preliminary Determination
3 which, for this proceeding, has been marked for
4 identification purposes as Staff Exhibit No. 5;
5 is that not correct?

6 A. That's correct.

7 Q. Let me ask you, Mr. Canty, you have
8 been chief, assistant chief of compliance for a
9 number of years now. Was Mr. Sweeney treated
10 any differently than anybody else in your
11 experience who would have been in the same
12 situation?

13 A. No. As I said before, this is a
14 fairly standard case; nothing out of the
15 ordinary.

16 MR. REILLY: Your Honor, may I have
17 a minute?

18 HEARING EXAMINER PRICE: You may.

19 MR. REILLY: Thank you. Thank you,
20 Mr. Canty. We pass the witness, Your Honor.

21 HEARING EXAMINER PRICE: Mr. Canty,
22 I have a couple questions first. Mr. Canty,
23 Staff Exhibit 4 was the Notice of Apparent
24 Violation and Intent to Assess Forfeiture; is
25 that correct?

1 THE WITNESS: That's correct.

2 HEARING EXAMINER PRICE: There is
3 no reference on Staff Exhibit 4 to fail to file
4 a uniform hazmat permit application, is there?

5 THE WITNESS: No, there's not.

6 HEARING EXAMINER PRICE: Staff
7 Exhibit 5 has a reference to that fail to file.

8 THE WITNESS: I also noticed that,
9 Your Honor.

10 HEARING EXAMINER PRICE: But staff
11 is not pursuing that violation or any penalty
12 related to that violation today, are they?

13 THE WITNESS: No. The dollar
14 amount for that violation listed on Staff
15 Exhibit 5 is zero.

16 HEARING EXAMINER PRICE: Okay.
17 Thank you. Mr. Ferris, cross?

18 MR. FERRIS: Thank you, Your Honor.

19 - - -

20 CROSS-EXAMINATION

21 By Mr. Ferris:

22 Q. Mr. Canty, you testified that Staff
23 took the violation directly off of Staff Exhibit
24 1. Would that be the violation alleged in the
25 violations box of Staff Exhibit 1?

1 A. Yes, it would be.

2 Q. Mr. Canty, on Staff Exhibit 3, does
3 the Commission anywhere on that exhibit assess
4 the Respondent's ability to pay any forfeiture
5 assessed?

6 A. No. That's something that we cannot
7 take into consideration during the initial
8 assessment since we have nothing in our
9 possession to argue either way. That is
10 something that is taken into consideration later
11 on should the Respondent raise that issue.

12 Q. Do you know if it was taken into
13 consideration in this particular case?

14 A. I would have to read the conference
15 summary which Mr. Hines would have completed
16 after the conference to see if the Respondent
17 raised that issue.

18 MR. FERRIS: No further questions,
19 Your Honor.

20 HEARING EXAMINER PRICE: Do you have
21 any reason to believe that Respondent cannot pay
22 a civil forfeiture of \$450?

23 THE WITNESS: I am not aware of any
24 financial circumstances of this company, Your
25 Honor.

1 HEARING EXAMINER PRICE: Okay. Have
2 you had any training by the U.S. Department of
3 Transportation?

4 THE WITNESS: Yes.

5 HEARING EXAMINER PRICE: Have you
6 had cargo tank training?

7 THE WITNESS: Yes.

8 HEARING EXAMINER PRICE: Is it a
9 violation of the hazardous material rules to
10 display a specification plate on a package that
11 does not meet those specifications?

12 THE WITNESS: Yes, it is.

13 HEARING EXAMINER PRICE: And does
14 the Staff typically assess a penalty if that
15 were the case?

16 THE WITNESS: Yes, we would.

17 HEARING EXAMINER PRICE: If the
18 vehicle was transporting hazardous materials?

19 THE WITNESS: Yes.

20 HEARING EXAMINER PRICE: Do you know
21 off the top of your head what that penalty would
22 be in those situations?

23 THE WITNESS: I don't recall the
24 exact point value but I know it's actually
25 higher than the point value for the violation

1 here. So it would have been a higher point
2 value, so the fine would have been a higher
3 dollar amount.

4 HEARING EXAMINER PRICE: Can the
5 Staff inspect any vehicle containing hazardous
6 materials at any time? Let me ask a preliminary
7 question first.

8 Does the compliance division review
9 whether or not a vehicle was properly stopped
10 before the inspection?

11 THE WITNESS: No, we don't.

12 HEARING EXAMINER PRICE: Are there
13 rules of the Commission, to the best of your
14 knowledge, to when Staff can and can't inspect
15 vehicles?

16 THE WITNESS: To the best of my
17 knowledge, there are rules, yes.

18 HEARING EXAMINER PRICE: Let's go
19 back to my previous question. Can the Staff
20 inspect any hazardous material vehicle at any
21 time?

22 THE WITNESS: I would not be
23 comfortable offering an opinion on that, Your
24 Honor.

25 HEARING EXAMINER PRICE: Okay.

1 Thank you. You're excused. I'm sorry, I did it
2 again. Redirect?

3 MR. REILLY: Thank you, Your Honor.

4 - - -

5 REDIRECT EXAMINATION

6 By Mr. Reilly:

7 Q. Mr. Canty, if I could draw your
8 attention to what's been marked for
9 identification as Staff Exhibit No. 3, just so
10 we're all clear. I'd like you to take a look at
11 the Nature and Gravity box. I want to make sure
12 I understood your responses to the Bench's
13 questions. If the Sweeney Services truck had
14 not been a cargo tank, given what was on the
15 specification plate, it could not be hauling the
16 material inside; is that correct?

17 A. Correct.

18 Q. And if it was not a cargo tank, that
19 violation for hauling the material which was
20 inside the tank would be of a greater gravity
21 than the violation that we're here about today;
22 is that correct?

23 MR. FERRIS: Objection, Your Honor.
24 It's speculative. It is not relevant.

25 MR. REILLY: Your Honor, the witness

1 already testified --

2 HEARING EXAMINER PRICE: It's a
3 follow-up to my question. I'll allow it.

4 A. Yes. To answer your question, yes,
5 it would have been a higher point value. I
6 don't know the exact point value without
7 consulting our nature and gravity chart, but in
8 my best recollection it is a higher point value.

9 Q. And following it down through, that
10 higher point value would have translated into a
11 higher ultimate civil forfeiture; is that
12 correct?

13 A. That's correct.

14 Q. Mr. Canty, you have been involved
15 with the compliance division. You have been an
16 assistant chief of the compliance division for
17 over a decade now, correct?

18 A. Correct.

19 HEARING EXAMINER PRICE: I think
20 that's outside the scope of cross.

21 MR. REILLY: Okay. I withdraw the
22 question. I have asked that before. Nothing
23 further, Your Honor. Thank you.

24 HEARING EXAMINER PRICE: Thank you.
25 Recross?

1 MR. FERRIS: No, Your Honor.

2 HEARING EXAMINER PRICE: Now Mr.
3 Canty, you're excused. Does Staff have any
4 further witnesses?

5 MR. LINDGREN: Your Honor, the Staff
6 rests its case in chief. I would like to move
7 the admission of all the Staff exhibits that
8 have been introduced.

9 HEARING EXAMINER PRICE: Any
10 objection to admission of Staff Exhibits 1, 2A
11 through 20, 3, 4, 5, and 6?

12 MR. FERRIS: No, Your Honor.

13 HEARING EXAMINER PRICE: Those
14 exhibits will be admitted.

15 (EXHIBITS HEREBY ADMITTED.)

16 HEARING EXAMINER PRICE: Mr.
17 Ferris, do you have any witnesses to call today?

18 MR. FERRIS: I do, Your Honor, but
19 before we proceed, I'd like to move to dismiss
20 the case on behalf of Respondent based on two
21 items, the first being the lack of just cause
22 for this stop. The testimony was clear that
23 this Respondent has an impeccable record. In
24 fact, I believe that there is no adverse marks
25 on their safety history, that there was no

1 deficiencies noted with respect to the truck,
2 and the officer simply stopped this truck on a
3 whim. So that would be the first item.

4 The second would be to move to
5 dismiss based on the fact that of his own
6 admission, Mr. Forbes did not have knowledge of
7 whether or not a violation occurred. The
8 Commission has failed to produce any witness
9 that would be able to testify as to whether or
10 not a violation occurred. Specifically, he
11 testified that he had to check with somebody
12 else. He noted that on Staff Exhibit 1, and
13 that person, neither that person or anybody else
14 is here to testify with respect to that aspect
15 of the case.

16 HEARING EXAMINER PRICE: Thank you.
17 Staff?

18 MR. REILLY: Thank you, Your Honor.
19 With regard to the first issue about just cause
20 for the stop, the Respondent's company is
21 hauling hazardous material. This is a random
22 inspection.

23 HEARING EXAMINER PRICE: No, Mr.
24 Reilly, it was not a random inspection.
25 Mr. Forbes testified it was not a random

1 inspection.

2 MR. RIELLY: Mr. Forbes testified
3 that he saw --

4 HEARING EXAMINER PRICE: Mr. Forbes
5 testified to my question "Was this a random
6 inspection?"

7 "No."

8 MR. REILLY: Mr. Forbes, in Staff
9 Exhibit No. 1, it mentions he was stopped for a
10 HINT inspection, that there was specific reason
11 for the stop for a HINT inspection.

12 HEARING EXAMINER PRICE: And the
13 specific reason was?

14 MR. REILLY: That it was stopped for
15 a HINT inspection.

16 HEARING EXAMINER PRICE: But the
17 specific HINT was hazardous materials. Isn't
18 that his point; that hazardous materials is any
19 vehicle he could see on a whim?

20 MR. REILLY: And what I would
21 suggest to you is that that would not be a
22 reason to dismiss the case; that if an inspector
23 feels that an inspection is necessary for
24 whatever reason, that a stop to do an inspection
25 is proper with hazardous materials.

1 HEARING EXAMINER PRICE: So you're
2 arguing the Staff can stop and inspect any --
3 well, I'll ask the question I asked Mr. Canty.
4 Staff's position is Staff can inspect any
5 hazardous material vehicle at any time for any
6 reason?

7 MR. REILLY: The answer to that is
8 yes, and in that assessment I would suggest the
9 nature of the material should be kept in mind.
10 We're talking about things that by their very
11 nature create a hazard, such that both the
12 Federal government and the State of Ohio have
13 decided to regulate them especially.

14 HEARING EXAMINER PRICE: So if this
15 were just a regular commercial motor vehicle,
16 you would not be saying the Staff can inspect
17 any motor vehicle at any time?

18 MR. REILLY: I'm not saying that at
19 this point in time. In fact, I'm sure Your
20 Honor does not have to make such a determination
21 in order to decide this issue. We are here on
22 hazardous materials.

23 HEARING EXAMINER PRICE: Okay.
24 Let's move on to the second ground for
25 dismissal.

1 MR. REILLY: The second part of your
2 question, that there isn't any evidence with
3 regard to how the tank was attached, there is
4 evidence that in Staff Exhibit No. 1 that this
5 was attached in such a way that it was a cargo
6 tank because that's what he was cited for. In
7 addition, he was cited under, as the testimony
8 showed, the more lenient of possible
9 violations. If they're right, this is more, a
10 graver violation. It's still a violation of the
11 rules.

12 I think as far as a Motion to
13 Dismiss goes, the Staff Exhibit No. 1 answers
14 was this a cargo tank violation. That is
15 evidence that it was. Thank you, Your Honor.

16 HEARING EXAMINER PRICE: It's
17 long-standing Commission precedent that when
18 considering a Motion to Dismiss, all facts and
19 circumstances must be construed in favor of the
20 non-moving party. Accordingly, the Motion to
21 Dismiss would be denied. You can make your
22 arguments, Mr. Ferris, on brief to the
23 Commission if you so choose.

24 MR. FERRIS: Thank you.

25 HEARING EXAMINER PRICE: Would you

1 like to call a witness?

2 MR. FERRIS: Could we take a short
3 recess, please?

4 HEARING EXAMINER PRICE: You may.

5 (Off the record.)

6 HEARING EXAMINER PRICE: Back on the
7 record. Mr. Ferris?

8 MR. FERRIS: Yes, Your Honor. The
9 Respondent has no witnesses and we would be
10 content to submit this case on the briefs.

11 HEARING EXAMINER PRICE: Thank you
12 very much. Mr. Reilly, do you have something
13 else?

14 MR. REILLY: We have nothing, Your
15 Honor.

16 HEARING EXAMINER PRICE: Okay. How
17 long for briefs? This is the holiday season.
18 30 days for initial briefs -- let's go off the
19 record.

20 (Off the record.)

21 HEARING EXAMINER PRICE: Okay.
22 Having discussed the briefing schedule off the
23 record, the parties agree that initial briefs
24 will be due on January 30, 2010, and reply
25 briefs will be due February 15, 2010. I just

1 now am realizing that January 30 is a Saturday,
2 so we will make it January 29. Sorry about
3 that.

4 After the briefs are submitted, this
5 case will be submitted to the Commission on the
6 record. Thank you all. We are adjourned.

7 - - -

8 Thereupon, at 11:50 a.m. the case
9 was adjourned.

10 - - -

CERTIFICATE

I do hereby certify that the foregoing is
a true and correct transcript of the proceedings
taken by me in this matter before the Public
Utilities Commission of Ohio on Tuesday,
December 1, 2009.

Iris I. Dillion, Registered
Professional Reporter.

- - -

This foregoing document was electronically filed with the Public Utilities

Commission of Ohio Docketing Information System on

12/15/2009 2:24:03 PM

in

Case No(s). 09-0607-TR-CVF

Summary: Transcript Transcript for hearing held on 12/01/09 electronically filed by Mrs. Jennifer Duffer on behalf of Armstrong & Okey, Inc. and Dillion, Iris I. Mrs.