

FILE

BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO

PUCO

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In the Matter of the Commission's Review )  
of its Rules for Safety Standards at Chapter ) Case No. 09-223-TR-ORD  
4901:2-5, Ohio Administrative Code )

COMMENTS OF THE OHIO CABLE TELECOMMUNICATIONS ASSOCIATION

The Ohio Cable Telecommunications Association ("the OCTA" or "the Association") respectfully submits these comments pursuant to the Entries adopted on July 29 and August 17, 2010. In this case, the Commission has undertaken its periodic review of Chapter 4901:1-2-5 of the Ohio Administrative Code.

The Association's major concern is subjecting the PUCO motor carrier safety rules to the Association's members who are private carriers and operate motor vehicles with a gross vehicle weight or combination weight rating of between 10,001 pounds and 26,000 pounds. Until recently, the Commission exempted private carriers who operated motor vehicles with a gross vehicle rate (GVR) or combination weight rating (GVCR) between 10,001 and 26,000 pounds. The expansion of this safety jurisdiction will include the establishment of driver qualification files, conducting pre- and post-trip vehicle inspections, requiring medical certifications, and many other regulatory duties which have not been previously applicable. The Association estimates that its members have at least 450 trucks and drivers who will be affected by this expansion and that significant costs will be incurred to achieve both initial and ongoing compliance.

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The OCTA submits these comments because it believes that the Commission is without authority to expand such jurisdiction and further that there is no need for such expansion even if it were lawful. The Association respectfully requests that the Commission reconsider its decisions and determine that private motor carriers who operate motor vehicles within Ohio with a gross vehicle weight or combination weight rating of between 10,001 and 26,000 should not be subject to motor carrier safety regulatory and enforcement jurisdiction.

**I. The Commission in recently attempting to expand its safety jurisdiction, acted ultra vires and without legal authority.**

The Association concurs in the argument advanced in the Comments filed by the Joint Industry in this case that State law does not authorize the extension of the federal rules to the smaller vehicles.

Section 4923.20, Revised Code, authorized the Public Utilities Commission of Ohio to adopt and enforce rules concerning the safety of operation of commercial motor vehicles by intrastate private motor carriers who are not operating on a for hire basis. This 1985 statute was amended effective October 1, 1987 to include the definition of a "commercial motor vehicle". Section 4923.20(A)(2), Revised Code, which became effective October 1, 1987, provided:

(2) "Commercial motor vehicle" has the same meaning as in the "Commercial Motor Vehicle Safety Act of 1986, 49 U.S.C.A. 2701, as amended except that "commerce" means trade, traffic and transportation solely within this state. (emphasis added)

On October 1, 1987, at the time that Section 4923.20(A)(2), Revised Code became effective, the definition of "commercial motor vehicle" as defined in the "Commercial Motor Vehicle Safety

Act of 1986", 49 U.S.C.A. 2701 included only motor vehicles having a Gross Vehicle Weight Rating ("GVWR") of 26,001 pounds and greater.<sup>1</sup>

In State v. Gill, 63 Ohio St. 3d 53, the Ohio Supreme Court addressed the question of what is meant when the General Assembly enacts a statute that adopts a federal standard followed by the language "as amended". State v. Gill involved a statute where the General Assembly had adopted a federal standard and the related constitutional question was whether or not the phrase "as amended" constituted an unconstitutional delegation of legislative authority in violation of Section I, Article II of the Ohio Constitution. The Ohio Supreme Court, in a 5-2 decision, held that it did not. Justice Douglas stated:

It is clear to us that the General Assembly by using the language "as amended" did not intend to adopt amendments to the Federal law subsequent to the effective date of R.C. 2913.46(A), but rather, the General Assembly simply intended to incorporate the Federal Food Stamp law as it existed on the date R.C. 2913.46(A) was enacted. Given its common and plain meaning, the language "as amended" does not anticipate amendments to the Federal law after July 1, 1983. This is buttressed by the fact that had the General Assembly intended to incorporate the Federal law subsequent to the enactment of R.C. 2913.46(A), it certainly knew how to do so. For example, R.C. 2915.01(AA) provides that the "'Internal Revenue Code' means the 'Internal Revenue Code of 1986,' 100 Stat. 2085, 26 U.S.C. 1, *as now or hereafter amended* (emphasis added)." There is a notable distinction between the language used in R.C. 2915.01(AA) and in 2913.46(A). In utilizing language "as now or hereafter amended," the General Assembly obviously intended to incorporate amendments subsequent to the time R.C. 2915.01(AA) was enacted.

Turning to Section 4923.20(A)(2), Revised Code, it is clear that under the rationale of State v. Gill, the General Assembly adopted the definition of "commercial motor vehicle" as it

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<sup>1</sup> Today the Commercial Motor Vehicle Safety Act of 1986 as enacted has no currently effective sections. On December 9, 1999, 49 U.S.C.A. Section 31301 became effective as a successor to the definition of "commercial motor vehicle" that was contained in 49 U.S.C.A. 2701. The definition of "commercial motor vehicle" in 49 U.S.C.A. Section 31301 included a motor vehicle used in commerce to transport property that has a gross vehicle weight rating or gross vehicle weight of at least 26,001 pounds, whichever is greater, or a lesser gross vehicle weight rating or gross vehicle weight the Secretary of Transportation prescribes by regulation, but not less than a gross vehicle weight rating of 10,001 pounds. This 1999 amendment to Federal law was not effectively incorporated by reference into the Ohio statute.

appeared in Federal law on October 1, 1987. That definition defined commercial motor vehicles as those motor vehicles with a gross vehicle rate rating of 26,001 or greater.

49 U.S.C.A. Section 2716(6) provided:

(6) Commercial Motor Vehicle

The term "commercial motor vehicle" means a motor vehicle used in commerce to transport passengers or property --

(A) If the vehicle has a gross vehicle weight rating of 26,001 or more pounds or such a lesser gross vehicle weight rating as the Secretary determines appropriate by regulation but not less than a gross vehicle weight rating of 10,001 pounds; (emphasis added)

(B) If the vehicle is designed to transport more than 15 passengers, including the driver; or

(C) If such vehicle is used in the transportation of hazardous materials found by the Secretary to be hazardous for the purposes of the Hazardous Materials Transportation Act [49 App. U.S.C. 1801 et seq.]. ...

The only definition of "commercial motor vehicle" in a regulation that was issued by the Secretary of Transportation pursuant to the Commercial Motor Vehicle Safety Act of 1986 and that was in effect on October 1, 1987 is contained in 49 CFR Section 383.5 in the context of Commercial Drivers' Licenses as set forth in 52 Federal Register, 20587 (Monday, June 1, 1987). This Federal Regulation provided as follows:

"Commercial motor vehicle" means a motor vehicle used in commerce to transport passengers or property if the vehicle --

(a) Has a gross vehicle weight rating of 26,001 or more pounds;

(b) Is designed to transport more than 15 passengers, including the driver; or

(c) Is of any size and is used in the transportation of materials found to be hazardous for the purposes of the Hazardous Materials Transportation Act and which require the vehicle to be placarded.

Therefore, as of October 1, 1987, the Secretary of Transportation had only issued one definition of "commercial motor vehicle" pursuant to the Commercial Motor Vehicle Safety Act of 1986 and that definition only included motor vehicles with a gross vehicle weight rating of 26,001 or more pounds.<sup>2</sup> As a result and consistent with State v. Gill, in amending Section 4923.20(A)(2), Revised Code, the General Assembly only authorized the Public Utilities Commission of Ohio to adopt and enforce safety rules for the operation of commercial motor vehicles by private motor carriers in intrastate commerce for those vehicles that had a gross vehicle weight rating of 26,001 pounds or greater. Thus, the Commission's recent attempt to change this definition by Rule was ultra vires and without authority.

Recently, in Case No. 10-1010-TP-ORD, the Commission proposed a rule (Rule 4901:1-6-02(H)) that provides that each citation made to a section of the U.S. Code or Regulation incorporates the version that was effective on September 13, 2010 (the effective date of Sub. Senate Bill No. 162). Thus, this demonstrates that the Commission understands the import of State v. Gill. It should apply the import of State v. Gill in this situation and recognize that it is precluded from expanding its safety jurisdiction over private carriers in Ohio without legislative authorization.

## **II. There is nothing demonstrating a need for the expansion of safety jurisdiction.**

The OCTA concurs in the Comments filed by the Joint Industry in this case indicating that elimination of the exemption is very costly with no countervailing benefits.

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<sup>2</sup> The Secretary of Transportation subsequently issued other definitions of "commercial motor vehicle" after October 1, 1987. Those definitions were in the context of drug and alcohol testing (49 CFR 382.107 at 66 Federal Register 43,103 on August 17, 2001 and in the context of Carrier insurance, driver qualifications, safe driving and operation of commercial motor vehicles, required vehicle parts and accessories, hours of service and log books, and vehicle maintenance and repair (49 CFR 390.5 at 53 Federal Register 18052 on May 19, 1988. As part of 49 CFR 350.3, the Secretary of Transportation issued a different definition of "commercial motor vehicle" prior to 1987, but that definition was issued as a result of the Surface Transportation Assistance Act of 1982, not the Commercial Motor Vehicle Safety Act of 1986 which was expressly referenced by the General Assembly.

Even if the Commission had the authority, there is nothing cited by the Commission in either this case or Case No. 07-1095 which demonstrates that there is a statistical need to improve the safety of private motor carriers operating on an intrastate basis in Ohio with trucks and tractors with a gross vehicle weight rating or combination weight rating of 10,001 pounds to 26,000 pounds. The only reason provided for the PUCO expansion of regulations in Case No. 07-1095 was to make sure that Ohio Safety laws were “compatible” with Federal Motor Carrier regulations and the Federal Hazardous Materials regulations so that the PUCO could continue to receive Federal funds. Absent a showing that the safety record of private motor carriers operating vehicles with a gross vehicle weight rating or combination weight rating of between 10,001 and 26,000 is sub-standard, there is no basis to make this change. Even if the Commission did have authority to expand such safety regulation (which it does not) there has been no need demonstrated. At a time when Ohio businesses are struggling to cope with the economic downturn, and in the absence of a documented need for such expansion of safety regulation, the Commission cannot expand regulation to private motor carriers who operate motor vehicles with a gross vehicle weight rating or combination rating in excess of 10,001 pounds but less than 26,000 pounds.

### **III. Utility Service Vehicle Exemption from Hours of Service Regulations**

49 CFR 395.1(n) provides that the hours of service regulations contained in 49 CFR Section 395 shall not apply to a driver of a utility service vehicle. 49 CFR Section 395.2 defines a utility service vehicle to mean any commercial motor vehicle used in the furtherance of repairing, maintaining, or operating any structures or any other physical facilities necessary for the delivery of public utility services, including the furnishing of electric, gas, water, sanitary sewer, telephone, and television cable or community antenna service.

In adopting certain provisions of the Motor Carrier Safety Regulations of the U.S. Department of Transportation, the Commission has indicated that it would not adopt those that were specifically excluded or modified by a rule of this Commission. See Rule 4901:2-5-02(A) of the Ohio Administrative Code. There are no specific exclusions or modifications by rule where the Commission has stated that a utility service vehicle operated by a cable television operator or an electric, gas, or water cooperative is excluded from the definition of a utility service vehicle.

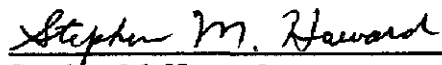
Yet, by expanding its safety jurisdiction by applying the federal motor carrier safety regulations over certain private carriers, the Commission runs the risk of having multiple interpretations. An example is the utility service vehicle definition described above. Although the language appears clear, some might argue that this definition does not apply to cable television operators, electric cooperatives, gas cooperatives, and water cooperatives in Ohio. To create a separate sub-class for those entities such as cable television operators, electric cooperatives, gas cooperatives, and water cooperatives who are not considered under State law to be public utilities would create an even more difficult task of enforcement for the PUCO Transportation Department. To exempt certain subclasses and not others may create competitive disadvantages. The Commission should apply the plain meaning of the Federal Regulation without multiple interpretations if it ultimately sees fit to apply these Federal Motor Carrier Safety Regulations to private carriers operating in intrastate commerce with commercial motor vehicles between 10,001 and 26,000 pounds.

#### **IV. Conclusion**

The Commission is a creature of statute. It can only assert safety jurisdiction over those private carriers over whom the General Assembly has delegated such jurisdiction. It is clear that the General Assembly has not given the Commission authority to assert safety jurisdiction over private

motor carriers operating on an intrastate basis with vehicles with a gross vehicle weight rating or combination weight rating of more than 10,001 pounds but less than 26,000 pounds. Even if the Commission were to find that it did have authority to expand such safety jurisdiction over private carriers, there has been no need demonstrated for such an expansion. The Commission should not expand its safety regulations at this point in time.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing documents was served on all parties of record this 20<sup>th</sup> day of September, 2010 via e-mail unless other indicated:

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