

# THE PUBLIC UTILITIES COMMISSION OF OHIO

IN THE MATTER OF JAMES T. MACHERAS,  
NOTICE OF APPARENT VIOLATION AND  
INTENT TO ASSESS FORFEITURE.

CASE NO. 16-846-TR-CVF  
(OH1238001195D)

## OPINION AND ORDER

Entered in the Journal on January 18, 2017

### I. SUMMARY

{¶ 1} The Commission finds that Staff did not demonstrate, by a preponderance of the evidence, that James T. Macheras violated the Commission's transportation rules for using a hand-held mobile telephone while operating a commercial motor vehicle.

### II. PROCEDURAL HISTORY

{¶ 2} Following an inspection of a commercial motor vehicle (CMV) operated by Buckeye Waste Industries, Inc. and driven by James T. Macheras (Mr. Macheras or Respondent), Respondent was timely served with a Notice of Preliminary Determination (NPD) in accordance with Ohio Adm.Code 4901:2-7-12, notifying him that Staff intended to assess a \$250 civil monetary forfeiture for a violation of 49 C.F.R. 392.82(a)(1) — using a hand-held mobile telephone while operating a CMV. A prehearing conference was conducted on May 17, 2016, and a hearing was held on November 16, 2016. At hearing, Ohio State Highway Patrol Trooper Charles Mendenhall and Jonathan Frye appeared as witnesses for Staff and Mr. Macheras appeared on his own behalf.

### III. LAW

{¶ 3} Under Ohio Adm.Code 4901:2-5-03(A), the Commission adopted certain provisions of the Federal Motor Carrier Safety Regulations, 49 C.F.R. Sections 40, 42, 383, 387, 390-397, to govern the transportation of persons or property in intrastate commerce within Ohio. Ohio Adm.Code 4901:2-5-03(B) and (C) require all motor carriers engaged in intrastate and interstate commerce in Ohio to operate in conformity with all federal regulations that have been adopted by the Commission. Ohio Adm.Code 4901:2-7-20(A) requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the

evidence. As relevant to this case, 49 C.F.R. 392.82(a)(1) provides that no driver shall use a hand-held mobile telephone while driving a CMV.

#### IV. ISSUE

{¶ 4} The issue is whether Staff satisfied its burden to show, by a preponderance of the evidence, that Respondent was using a hand-held mobile telephone (hereinafter, "cell phone") while operating a CMV in violation of 49 C.F.R. 392.82(a)(1). Staff alleges that Mr. Macheras used a hand-held cell phone while driving his company's CMV. Mr. Macheras contests the violation, stating that, although he was conducting a telephone conversation when he was observed by Trooper Mendenhall, he was using hands-free technology to activate his cell phone, and he was not holding a cell phone.

#### V. SUMMARY OF THE EVIDENCE

{¶ 5} Trooper Mendenhall identified Staff Exhibit 1, the inspection report in this matter, and testified that, on February 28, 2015, he observed Mr. Macheras driving a CMV while holding a cell phone up to his ear, as if he were talking on the cell phone. Trooper Mendenhall testified that he stopped the vehicle for a roadside inspection in Streetsborough, Portage County, Ohio, on State Route 14 and that, upon contacting Mr. Macheras, was informed that Mr. Macheras was not talking on his cell phone, but was listening to music on it. Trooper Mendenhall then advised Mr. Macheras that holding a cell phone and listening to music was still a violation; thereafter, he prepared an inspection report citing Mr. Macheras for the cell phone violation. (Tr. at 10-14; Staff Ex. 1.)

{¶ 6} Jonathan Frye, chief compliance officer with the Commission's motor carrier compliance division, testified that he reviews fines that are assessed against respondents in civil forfeiture cases. Mr. Frye identified Staff Exhibit 2, the NPD that was sent to Mr. Macheras, and testified that the NPD reflects the \$250 forfeiture assessed in this matter. Mr. Frye explained that the forfeiture in this case was allocated to one of four violation groups, and based on the type and severity of the violation, a dollar amount was assigned. Mr. Frye

testified the forfeiture is based on the recommended fine schedule of the Commercial Vehicle Safety Alliance and that the forfeiture process is applied uniformly to all shippers, carriers, and CMV drivers. Mr. Frye also stated that he recommended \$250 as the amount of the forfeiture in this matter. (Tr. at 16-20.)

{¶ 7} Mr. Macheras testified that he was not talking on a hand-held cell phone when he was stopped by Trooper Mendenhall. He admitted that he was talking to another trucker via his cell phone, but stated that he was using his cell phone in a hands-free operating mode at the time of the stop. Mr. Macheras explained that his cell phone sits on the dashboard of his truck and that he operates the cell phone with Bluetooth, a wireless technology that connects the cell phone with the truck's radio and his earphone headset.<sup>1</sup> Mr. Macheras stated that he did not tell Trooper Mendenhall that he was listening to music on his cell phone. Instead, he explained to the trooper that even his truck radio functions in a hands-free mode and that, with the radio and cell phone connected, both radio and cell phone function hands-free, even if he is talking via his cell phone. Mr. Macheras noted that, because his truck is so loud, he does push on the Bluetooth-enabled headset with his entire hand. So, perhaps Trooper Mendenhall saw his hand positioned near the headset and assumed he was holding a cell phone while talking on it. (Tr. 21-23.)

{¶ 8} On rebuttal, Trooper Mendenhall testified that Mr. Macheras stated that he was listening to music on his cell phone, and did not explain anything about a Bluetooth device on his cell phone. Trooper Mendenhall testified that Mr. Mendenhall's explanation to him on the day of the inspection seemed to differ completely from his testimony in the hearing room. (Tr. at 26.)

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<sup>1</sup> Bluetooth is a short-range, wireless interconnection of mobile phones, computers, and other electronic devices. A Bluetooth device uses radio waves instead of wires or cables to connect to a phone or computer.

## VI. COMMISSION CONCLUSION

{¶ 9} The Commission notes that, pursuant to 49 C.F.R. 392.82(a)(1), "[n]o driver shall use a hand-held mobile telephone while driving a CMV." Further, under 49 C.F.R. 390.5, using a hand-held mobile telephone is defined as: "(1) Using at least one hand to hold a mobile telephone to conduct a voice communication, (2) dialing or answering a mobile telephone by pressing more than a single button, or (3) reaching for a mobile telephone in a manner that requires a driver to maneuver so that he or she is no longer in a seated driver position, restrained by a seat belt \* \* \*." However, conducting a conversation with someone via a cell phone in a hands-free operating mode, as Mr. Macheras maintains he was doing when he was stopped by Trooper Mendenhall, is not listed as being prohibited under either 49 C.F.R. 392.82(a)(1) or 49 C.F.R. 390.5. Similarly, even if Mr. Macheras was listening to music on his cellphone, as testified by Trooper Mendenhall (Tr. at 14), that also is not listed as being prohibited under either 49 C.F.R. 392.82(a) or 49 C.F.R. 390.5. In this case, Trooper Mendenhall's testimony is based on observing Mr. Macheras, when he drove by Trooper Mendenhall's parked patrol car, in what may have been inclement weather conditions with less-than-optimal visibility. More specifically, Mr. Macheras testified that he clearly remembered, at the time of the stop, substantial rain that fogged the windows of his truck (Tr. at 15, 21); although Trooper Mendenhall did not remember if it was raining, and testified that nothing weather-related that day would have impaired his vision (Tr. at 13, 15).

{¶ 10} Considering the evidence, the Commission finds that, under the circumstances presented in this case, we cannot discount the possibility that Mr. Macheras might have been using hands-free technology to talk on his cell phone, as he claimed, and was not actually engaging in the prohibited act of holding his cell phone while talking on it. Consequently, the Commission believes that insufficient evidence has been presented to conclude that Mr. Macheras used a hand-held cell phone while operating a CMV.

{¶ 11} Staff, therefore, has not proven by a preponderance of the evidence, pursuant to Ohio Adm.Code 4901:2-7-20(A) that a violation of 49 C.F.R. 392.82(a)(1) occurred.

Accordingly, the violation of 49 C.F.R. 392.82(a)(1) should be dismissed and removed from Mr. Macheras' Safety Net record and history of violations.

#### VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

{¶ 12} On December 28, 2015, Trooper Mendenhall stopped, and subsequently inspected, a CMV driven by Mr. Macheras, because of an alleged violation of the Commission's transportation regulations, 49 C.F.R. 392.82(a)(1), using a hand-held cell phone while driving a CMV.

{¶ 13} Mr. Macheras was timely served with an NPD listing a civil forfeiture of \$250 for violation of 49 C.F.R. 392.82(a)(1).

{¶ 14} A prehearing conference was conducted on May 17, 2016, and a hearing was held on November 16, 2016.

{¶ 15} Ohio Adm.Code 4901:2-7-20 requires that, at hearing, Staff prove the occurrence of a violation by a preponderance of the evidence.

{¶ 16} Based upon the record in this proceeding, the Commission finds that Staff has not proven, by a preponderance of the evidence, that Mr. Macheras violated 49 C.F.R. 392.82(a)(1) by using a hand-held cell phone while driving a CMV. Accordingly, the violation of 49 C.F.R. 392.82(a)(1) should be dismissed and removed from Mr. Macheras' Safety Net record and history of violations.

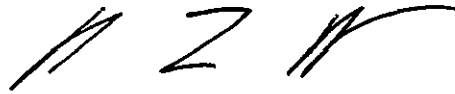
#### VIII. ORDER

{¶ 17} It is, therefore,

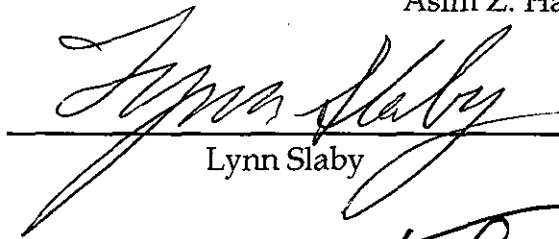
{¶ 18} ORDERED, That the alleged violation of 49 C.F.R. 392.82(a)(1) by Mr. Macheras be dismissed and removed from his Safety Net record and history of violations. It is, further,

{¶ 19} ORDERED, That a copy of this Opinion and Order be served upon each party of record.

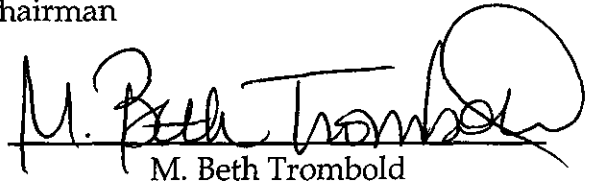
THE PUBLIC UTILITIES COMMISSION OF OHIO



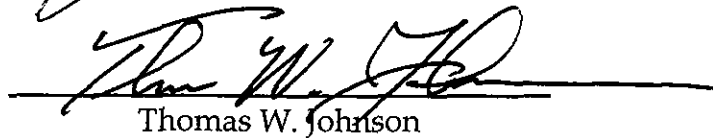
Asim Z. Haque, Chairman



Lynn Slaby



M. Beth Trombold

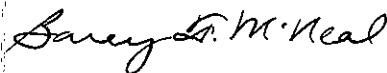


Thomas W. Johnson

KKS/vrm

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**JAN 18 2017**



Barcy F. McNeal  
Secretary