

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Commission's Review)
of Chapter 4901:2-5, Ohio Administrative) Case No. 13-1106-TR-ORD
Code, Safety Standards.)

FINDING AND ORDER

The Commission finds:

- (1) R.C. 119.032 requires all state agencies to conduct a review, every five years, of their rules and to determine whether to continue their rules without change, amend their rules, or rescind their rules. The Commission has established this docket in order to conduct an evaluation of Ohio Adm.Code Chapter 4901:2-5, concerning safety standards applicable to motor carriers and offerors of hazardous materials.
- (2) R.C. 119.032(C) requires that the Commission determine whether:
 - (a) The rules should be continued without amendment, be amended, or be rescinded, taking into consideration the purpose, scope, and intent of the statute under which the rules were adopted;
 - (b) The rules need amendment or rescission to give more flexibility at the local level;
 - (c) The rules need amendment or rescission to eliminate unnecessary paperwork, or whether the rule incorporates a text or other material by reference and, if so, whether the text or other material incorporated by reference is deposited or displayed as required by R.C. 121.74, and whether the incorporation by reference meets the standards stated in R.C. 121.71, 121.75, and 121.76;

- (d) The rules duplicate, overlap with, or conflict with other rules; and
 - (e) Whether the rules have an adverse impact on businesses and whether any such adverse impact has been eliminated or reduced.
- (3) In addition, on January 10, 2011, the governor of the state of Ohio issued Executive Order 2011-01K, entitled "Establishing the Common Sense Initiative," which sets forth several factors to be considered in the promulgation of rules and the review of existing rules. Among other things, the Commission must review its rules to determine the impact that a rule has on small businesses; attempt to balance properly the critical objectives of regulation and the cost of compliance by the regulated parties; and amend or rescind rules that are unnecessary, ineffective, contradictory, redundant, inefficient, or needlessly burdensome, or that have had negative, unintended consequences, or unnecessarily impede business growth.
- (4) Additionally, in accordance with R.C. 121.82, in the course of developing draft rules, the Commission must evaluate the rules against the business impact analysis (BIA). If there will be an adverse impact on businesses, as defined in R.C. 107.52, the agency is to incorporate features into the draft rules to eliminate or adequately reduce any adverse impact. Furthermore, the Commission is required, pursuant to R.C. 121.82, to provide the Common Sense Initiative (CSI) office the draft rules and the BIA.
- (5) By Entry issued June 17, 2013, the Commission scheduled a workshop at the offices of the Commission on July 22, 2013, to elicit feedback on any proposed revisions to the rules which Staff may have and to permit stakeholders to propose their own revisions to the rules for Staff's consideration. The workshop was held as scheduled. Only one stakeholder was present at the workshop; he made no comments concerning Ohio Adm.Code Chapter 4901:2-5.
- (6) Staff's proposed changes to Ohio Adm.Code Chapter 4901:2-5 were issued in a January 15, 2014 Entry, which

also established a January 29, 2014 deadline for initial comments and a February 12, 2014 deadline for reply comments. The Entry also contained, pursuant to the requirements of Executive Order 2011-01K and Senate Bill 2 of the 129th General Assembly, a BIA for Ohio Adm.Code Chapter 4901:2-5, to assess and justify any adverse impact the proposed rules have on the business community.

- (7) On January 29, 2014, comments were filed by the Ohio Trucking Association (OTA) regarding Staff's proposals for Ohio Adm.Code 4901:2-5-03, 4901:2-5-04, and 4901:2-5-07.¹ The Ohio Aggregates and Industrial Minerals Association filed comments on January 30, 2014, that address the same rules and contain comments identical to those of OTA. A summary of OTA's remarks and Commission conclusions follows. Any recommended change that is not discussed below or incorporated into the proposed rules should be considered denied.

Comments on Ohio Adm.Code 4901:2-5-03 - Adoption and Applicability of U.S. Department of Transportation Safety Standards

- (8) Paragraph H. Staff proposed amending the rule to prohibit a motor carrier from allowing a driver to drive more than twelve hours following ten consecutive hours off duty, or for any period after having been on duty sixteen hours following ten consecutive hours off duty.
- (9) OTA asserts that the construction hours of service exception provides the trucking industry with flexibility that is necessary for the construction season. OTA contends that if Staff's proposal is adopted, a driver's starting time would be pushed back by two hours each consecutive day, thus reducing the amount of time a motor carrier can schedule a driver during peak season. OTA adds that the Federal Motor Carrier Safety Administration (FMCSA) has not threatened to withhold any Motor Carrier

¹ In its comments, OTA inadvertently identified its comments intended for Ohio Adm.Code 4901:2-5-07 as comments for Ohio Adm.Code 4901:2-5-10.

Safety Assistance Program (MCSAP) funding because Commission rules are incompatible with federal law.

- (10) The Commission declines to adopt OTA's recommendations. We note that, under R.C. 4923.04(A)(1), the Commission adopted rules applicable to the transportation of persons or property by motor carriers operating in interstate and intrastate commerce. In addition, R.C. 4923.04(B) provides that the rules adopted by the Commission shall not be incompatible with requirements of the U.S. Department of Transportation (USDOT). Contrary to OTA's claims, the FMCSA advised the Commission on September 13, 2013, that its review of the Commission's MCSAP indicated that the eight hours off duty requirement is incompatible with 49 C.F.R. 395.3, which mandates maximum driving time for property carrying vehicles, and 49 C.F.R. 350.341(e) which concerns hours of service for drivers. The FMCSA advised that the incompatibility jeopardizes the Commission's continued participation in MCSAP and the receipt of MCSAP funding. FMCSA proposed a timeline of 24 months to resolve the matter. Furthermore, the Commission observes that under proposed Ohio Adm.Code 4901:2-5-05(D)(1) a motor carrier can request that the Commission submit an application to the USDOT to obtain, for specific industries, an intrastate exemption from state laws and regulations.

Comments on Ohio Adm.Code 4901:2-5-04 - Qualifications of Drivers

- (11) Paragraph C. Staff proposed to clarify who can perform a medical examination for purposes of provisional medical certification (PRC). Staff explained that its proposed language ensures consistency with 49 C.F.R. 391.42, which requires that as of May 21, 2014, only medical examiners listed on the National Registry of Certified Medical Examiners (National Registry) can perform medical examinations of commercial motor vehicle (CMV) drivers.
- (12) OTA expresses concern whether the National Registry will be operational by the May 21, 2014, deadline. OTA urges the Commission to remove language referring to the

National Registry until the USDOT has the system operational.

- (13) The Commission understands OTA's concerns, but notes that Staff's proposed language simply makes the PRC process consistent with 49 C.F.R. 391.42. This section provides: "On and after May 21, 2014, each medical examination required under this subpart must be conducted by a medical examiner who is listed on the National Registry of Certified Medical Examiners." However, taking into account OTA's concerns whether the National Registry will be operational by May 21, 2014, the Commission finds that it is reasonable to delete the May 21, 2014 date from the language that Staff initially recommended. Thus, if the effective date of the National Register is postponed, a driver can have the medical examination performed by the medical examiner that he or she has previously relied upon, or another medical examiner, regardless of whether the driver is seeking PRC.

Comments on Ohio Adm.Code 4901:2-5-07 - Out-of-Service Vehicles and Drivers

- (14) Paragraph (A)(4). Staff proposed allowing enforcement personnel to place a vehicle out of service if a for-hire intrastate motor carrier does not have a valid certificate of public convenience and necessity (CPCN).
- (15) OTA contends that a vehicle should be placed out-of-service only for safety reasons, and not under circumstances when a motor carrier that has registered for many years neglected to re-register before a deadline or when a driver cannot produce a CPCN during a roadside vehicle inspection.
- (16) The Commission declines to adopt OTA's recommendation. Existing Ohio Adm.Code 4901:2-1-02(B) already provides that an intrastate motor carrier that fails to annually register with the Commission and pay the associated tax may be placed out of service under existing Ohio Adm.Code 4901:2-5-07. In addition, the ability to place a motor carrier out of service for failure to obtain and

maintain Ohio operating authority is consistent with the ability to place an interstate motor carrier out of service for not having federal operating authority, pursuant to 49 C.F.R. 392.9a(b). Finally, R.C. 4921.03 states that a for-hire motor carrier may not operate in intrastate commerce unless it has a valid CPCN.

- (17) In conclusion, the Commission finds that existing Ohio Adm.Code 4901:2-5-01, 4901:2-5-02, 4901:2-5-03, 4901:2-5-04, 4901:2-5-05, 4901:2-5-07, 4901:2-5-10, 4902:2-5-11, 4901:2-5-12, 4901:2-5-13, and 4901:2-5-14 should be rescinded; new Ohio Adm.Code 4901:2-5-01, 4901:2-5-02, 4901:2-5-03, 4901:2-5-04, 4901:2-5-05, 4901:2-5-07, 4901:2-5-10, 4902:2-5-11, 4901:2-5-12, 4901:2-5-13, and 4901:2-5-14 should be adopted; amended Ohio Adm.Code 4901:2-5-15 should be adopted as amended; and existing Ohio Adm.Code 4901:2-5-08 should be approved and adopted. In addition, these rules should be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with divisions (D) and (E) of R.C. 111.15.

It is, therefore,

ORDERED, That existing Ohio Adm.Code 4901:2-5-01, 4901:2-5-02, 4901:2-5-03, 4901:2-5-04, 4901:2-5-05, 4901:2-5-07, 4901:2-5-10, 4902:2-5-11, 4901:2-5-12, 4901:2-5-13, and 4901:2-5-14 be rescinded; new Ohio Adm.Code 4901:2-5-01, 4901:2-5-02, 4901:2-5-03, 4901:2-5-04, 4901:2-5-05, 4901:2-5-07, 4901:2-5-10, 4902:2-5-11, 4901:2-5-12, 4901:2-5-13, and 4901:2-5-14 be adopted; amended Ohio Adm.Code 4901:2-5-15 be adopted as amended; and existing Ohio Adm.Code 4901:2-5-08 be approved and adopted. It is, further,

ORDERED, That the rescinded and adopted rules be filed with the Joint Committee on Agency Rule Review, the Secretary of State, and the Legislative Service Commission, in accordance with divisions (D) and (E) of R.C. 111.15. It is, further,

ORDERED, That the final rules be effective on the earliest date permitted by law. Unless otherwise ordered by the Commission, the five-year review date for Ohio Adm.Code Chapter 4901:2-5 shall be in compliance with R.C. 119.032. It is, further,

ORDERED, That a copy of this Finding and Order without the attached rules be served upon the Transportation list-serve. It is, further,

ORDERED, That a copy of this Finding and Order without the attached rules be served upon Ohio Trucking Association, National Tank Truck Carriers, Inc., Ohio Department of Transportation, Ohio State Highway Patrol, Ohio Farm Bureau Federation, and any other interested persons of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

Thomas W. Johnson, Chairman

Steven D. Lesser

M. Beth Trombold

Lynn Slaby

Asim Z. Haque

JML/sc

Entered in the Journal

MAY 14 2014

Barcy F. McNeal

Barcy F. McNeal
Secretary