

FILE



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June 26, 2014

Public Utilities Commission of Ohio
Docketing Division
180 East Broad Street
Columbus, OH 43215

RECEIVED-DOCKETING DIV
2014 JUN 27 PM 3:05
PUCO

RE: Request for Application to the USDOT for the Construction Hours of Service Exemption
Case No. 13-1106-TR-ORD
Concerning Rule 4901:2-5-03

My name is Greg Colvin I am President & Executive Director of the Ohio Ready Mixed Concrete Association, d.b.a. Ohio Concrete. We are a trade association representing nearly 200 members comprised of ready mixed concrete producers, concrete contractors and associates in Ohio.

On behalf of the members of Ohio Concrete and the concrete construction community, we respectfully request that the Commission submit an application to the USDOT to obtain an intrastate exemption from the hours of service regulations for the ready mixed concrete industry under Ohio Adm. Code 4901:2-5-05(D)(1).

We believe that the recent ruling to eliminate the construction hours of service exemption will cause undue hardship for our members; many of which are small, family-owned, business owners already struggling to recover from the economic recession of 2008.

The regulatory relief exemption for the ready mixed concrete industry was originally put into place in 1997 after a ten year effort from the Association and other interested parties who proved that the ready mixed concrete industry does justify an exemption from the drivers hours of service limitations due to the nature of the industry (See enclosed *Finding and Order for Case No. 97-456-TR-COI*).

For example, drivers in the concrete industry generally are driving one hour or less between loading facility and a construction site, which is different than long-haul commercial vehicle operators who may experience fatigue. Industry data has shown that less than 1/3 of a ready mixed driver's daily on duty time consists of actual driving time.

In addition the perishable nature of the ready mixed concrete industry and the unpredictable weather during the construction seasons further warrant the exemption for Ohio drivers.

Concrete is a perishable commodity and must be delivered within one hour from being batched or loaded otherwise its quality will not meet specifications. This restricts the ready mixed concrete industry to local operations with all deliveries essentially limited to within a 50-air mile radius of the carrier's terminal.

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Technician SW Date Processed JUN 27 2014

June 26, 2014 Page 2

Request for Application to the USDOT for the Construction Hours of Service Exemption

Case No. 13-1106-TR-ORD

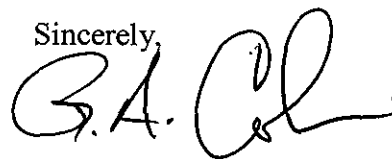
Concerning Rule 4901:2-5-03

Furthermore, as a result of Ohio's harsh weather conditions, drivers have approximately 8 months to earn their wages for the entire year. The restrictions imposed on driving time could potentially cause them to lose a substantial amount of money thus making Ohio an unattractive place to do business.

We hope you will consider the unique characteristics of the ready mixed concrete industry and the need for regulatory relief from the hours of service restrictions set forth under the provisions of Chapter 4901:2-5-02, Ohio Administrative code.

We appreciate the opportunity to express our concerns and trust that the Commission will heed our request to submit an application to the USDOT for an intrastate exemption from state laws and regulations for the ready mixed concrete industry

Sincerely,

A handwritten signature in black ink, appearing to read "G.A. Colvin", with a stylized flourish at the end.

Gregory A. Colvin
President & Executive Director

In the Matter of the Investigation)
into Regulatory Relief for the.)
Ready Mixed Concrete Industry from) Case No. 97-456-TR-COI
the Provisions of Chapter 4901:2-5,)
Ohio Administrative Code.)

The Commission finds:

- (1) Chapter 4901:2-5, Ohio Administrative Code (O.A.C.), currently adopts the provisions of the Federal Motor Carrier Safety Rules, Title 49, Code of Federal Regulations, Parts 383, 387, 390-397, for transportation into, through or within Ohio. These provisions include requirements for drivers and carriers with respect to the hours-of-service a driver may operate a commercial motor vehicle.
- (2) Recently, the Federal Highway Administration of the United States Department of Transportation initiated a new rulemaking regarding hours-of-service requirements for drivers and carriers in interstate commerce. Implicit in this new rulemaking is the understanding that the hours of service requirements were originally developed to regulate common carriers in interstate commerce but have been extended to many other carriers, including private carriers in intrastate commerce. Since the Federal Highway Administration is revisiting this area for carriers in interstate commerce, it is appropriate for the Commission to investigate the possibility of regulatory relief for certain private carriers in intrastate commerce.
- (3) The ready mixed concrete industry is regulated by the Commission as private carriers in intrastate commerce. Representatives of the industry have engaged in informal discussions regarding the hours-of-service requirements with the Commission. As the result of these discussions, the Commission, by entry dated May 1, 1997, invited comments from interested parties on the potential for regulatory relief from the hours-of-service requirements for the ready mixed concrete industry
- (4) The Docketing Division received forty-four responses to the Commission entry dated May 1, 1997. Comments were filed by the Ohio Ready Mixed Concrete Association ("ORMCA"), by the

Ohio Chamber of Commerce ("Ohio Chamber"), by Plainville Concrete Services, Inc. ("PCS") and jointly by Anderson Concrete Company, Del Mar Concrete Corporation and West Jefferson Concrete Corporation ("Anderson"). Moreover, carriers in the ready mix concrete industry filed thirty-eight separate letters in support of granting a broad exemption to the hours-of-service requirements for ready mix concrete operations within one hundred air-miles of the carrier's terminal. In addition, the Federal Highway Administration ("FHWA") filed comments with respect to the Commission's obligations under the MCSAP agreement with FHWA. In addition, ORMCA filed supplemental comments on June 10, 1997.

The following summarizes the comments received with respect to each of the specific questions posed by the Commission in the entry dated May 1, 1997:

- (a) Is this industry sufficiently distinguishable from other transportation industries where the general hours of service regulations are applicable? Why or Why not? Cite specific reasons for your position on this issue.

ORMCA stated that it's members were sufficiently distinguishable from other regulated industries because of: the local nature of its operations, necessitated by the perishable nature of ready mixed concrete; the demands placed on its operations by the uncontrollable vagaries of the weather; the seasonal nature of its operations; and the fact that only a third of each driver's time is spent actually driving. ORMCA further stated that its operations are more akin to other motor carrier operations which are exempted from Federal and state regulation.

Anderson stated that the highly perishable nature of ready mixed concrete required that deliveries be made within one hour of the loading of the vehicle. Moreover, Anderson stated that their operations are particularly dependent upon the unpredictable weather in Ohio because contractors will cancel scheduled deliveries based upon the threat of rain. Consequently, postponed deliveries will accumulate, requiring the use of drivers for up to seventy hours of on duty time per week for a peak period of twelve to fifteen weeks.

PCS relied primarily on the fact that it is a private carrier and that private carriers were not subject to the safety rules when the safety rules initially were adopted fifty years ago. Consequently, the Interstate Commerce Commission, which promulgated the hours-of-service regulations, did not consider the unique aspects of the concrete industry: movements confined to a fifty air-mile radius of the terminal, repetitive movements from construction site to the concrete plant and the fact that drivers are behind the wheel only one third of the time which they are on duty. Therefore, PCS argued that the public is exposed to their drivers for fewer hours and miles than to the driver of a long haul vehicle.

The thirty-eight letters filed by carriers in the industry stated that their operations consist of local short-haul operations as opposed to interstate carriers for whom the regulations were initially intended to be applied.

- (b) To what degree do the regulatory costs to the ready mixed concrete industry of compliance with the existing rules outweigh the benefits to public safety?

ORMCA restated this question as whether revising the hours-of-service regulations would have an adverse impact upon public safety. ORMCA stated that the industry's safety record was "extraordinary" based upon the responses of its members to a survey by ORMCA regarding their accident rates. ORMCA further stated that "the industry's options to continue compliance with the . . . regulations in an expanding economy are to add more trucks and/or construct additional plants to meet demands during peak weeks in the busy season."

Anderson stated that it is not economically feasible to add additional trucks, plants or drivers to meet weather-related emergencies. Anderson further stated that, because it competes with seven other companies in Franklin County alone, investing in additional equipment and facilities would place it at a competitive disadvantage.

PCS stated that their industry is already subject to numerous exceptions from the hours-of-service requirements: drivers operating within one hundred air miles of their home terminal are not required to prepare a log book unless on duty more than twelve consecutive hours; the limit of seventy hours in eight days is reset for each period of twenty-four hours off duty; and operations wholly within a single municipality or contiguous municipalities are not subject to Commission regulation.

Nonetheless, PCS stated that compliance with the remaining hours-of-service requirements imposes considerable time and expense, particularly when the driver is on duty for more than twelve consecutive hours and must prepare a log of his driving for that day. PCS stated that, because their drivers are operating the vehicle for one third of the time they are on duty, their drivers will be less fatigued after twelve consecutive hours on duty than a long haul driver.

- (c) Should regulatory relief be granted to this industry from the hours of service requirements entirely? Should regulatory relief simply extend the permissible number of hours, on a daily or weekly basis, that a driver may operate a commercial motor vehicle? What is the maximum number of hours a driver should be permitted to operate a commercial motor vehicle?

ORMCA stated that, if a complete exemption is not granted, it is preferable to provide regulatory relief based upon the industry's unique characteristics: local, short-haul operations. ORMCA further stated that such operations were not intended to be subject to hours-of-service regulation, as evidenced by Federal and state exemptions of similar industries.

PCS stated that regulatory relief from all of the hours-of-service requirements should be granted to the ready mixed concrete industry in order to return the industry to the status quo prior to the extension of the Federal Motor Carrier Safety Rules to private carriers.

The thirty-eight letters from carriers stated that, due to the local nature of their operations and the limited

amount of time the drivers actually spend driving, their operations should be exempt from the hours-of-service and record-keeping requirements for all movement within one hundred air-miles of their terminals.

The FHWA stated that the tolerance guidelines control the degree to which a state can implement regulations which vary from the Federal Motor Carrier Safety Rules and still be eligible for MCSAP funding. According to the FHWA, under the tolerance guidelines, states may: expand the ten hour limit on driving to twelve hours; expand the limit on driving after fifteen hours on duty to sixteen hours; and increase the limit of seventy hours in eight days to seventy hours in seven days or eighty hours in eight days.

In light of the letter filed by the FHWA, the ORMCA filed supplemental comments stating that, although a complete exemption is preferable, the ORMCA recommended that the Commission increase the hours-of-service to the maximum permissible under the tolerance guidelines rather than risk the delay inherent in obtaining a variance from the FHWA in order to provide complete regulatory relief.

- (d) Should regulatory relief be limited to carriers and drivers operating within fifty-air miles of the driver's home terminal? To one hundred air-miles of the driver's home terminal?

ORMCA stated that regulatory relief from the hours-of-service-requirements for driver's operating within one hundred air-miles of their home terminal "is consistent with the characteristics of the industry and is sufficient to provide regulatory relief to the ready mixed industry." However, ORMCA further stated that regulatory relief for driver's operations within only fifty air-miles of their home terminal "would provide sufficient regulatory relief" because their deliveries must be made within one hour of the loading of the vehicle, which approximates fifty air-miles.

Anderson stated that the unique characteristics of the ready mixed concrete industry warrants a complete

exemption from the hours-of-service requirements irrespective of the distance from the driver's terminal; however, Anderson further stated that, if the Commission does not grant a complete exemption, the Commission should grant an exemption from the hours-of-service requirements for drivers operating within one hundred air-miles of their home terminal.

Although PCS represented that one unique aspect of the ready mixed concrete industry is the fact that its operations are always within fifty air-miles of a terminal, PCS stated that regulatory relief should not be limited to drivers operating within fifty or one hundred air-miles of their home terminal. PCS noted that operations within one hundred air-miles of the driver's terminal are already subject to relief from driver's log book requirements.

The FHWA stated that the tolerance guidelines do not permit regulatory exemptions based upon the distance a carrier operates from its home terminal; however, the tolerance guidelines do permit an extension of the one hundred air-mile radius exception from driver logging requirements to one hundred fifty miles.

- (e) Should any regulatory relief be granted on a seasonal basis? What is the appropriate seasonal period for the ready mixed concrete industry for regulatory relief?

ORMCA stated that the seasonal period for ready mixed concrete is from April 1 through November 30 although the peak period of twelve to fifteen weeks may fall randomly throughout this period. However, ORMCA stated that due to the local nature of their operations, a seasonal restriction is unnecessary.

Although PCS stated that business in the industry is seasonal, PCS stated regulatory relief "should be complete and should not be limited to particular months of the year" because "business is actually tied to weather conditions which can change from year to year and month to month".

The FHWA stated that regulatory exemptions based upon seasonal operations are not permitted under the tolerance guidelines.

- (f) Would provision of regulatory relief adversely impact any grant agreements between the State of Ohio and the U.S. Department of Transportation? Is the proposed regulatory relief within the tolerance guidelines set forth in 49 C.F.R. Part 350, Appendix C?

ORMCA stated that it had contacted officials of various states, as well as the FHWA, who have indicated that the enactment of similar regulatory relief for the ready mixed concrete industry has not resulted in the loss of Federal funds.

Nonetheless, in their supplemental comments filed on June 10, 1997, ORMCA recognized the potential delay and difficulties in obtaining a variance from the tolerance guidelines from the FHWA and recommended that the Commission provide regulatory relief up to the maximum level available under the tolerance guidelines.

PCS stated that granting regulatory relief would not violate the tolerance guidelines because PCS believes that the FHWA would approve a request by the Commission to implement an exception for the industry.

FHWA stated that "[e]nactment of incompatible intrastate rules [i.e., intrastate rules which are neither identical to the Federal Motor Carrier Safety Rules nor within the tolerance guidelines] will result in withholding of 50% of Ohio's basic formula allocation under the MCSAP program." However, the FHWA further stated that States can apply for a variance from the tolerance guidelines if the State can demonstrate that the State regulation achieves substantially the same result as the Federal rule, does not apply to interstate commerce and has no adverse impact upon safety.

- (5) Based upon the information presented by the proponents of regulatory relief for the ready mixed concrete industry and the

lack of any comments filed by other interested parties demonstrating reasons not to expand the permissible hours-of-service, the Commission will increase the hours-of-service for the ready mix concrete industry to the maximum permissible under the tolerance guidelines. The Commission remains concerned with the potential posed by these rules to contribute to the problem of fatigued drivers on the public highways. In light of the absence of clear scientific data or studies on this particular industry segment, the Commission hereby directs the staff to monitor the effects of the expansion upon public safety.

- (6) Because the issues raised in this proceeding are being studied and addressed by the FHWA in their hours-of-service rulemaking, the Commission should sunset this rule six months after the effective date of any final rule issued by the FHWA in their rulemaking.
- (7) In light of the fact that no comments were filed opposing the principle of regulatory relief for the ready mixed concrete industry, the Commission should issue a final rule directly, without further notice-and-comment. The staff has prepared the attached amendment to Rule 4901:2-5-02, O.A.C., which would grant regulatory relief to the ready mixed concrete industry to the extent permitted by the tolerance guidelines issued by the FHWA. This rule should be adopted immediately, without further proceedings.

It is, therefore,

ORDERED, That amended Rule 4901:2-5-02, O.A.C., is adopted in final form as of the date of this Finding and Order. It is, further,

ORDERED, That amended Rule 4901:2-5-02, O.A.C., be effective July 7, 1997. It is, further,

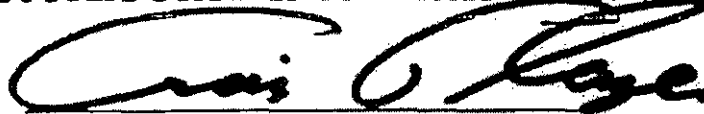
ORDERED, That nothing in this Finding and Order shall be binding upon the Commission in any subsequent investigation or proceeding involving the justness or reasonableness of any charge, rule, or regulation. It is, further,

ORDERED, That our approval of amended Rule 4901:2-5-02, O.A.C., as set forth in this Finding and Order does not constitute state action for the purpose of the antitrust laws. It is not our intent to insulate the companies from any provisions of any state or federal law which prohibit the restraint of trade. It is, further,

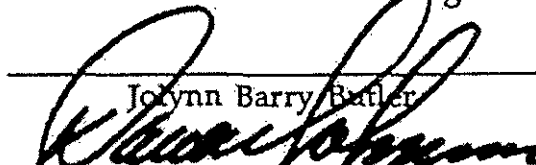
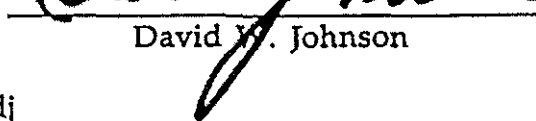

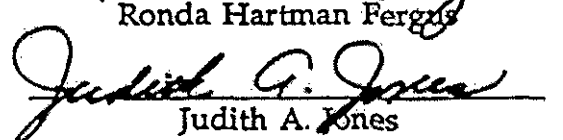
ORDERED, That this entry and the attached final rule amending Rule 4901:2-5-02, O.A.C., be filed with the Secretary of State and the Legislative Service Commission. It is, further,

ORDERED, That a copy of this entry and the attached final rules be served upon the Ohio Ready Mixed Concrete Association, Ohio Contractors Association, the Ohio Manufacturers Association, the Ohio Trucking Association, the Ohio Chamber of Commerce, the Ohio Petroleum Marketers Association, the Ohio Propane Gas Association, the Ohio Household Movers Association, Ohio AAA, the Ohio Motorists Association, the Ohio Insurance Institute, Citizens for Truck Safety, the Commercial Motor Vehicle Safety Alliance, the U.S. Department of Transportation Federal Highway Administration, the Owner-Operator Independent Drivers Association, the Teamsters Union and all other parties which filed comments in this proceeding.

THE PUBLIC UTILITIES COMMISSION OF OHIO




Craig A. Glazer, Chairman


Jolynn Barry Butler

David W. Johnson
Ronda Hartman Fergus

Judith A. Jones

GP:dj

Entered in the Journal
JUN 26 1997

A True Copy


Gary E. Vigorito
Secretary

4901:2-5-02 Adoption of U.S. department of transportation safety standards.

- (A) The commission hereby adopts the provisions of the motor carrier safety regulations of the U.S. department of transportation contained in Title 49, CFR Parts 383 and 387 (insofar as that pertains to the transportation of hazardous materials, hazardous substances or hazardous wastes as therein defined) and Parts 390 through 397 including future modifications or additions, unless specifically excluded or modified by a rule of this commission, and those portions of the hazardous materials Transportation regulations contained in Title 49 CFR Parts 171 through 180 as are applicable to transportation or offering for transportation by motor vehicle, including future modifications or additions. All motor carriers operating in intrastate commerce within Ohio shall conduct their operations in accordance with those regulations and the provisions of this chapter. With respect to such regulations as applicable to intrastate motor carriers, any notices or requests permitted or required to be made to the U.S. department of transportation or officials thereof under Title 49, CFR Parts 390 through 397 shall instead be made to the director of the commission's transportation department.
- (B) All motor carriers engaged in interstate commerce in Ohio shall operate in conformity with all regulations of the U.S. department of transportation, including future modifications, or additions, which have been adopted by this commission. Violation of any such federal regulation by any motor carrier engaged in interstate commerce in Ohio shall constitute a violation of this commission's rules.
- (C) All offerors shall operate in conformity with all applicable regulations of the U.S. department of transportation, including future modifications or additions, which have been adopted by this commission. Violation of any such federal regulation by any offeror shall constitute a violation of this commission's rules.
- (D) Enforcement of those portions of Title 49, CFR Parts 171 through 180 as are applicable to transportation or offering for transportation of hazardous materials by motor vehicle shall be subject to any, exemptions granted by the U.S. department of

transportation pursuant to Title 49, CPR Part 107 and shall be consistent with interpretations issued by the research and special programs administration, U.S. department of transportation.

(E) TITLE 49, CFR PART 395.3, MAXIMUM DRIVING TIME, DOES NOT APPLY TO PRIVATE MOTOR CARRIERS ENGAGED IN THE INTRASTATE TRANSPORTATION OF READY MIXED CONCRETE. AS TO SUCH CARRIERS, THE FOLLOWING MAXIMUM DRIVING TIME LIMITATIONS APPLY:

(1) NO PRIVATE MOTOR CARRIER ENGAGED IN THE INTRASTATE TRANSPORTATION OF READY MIXED CONCRETE SHALL PERMIT OR REQUIRE ANY DRIVER USED BY IT TO DRIVE NOR SHALL ANY SUCH DRIVER DRIVE.

(A) MORE THAN TWELVE HOURS FOLLOWING EIGHT CONSECUTIVE HOURS OFF DUTY; OR

(B) FOR ANY PERIOD AFTER HAVING BEEN ON DUTY SIXTEEN HOURS FOLLOWING EIGHT CONSECUTIVE HOURS OFF DUTY.

(2) NO PRIVATE MOTOR CARRIER ENGAGED IN THE INTRASTATE TRANSPORTATION OF READY MIXED CONCRETE SHALL PERMIT OR REQUIRE A DRIVER OF A COMMERCIAL MOTOR VEHICLE TO DRIVE, NOR SHALL ANY DRIVER DRIVE, REGARDLESS OF THE NUMBER OF MOTOR CARRIERS USING THE DRIVER'S SERVICES, FOR ANY PERIOD AFTER:

(A) HAVING BEEN ON DUTY SEVENTY HOURS IN ANY SEVEN CONSECUTIVE DAYS IF THE EMPLOYING MOTOR CARRIER DOES NOT OPERATE COMMERCIAL MOTOR VEHICLES EVERY DAY OF THE WEEK; OR

(B) HAVING BEEN ON DUTY EIGHTY HOURS IN ANY EIGHT CONSECUTIVE DAYS IF THE EMPLOYING MOTOR CARRIER OPERATES COMMERCIAL MOTOR VEHICLES EVERY DAY OF THE WEEK.

Case No. 97-456-TR-COI

Effective: July 7, 1997

Certification

Daisy L. Crockron, Acting Secretary

Date

Promulgated under R. C. Sec. 111.15

Authorized by R.C. Sec. 4919.79, 4921.03, 4921.04,
4923.03, 4923.20

Rule amplifies R.C. Sec. 4921.03, 4921.04, 4923.03,
4923.20

Prior effective dates: 4/25/92, 10/28/90, 12/15/88,

12/25/87, 3/19/87, 11/11/78, 9/5/77, 11/23/70,

2/17/67, 6/12/65, 7/1/64, 5/31/64, 4/12/64, 1/23/64,

11/30/63, 10/19/63