BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of SJA Transport, Inc.,	:	Case No. 17-779-TR-CVF
Notice of Apparent Violation and	:	(OH3210302495C)
Intent to Assess Forfeiture.	:	
	:	
In the Matter of SJA Transport, Inc.,	:	Case No. 17-1199-TR-CVF
Notice of Apparent Violation and	:	(OH3238011444C)
Intent to Assess Forfeiture.	:	

SJA TRANSPORT, INC.'S POST-HEARING BRIEF

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I. INTRODUCTION

For several years, SJA Transport, Inc. ("SJA") transported ethanol in a manner that it believed—and that it was instructed by regulators and inspectors—was in full compliance of the law. Yet, on December 30, 2016 and February 21, 2017, the Transportation Department of the Public Utilities Commission of Ohio and the Ohio State Highway Patrol, respectively, issued violations to SJA relating to the transportation of ethanol under 49 C.F.R. § 180.415(b) and 49 C.F.R. § 177.823(a). These violations were completely contradictory to the Transportation Department's and State Highway Patrol's practices and advice given to SJA from just a few months prior. Thus, SJA was forced to challenge the issuance of the violations in this proceeding so that this Commission can correct the misapplication of the law as well as the PUCO's Transportation Department's arbitrary and capricious enforcement.

SJA's challenge to the alleged violation of § 180.415(b) is two-fold. First, SJA did not violate § 180.415(b). This regulation is simply a markings requirement and its plain language only requires operators to notify inspectors of the regulatory tests that particular cargo tank *has passed* by affixing certain stickers to their cargo tanks. It does not mandate that cargo tanks pass a particular test before that tank can transport certain hazardous materials. The evidence at the hearing plainly demonstrates that SJA's cargo tanks were marked in full compliance with § 180.415(b) on the dates of the alleged violations. This Commission should dismiss the alleged violations of § 180.415(b) for this reason alone.

Second, this Commission should dismiss the alleged violations of § 180.415(b) because of the Transportation Department's arbitrary and capricious enforcement of the leakage test requirements for the transportation of ethanol. There is undeniable confusion among inspectors, regulators, and operators as to which cargo tank leakage test is required when transporting ethanol—the standard leakage test ("K-Test") or the "substitute" leakage test, called the

Environmental Protection Agency's "Method 27 – Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure-Vacuum Test" ("K-EPA 27 Test"). There was so much confusion, in fact, that the Pipeline and Hazardous Materials Safety Administration ("PHMSA") and Federal Motor Carrier Safety Administration ("FMCSA") each released interpretations of the leakage test requirements in August 2016 and November 2016, respectively. These interpretations instructed that cargo tanks transporting non-petroleum distillate fuels, such as ethanol, must pass the K-Test. Despite these interpretations, ***in late 2017***, FMCSA acknowledged that it, as well as other states, had not taken action on enforcement and that it was still in the process of educating carriers and inspectors about how the leakage tests should be applied and enforced.

When SJA received the first alleged violation on December 30, 2016—just ***30 days*** after the FMCSA interpretation—it was transporting ethanol having only passed the K-EPA 27 Test, which is consistent with the manner instructed by the Ohio State Highway inspectors, just *four months* prior. Indeed, during four inspections from October 2015 to August 2016, the Transportation Department affirmed that SJA was transporting ethanol in full compliance with the law. Yet, during each those inspections, SJA's cargo tanks had passed *only* passed the K-EPA 27 Test, and not the K-Test. SJA's surprise at the total change in enforcement is understandable. SJA has been instructed by inspectors and regulators for several years that one practice was acceptable. But now, without warning or notice, those same inspectors and regulators were issuing violations for the practice they previously endorsed.

In fact, on January 5, 2017, Rob Belna of SJA received an email from Robert Barrett, the enforcement officer who issued the December 30, 2016 violation, informing Mr. Belna that "it appears" that the K-EPA 27 Test could no longer be used as a substitute for the K-Test while

transporting ethanol. Then, within a short period after the first alleged violation and before SJA could have *all* 30 of its cargo tanks tested and in compliance, the Transportation Department issued SJA another alleged violation of § 180.415(b) for transporting ethanol with only the K-EPA 27 Test. The Transportation Department's arbitrary and capricious actions provide a second reason to dismiss the alleged violations of § 180.415(b).

The same is true for SJA's alleged violation of § 177.823(a). SJA was simply acting in accordance with the advice that it received from the state inspectors who ultimately issued the violation. In fact, Mr. Belna testified that he was operating according to industry standard and based on the instruction he received from the Transportation Department. This is just another example of the Transportation Department's arbitrary and capricious enforcement of the law and should result in the dismissal of SJA's alleged violation of § 177.823(a).

Importantly, SJA worked to ensure all 30 trucks were in full compliance after becoming aware of the Transportation Department's new enforcement position of the requirements of § 180.415(b) and § 177.823(a). SJA, however, should not be penalized for the uncertainty that existed within the industry, as well as the Transportation Department, about the requirements of § 180.415(b) and § 177.823(a)—uncertainly that existed even *after* the first alleged violation. Thus, for the reasons explained below, SJA respectfully requests that this Commission dismiss the alleged violation of § 180.415(b) issued on December 30, 2016, and the alleged violations of § 180.415(b) and § 177.823(a) issued on February 21, 2017.

II. STATEMENT OF THE CASE AND FACTS

A. SJA Is Cited by the Transportation Department for an Alleged Violation of 49 C.F.R. § 180.415(b).

On December 30, 2016, Robert Barrett, a member of the PUCO Hazmat Division of Transportation Field Staff, was on duty and patrolling the area near the ethanol plant located on

Houx Parkway in Lima, Ohio. (Transcript ("Tr.") 8, 10.) There, he observed a vehicle operated by SJA exiting the ethanol plant and stopped the vehicle for an inspection. (Tr. 10–11.) The vehicle was transporting ethanol, a non-petroleum distillate fuel. (Tr. 12.) Mr. Barrett observed that the markings on the vehicle's cargo tank indicated that an internal-visual, external-visual, and pressure inspection had been completed. (Tr. 13.) The markings, however, did not indicate that the cargo tank had passed the K-Test—a leakage test—but rather had passed the K-EPA 27 Test—a substitute leakage test for cargo tanks equipped with a vapor recovery system. (Tr. 13, 15, 80.)

Because the cargo tank was transporting ethanol and had not passed the K-Test, Mr. Barrett believed that the cargo tank was not in compliance with 49 C.F.R. § 180.415(b) ("§ 180.415(b)") and issued a violation. (Tr. 12–15; Staff Exhibit ("Staff Ex.") 1.) According to Mr. Barrett, even though the tank had proper markings required by § 180.415(b) for the K-EPA 27 Test, the K-EPA 27 Test was not an appropriate substitute for the K-Test when a vehicle is transporting non-petroleum distillate fuels such as ethanol. (Tr. 20–22, 23.) Mr. Barrett, however, admitted that it was not until sometime *after* the PHMSA published an advisory on August 3, 2016, and after a conversation with his supervisor, that it was "determined" or "established" that the K-EPA 27 Test "was not applicable when transporting any fuel other than petroleum." (Tr. 23; SJA Exhibit ("SJA Ex.") 1.)

B. SJA Is Cited by the Ohio State Highway Patrol for Alleged Violations of 49 C.F.R. § 180.415(b) and 49 C.F.R. § 177.823(a).

On February 21, 2017—less than two months after SJA's alleged violation on December 30, 2016—SJA received another violation. On this occasion, Michael Byrne, a Motor Carrier Enforcement Inspector for the Ohio State Highway Patrol, was working at a weigh

station near Bowling Green, Ohio. (Tr. 35.) A vehicle operated by SJA entered the station to be weighed and Mr. Byrne conducted an inspection. (Tr. 35.)

During the inspection, Mr. Byrne determined that three of the cargo tank's compartments contained residue of diesel fuel and the fourth compartment contained ethanol. (Tr. 41, 53.) Mr. Byrne also observed, among other things, that the cargo tank (1) was marked as having passed the K-EPA 27 Test and not the K-Test, and (2) carried the Class 3 placard with identification markings "UN1987" indicating that it was transporting alcohols. (Tr. 37–38; Staff Exs. 4, 5.)

Prior to issuing any violations, Mr. Byrne conferred with Kelli Hedglin, a Field Supervisor for PUCO who was also present, to get a "second opinion" about potential hazardous materials violations, specifically the applicability of the K-Test versus the K-EPA 27 Test. Mr. Byrne stated that he did not contact Ms. Hedglin "often" but did so when he had "concerns about hazardous materials." (Tr. 48.) Mr. Byrne also stated that he did "not recall" whether he had dealt with the K-Test versus K-EPA 27 Test question prior to February 21, 2017. (Tr. 49.) Mr. Byrne also could "not recall" whether he had issued any violations under § 180.415(b) for allegedly not having the proper test. (Tr. 49.)

Based on his conversation with Ms. Hedglin, Mr. Byrne issued two violations to SJA. First, Mr. Byrne decided that the cargo tank was not marked in accordance with § 180.415(b) because it lacked the markings for the K-Test. (Tr. 42–45; Staff Ex. 3.) Mr. Byrne surmised that even though the cargo tank had proper markings required by § 180.415(b) for the K-EPA 27 Test, the K-EPA 27 Test was not an appropriate substitute for the K-Test when a vehicle is transporting ethanol. (Tr. 42–44, 50–53.)

Second, Mr. Byrne issued a violation for non-compliance with § 177.823(a) because the vehicle was placarded "UN1987" for alcohols and not "UN1993" for flammable liquids. (Tr. 53.) Mr. Byrne believed that even though it is common for carriers to placard their vehicles based on lowest flashpoint[1] of the cargo they are hauling, this practice did not apply to vehicles transporting petroleum distillate fuels. Thus, even though the cargo tank was hauling ethanol and diesel fuel and the vehicle was placarded as "UN1987" for the substance with the *lower* flashpoint—ethanol—Mr. Byrne believed that a violation of § 177.823 existed. (Tr. 55–56, 172.) Mr. Byrne also issued other violations but these violations are not the subject of SJA's appeal. (*See* Staff Ex. 3.)

C. The Transportation Department Issues Notices of Preliminary Determination and SJA Requests an Administrative Hearing.

Following conferences between SJA and PUCO's Compliance Division, the Transportation Department issued Notices of Preliminary Determination on February 16, 2017, and April 12, 2017, for the alleged violations that occurred on December 30, 2016, and February 21, 2017, respectively. The Notices indicated that the Transportation Department was assessing a civil forfeiture against SJA for (1) $1,260 for the December 30, 2016, alleged violation of § 180.415(b), (2) $1,260 for the February 21, 2017, alleged violation of § 177.823(a), and (3) $1,260 for the February 21, 2017, alleged violation of § 180.415(b). (Staff Exs. 9, 10.) On March 16, 2017, and May 5, 2017, SJA timely requested an administrative hearing pursuant to Ohio Adm. Code 4901:2-7-13. The administrative hearing was held on April 23, 2018.

[1] The flashpoint of a substance is the *lowest* temperature at which vapors from the substance could ignite when exposed to a flame. (Tr. 54–55.) Ethanol has a *lower* flashpoint than diesel fuel. (Tr. 172.)

III. LAW AND ARGUMENT

A. Standard of Review

Under Ohio Adm. Code 4901:2-7-20, "the staff must prove the occurrence of a violation by a preponderance of the evidence." A preponderance of the evidence is "the greater weight of evidence, that is, evidence that you believe because it outweighs or overbalances in your mind the evidence opposed to it. A preponderance means evidence that is more probable, more persuasive, or of greater probative value. It is the quality of the evidence that must be weighed." *Cawrse v. Allstate Ins. Co.*, 5th Dist. Ashland No. 09COA002, 2009-Ohio-2843, ¶ 29. Thus, it is the Staff's burden of production and persuasion to establish its case. The Staff, however, has utterly failed to meet either of its burdens.

B. SJA's Cargo Tanks Complied with the Express Requirements of 49 C.F.R. § 180.415(b).

§ 180.415(b) requires that cargo tanks be *marked* according to tests that the tanks have passed. It does *not* require that cargo tanks pass a certain test before those tanks can transport certain hazardous materials. Put simply, § 180.415(b) is a *markings* requirement, not a *testing* requirement—*i.e.*, ***if*** a cargo tank has passed the K-EPA 27 Test or K-Test, § 180.415(b) ***then*** instructs operators as to how the cargo tank should be *marked*.

The Staff makes no argument that SJA did not meet the requirements of § 180.415(b) SJA. In fact, SJA was in full compliance with the express requirements of § 180.415(b) on December 30, 2016, and February 21, 2017. Rather, the Staff ***only*** alleges that SJA had the improper test for cargo tanks transporting ethanol. This, however, is not a violation of § 180.415(b).

1. Section 180.415(b) is a markings requirement, not a testing requirement.

The plain language of § 180.415(b)—titled "Test and Inspection Markings"—reveals that it is *only* a markings requirement. The Commission must apply § 180.415(b) as written. *See AT&T Communications of Ohio, Inc. v. Lynch*, 132 Ohio St.3d 92, 2012-Ohio-1975, 969 N.E.2d 1166, ¶ 18 ("When construing a statute, [the Commission] must first examine its plain language and apply the statute as written when the meaning is clear and unambiguous.") (quoting *Medcorp, Inc. v. Ohio Dept. of Job & Family Servs.*, 121 Ohio St.3d 622, 2009-Ohio-2058, 906 N.E.2d 1125). Moreover, the "interpretation of statutes and administrative rules should follow the principle that neither is to be construed in any way other as the words demand." *Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 36 (10th Dist.) Thus, "it is the duty of [the Commission] to give effect to the words used, not to delete words used or to insert words not used." *Columbus-Suburban Coach Lines, Inc. v. Pub. Util. Com.*, 20 Ohio St.2d 125, 127, 254 N.E.2d 8 (1969). When interpreting the regulation, the [Commission] must avoid an illogical or absurd result. *AT&T Communications*, 132 Ohio St. 3d 92, 2012-Ohio-1975, ¶ 18. Applying § 180.415(b) as anything other than a markings requirement—*i.e.*, requiring SJA's cargo tanks to display the proper markings for the tests they have *passed*—would be contrary to the express language of the regulation and result in an illogical and absurd result.

The plain and unambiguous language of § 180.415(b) solely regulates the manner and display of markings on a cargo tank. § 180.415(b) expressly provides:

> (b) Each cargo tank must be durably and legibly marked, in English, with the date (month and year) and the type of test or inspection performed, subject to the following provisions:
>
> (1) The date must be readily identifiable with the applicable test or inspection.

(2) The markings must be in letters and numbers at least 32 mm (1.25 inches) high, near the specification plate or anywhere on the front head.

(3) The type of test or inspection may be abbreviated as follows:

(i) V for external visual inspection and test;

(ii) I for internal visual inspection;

(iii) P for pressure test;

(iv) L for lining inspection;

(v) T for thickness test;

(vi) K for leakage test for a cargo tank tested under § 180.407, except § 180.407(h)(2); and

(vii) K-EPA27 for a cargo tank tested under § 180.407(h)(2) after October 1, 2004.

Section 180.415(b) makes no mandate that cargo tanks pass a certain test before they can transport certain materials. Thus, the plain language of § 180.415(b) requires *only* that cargo tanks be marked with the numbers and letters for the tests that the particular tank has *actually passed*. If a cargo tank is *not* properly marked for a ***completed*** test, *only then* is it a violation of § 180.415(b).

In addition to the express language of the regulation, the conclusion that § 180.415(b) is solely a markings requirement is supported by statements made during the hearing, PHMSA interpretations, and prior decisions from this Commission. For example, during the hearing Mr. Barrett explained that "the test date markings are on there *for communication*." (Tr. 15) (emphasis added). Additionally, Mr. Swegheimer provided an example of a § 180.415(b) violation by stating, "if you're hauling materials that would otherwise require a K leakage test, but failed to have the marking on the vehicle that such a test *had been performed*, that's a markings violation. . . . ***You only write what you can prove.***" (Tr. 101) (emphasis added). This

instructive statement from Mr. Swegheimer illustrates that § 180.415(b) is simply a markings requirement.

PHMSA has also given interpretations demonstrating that § 180.415(b) requires only that the proper markings be present for a successfully completed test, rather than obligating cargo tanks to complete a certain test before transporting certain materials. *See, e.g., PHMSA Response Letter October 2011 Ref. No. 11-0059* (Oct. 12, 2011) (**"**Each cargo tank successfully ***completing*** the test and inspection requirements contained in § 180.407 *must be marked as specified in § 180.415*.") (emphasis added) (attached); *see also PHMSA Response Letter July 2006 Ref. No. 06-0034*, July 31, 2006 (July 31, 2006) ("The annual, partial external visual inspection and leakage test *performed in accordance with § 180.407(h*) fulfill [t]he annual inspection and test requirements . . . . Once the external visual inspection and leakage test ***have been successfully completed***, the *tank may be marked in accordance with § 180.415(b).*") (emphasis added) (attached). PHMSA's interpretation plainly instructs that there is a testing requirement—§ 180.407—and then a subsequent markings requirement—§ 180.415(b).

This Commission's analysis in *In the Matter of National Safe T Propane*, Pub. Util. Comm. No. 07-1207-TR-CVF, 2008 WL 2600374 (June 28, 2008), provides a similar insight. There, a carrier was cited for a violation of § 180.415(b). The carrier, however, presented no evidence that he had the required test because § 180.415(b) "concerns the absence of proper . . . markings, not whether such tests had actually occurred." *Id.* at 4. In congruity with the carrier's position, the Commission performed *no* analysis of whether the carrier had completed the proper tests. *See id.* Rather, the Commission's entire analysis centered on whether the defendant violated § 180.415(b) by having insufficient markings. *Id.* at 4. This Commission's analysis

focusing on the markings and not the required test is telling and consistent with PHMSA's interpretation that § 180.415(b) is solely a markings requirement.

Accordingly, the *only* issue raised by an alleged violation of § 180.415(b) is whether SJA's markings were sufficient. Not having the proper test to transport ethanol is simply not a cognizable violation of § 180.415(b). Any other conclusion would result in an absurd and illogical result that Ohio law commands this Commission to avoid. *See AT&T Communications,* 2012-Ohio-1975, ¶ 18. As Mr. Swegheimer instructed, "you only write what you can prove." (Tr. 101.) As explained below, that is exactly what SJA did here.

2. SJA's cargo tanks complied with the markings requirements of § 180.415(b).

When applying the express language of § 180.415(b) to SJA's cargo tanks that were subject to inspection on December 30, 2017 and February 21, 2017, it is undisputed that SJA was in full compliance with § 180.415(b)'s requirements. Indeed, there is no evidence, nor even an allegation, that SJA's markings were insufficient for signaling that the cargo tanks had passed the K-EPA 27 Test. Rather, the *only* allegation is that SJA was required to have the K-Test, not the K-EPA 27 Test, to transport ethanol. Because of this, the Commission's allegations that SJA was in violation of § 180.415(b) fail.

On December 30, 2016 and February 21, 2017, SJA had its cargo tanks marked to signal that those tanks had passed the K-EPA 27 Test in compliance with § 180.415(b). It is undisputed that SJA's tanks were marked (1) durably and legibly, (2) in English, (3) with the date (month and year), (4) with the type of test or inspection performed, (5) with letters and numbers at least 1.25 inches high, near the front head, and (6) with "K-EPA27." (*See* Staff Exs. 2, 4, and 5.) Each individual that testified regarding SJA's markings—including those from PUCO and the Ohio State Highway Patrol—admitted that SJA's tanks were properly marked for the K-EPA 27

Test. (*See* Tr. 20–22; Tr. 50–53 ("Q. And based on [§ 180.415(b)], if a cargo tank had passed the K-EPA 27 Test, are these the markings you would expect to see? A. Yes."); Tr. 80–85 ("Q. So, if [SJA's cargo tank on December 30, 2016] had passed the K-EPA 27 Test under 180.407(h)(2), it had the proper markings for that test, correct? A. For that test, yes.); (Q. "[I]f, [SJA's cargo tank inspected on February 21, 2017] had passed the K-EPA 27 Test under 180.407(h), it has the proper markings for that test, correct? A. It has the proper markings for that test, yes."); Tr. 128–130; Tr. 133–138; *see also* Staff Exs. 2, 4, and 5.) There can be no question, SJA's cargo tanks bore the markings required by § 180.415(b) for tanks that had passed the K-EPA 27 Test.

Based on the facts, testimony, and the express requirements of the regulation, it is undisputed that SJA's cargo tanks were properly marked pursuant to § 180.415(b) on December 30, 2016, and February 21, 2017, as having passed the K-EPA 27 Test. For this reason alone, this Commission must dismiss SJA's alleged violations of § 180.415(b). *See AT&T Communications of Ohio, Inc.*, 2012-Ohio-1975, ¶ 18

C. The Transportation Department Arbitrarily and Capriciously Enforced the K-Test Requirement.

Even if this Commission finds that § 180.415(b) requires cargo tanks to have both proper markings *and* regulates which test is required—for the reasons stated above, SJA has shown that it does not—SJA's alleged violations should be dismissed due to the Transportation Department's arbitrary and capricious enforcement of the K-Test requirement. The facts plainly illustrate that there was—and still is—significant confusion amongst the Ohio State Highway Patrol, PHMSA, FMCSA, transporters, and even PUCO about when the K-EPA 27 Test can be appropriately used as a substitute for the K-Test. As explained below, this confusion resulted in the arbitrary and capricious enforcement of the K-Test requirement.

This Commission should not allow a single transporter to bear the brunt of the ill effects caused by the mass confusion surrounding these regulations. Especially given that, for several years, PUCO and State Highway Patrol inspectors affirmed that SJA was complying with the law while transporting ethanol.

Moreover, SJA took immediate steps to comply with the law after the Transportation Department finally informed SJA that the K-EPA 27 Test would no longer be an acceptable substitute for the K-Test when transporting ethanol. Accordingly, this Commission should dismiss SJA's alleged violation of the K-Test requirement.

1. Significant confusion exists surrounding the appropriate application of the K-EPA 27 Test and the K-Test.

Despite Mr. Swegheimer's statement to the contrary (Tr. 87), there has been significant confusion surrounding the appropriate application of the K-EPA 27 Test and K-Test since the regulation was amended in 2003. The testimony and evidence from the April 23, 2018 hearing before the Commission illustrates this confusion.

a) The Transportation Department requests and PHMSA and FMCSA issue interpretations on the use of the K-EPA 27 Test as a substitute for the K-Test.

On March 18, 2016—*13 years after* the Code of Federal Regulations was amended to include the K-EPA 27 Test—Mr. Swegheimer emailed Charles Betts of the Office of Standards and Rulemaking from the U.S. Department of Transportation asking for clarification on the use of the K-EPA 27 Test on a Department of Transportation 407 tank equipped with a vapor recovery system. (Tr. 88; SJA Ex. 4.) A few months later on August 3, 2016, PHMSA responded to Mr. Swegheimer's inquiry but broadened his questions to include "all specification cargo tanks," which includes the MC-306 tanks used by SJA. (SJA Ex. 1; Tr. 108.) Ultimately, PHMSA determined that the K-EPA 27 Test could only be used as a substitute for the K-Test

when the cargo tank was in dedicated service for transporting petroleum distillate fuels. (SJA Ex. 1.) This clarification of the use of the K-EPA 27 Test as a "substitute" for the K-Test appears to be the ***first*** one sought by PUCO since the amendment in 2003. (Tr. 92.)

Then, on November 30, 2016—just ***one month*** prior to SJA's first alleged violation of the K-Test requirement—FMCSA issued a Safety Advisory titled "Limitations on the use of the EPA Method 27 Test in lieu of the Leakage Test on DOT Specification Cargo Tank Motor Vehicles." (SJA Ex. 5.) FMCSA's broad interpretation does not apply to one specific type of cargo tank and was issued "*to provide notice* to owners, operators and Registered Inspectors of Cargo Tank Motor Vehicles (CTMVs) concerning the limitations on the EPA Method 27 Test when used in lieu of the Leakage Test on DOT Specification CTMVs." (SJA Ex. 5) (emphasis added). Specifically, FMCSA provides a definition of "petroleum distillate fuel" and states that "ethanol . . . [is] not [a] petroleum distillate fuel[], and [is] not EPA Method 27 eligible." (SJA Ex. 5.) Mr. Swegheimer admitted that he was not aware of any prior clarifications or advisories issued by FMCSA concerning the applicability of the K-EPA 27 Test as a substitute for K-Test. (Tr. 95.)

The fact that these interpretations were requested and issued 13 years after the inclusion of the K-EPA 27 Test illustrates that, as recently as 2016, questions still remained about the applicability of the test when transporting ethanol.

b) The inspectors who conducted the inspection of SJA's cargo tanks and issued the violations express uncertainty about application of the K-EPA 27 Test.

The testimony of the inspectors who issued SJA the alleged violations on December 30, 2016 and February 21, 2017, illustrates that they were uncertain about the applicability of the K-EPA 27 Test for carriers transporting ethanol. First, Mr. Barrett, the inspector for the Transportation Department who performed the December 30, 2016 inspection, testified that he

first became aware that the K-Test was necessary to transport ethanol because he "had some conversation with [his] supervisor and [] received an interpretation from PHMSA." (Tr. 23.) Given that the PHMSA interpretation that Mr. Barrett is referring to was not issued until August 3, 2016 (*see* SJA Ex. 1), Mr. Barrett admitted that the conversation with his supervisor did not occur until sometime *after* August 3, 2016. (Tr. 29.) Thus, Mr. Barrett, who has been conducting field inspections for PUCO since 2001, did not receive clarification about the applicability of the K-EPA 27 Test until just less than four months before issuing the December 30, 2016 alleged violation. (Tr. 9, 29.)

Mr. Barrett's confusion is further illustrated in an email to Mr. Belna sent on January 5, 2017, six days ***after*** Mr. Barrett issued the alleged violation to SJA. (SJA Ex. 13.) Mr. Barrett's email, which attached the November 30, 2016 FMCSA interpretation, tellingly informs Mr. Barrett that he received the FMCSA interpretation "this afternoon" and that "***it appears***" all cargo tanks would require the K-Test unless dedicated to gasoline service. (SJA Ex. 13) (emphasis added). Mr. Barrett's admission that even he did not become aware of the FMCSA interpretation until January 5, 2017, and his uncertain statement of "it appears" that the K-Test is required to transport ethanol is further confirmation that questions remained about the applicability of the two tests on January 5, 2017.

Second, Mr. Byrne, the inspector for the Ohio State Highway Patrol who performed the February 21, 2017 inspection, also revealed that he had questions about the applicability of the K-EPA 27 Test when transporting ethanol. After conducting the inspection of SJA's cargo tank, Mr. Byrne stated that he needed to seek input from Ms. Hedglin, Field Supervisor for PUCO, about the alleged violation, and even looked-up additional information before issuing the alleged violation to SJA. (Tr. 41, 47, 49.) Mr. Byrne further stated that he could not recall whether he

had previously issued a violation for not having the K-Test. (Tr. 49.) Mr. Byrne's testimony is just another example of the uncertainty surrounding the K-EPA 27 Test and K-Test.

c) FMCSA representatives explain that questions *still* exist about the application of the K-EPA 27 Test.

Recent statements from FMCSA officials confirm that the question of whether the K-EPA 27 Test can be used as a substitute for the K-Test is still a point of contention. These statements come from an article dated March 2, 2018, from Bulk Transporter Magazine, an industry magazine that Mr. Belna has subscribed to and relied on for 15 to 20 years. (SJA Ex. 14; Tr. 167.) Specifically, the article discusses a presentation given in early October 2017 at the 2017 Tank Truck Week by David Ford, HAZMAT Program Manager for FMCSA. (SJA Ex. 14.) Mr. Ford stated that the presentation was aimed to answer what he says is the "most-asked question": "Can you do a [K-EPA 27] Test in lieu of a leakage test [K-Test]?" (SJA Ex. 14.) When asked about the controversy, Mr. Ford stated:

> We realize this is a hot issue. Our agency [FMCSA] is not enforcing this. This has been out there for a year. We have not taken action. Now I know some states are enforcing it, but we're not. We've been doing this educational thing and trying to tell shops and carriers. This is a 180-degree turn. ***This is a big change in how we've done business***.

(SJA Ex. 14) (emphasis added). Mr. Ford's unequivocal statements confirm what Mr. Swegheimer's testimony expressly denies (Tr. 87)—there was, and still is, significant confusion among carriers, regulators, administrative agencies, and others about when the K-EPA 27 Test can be used as an alternative to the K-Test.

2. The confusion surrounding the application of the K-EPA 27 Test resulted in the Transportation Department's arbitrary and capricious enforcement of the K-Test.

The evidence plainly illustrates that there was, and still is, significant confusion about the enforcement of the K-Test requirement. This confusion resulted in the Transportation

Department's arbitrary and capricious enforcement of the K-Test requirement with the brunt of the consequences falling on carriers such as SJA.

"The agency's interpretation and application of [the] rules cannot be arbitrary, capricious or otherwise contrary to law." *Morning View Care Ctr.-Fulton v. Ohio Dept. of Human Servs.*, 148 Ohio App.3d 518, 2002-Ohio-2878, 774 N.E.2d 300, ¶ 44 (10th Dist.) Ohio law defines "arbitrary" as "without adequate determining principle . . . not governed by any fixed rules or standards" (*see Dayton ex rel. Scandrick v. McGee*, 67 Ohio St.2d 356, 359, 423 N.E.2d 1095 (1981)) and "capricious" as "characterized by or guided by unpredictable or impulsive behavior" (*see 3189 Fisher Rd. v. Franklin Cty. Economic Dev. & Planning Dept.*, Franklin C.P. No. 09CVF09-13597, 2010 Ohio Misc. LEXIS 15025, *15 (Nov. 4, 2010)). The facts introduced at the hearing demonstrate that the Transportation Department's enforcement of the K-Test requirement was unpredictable and without fixed standards.

Prior to December 30, 2016, it was SJA's understanding that the K-EPA 27 Test was a valid substitute for the K-Test when transporting ethanol. (Tr. 141.) This understanding was reasonable given that prior to December 30, 2016, SJA had *never* received a violation for not having the K-Test despite transporting ethanol "every day." (Tr. 141–142.) Moreover, Mr. Belna was unaware of any carriers who had received a violation of § 180.415(b) for hauling ethanol and only having passed the K-EPA 27 Test prior to December 30, 2016. (Tr. 144–145.) SJA's understanding was not the product of ignorance or coincidence. Rather, SJA's understanding came directly from the input it received from the Ohio State Highway Patrol and PUCO.

During at least ***four*** inspections that occurred within the 14 months prior to the December 30, 2016 alleged violation, the K-Test requirement was not enforced against SJA by

either the Ohio State Highway Patrol or the Transportation Department. First, on October 29, 2015, SJA was transporting ethanol and the cargo tank had passed the K-EPA 27 Test but not the K-Test. (Tr. 154–156; SJA Exs. 7, 11.) PUCO Inspector, Michael Hines, performed an examination of the SJA's vehicle and stated in the vehicle examination report that "no violations were discovered." (SJA Ex. 11.) More importantly, Mr. Hines issued SJA a CVSA sticker for the tractor *and* the cargo tank. (Tr. 155–156; SJA Ex. 11.) Mr. Belna explained that CVSA stickers are issued for a perfect inspection or, as he stated, when a cargo tank passes an inspection "with flying colors." (Tr. 155.) So, not only did the PUCO Inspector not issue SJA a violation for transporting ethanol in a cargo tank that had *only* passed K-EPA 27 Test, the Inspector informed SJA that they were "perfect" and in full compliance with the law.

Second, during a similar inspection on December 23, 2015, an SJA truck was transporting ethanol but again had *only* passed the K-EPA 27 Test. (Tr. 146–151; SJA Exs. 6, 8.) This time the inspection was done by the Ohio State Highway Patrol, but the result was the same—no violations were issued. (Tr. 146–151; SJA Exs. 6, 8.)

The third inspection took place on June 2, 2016, and was completed by the State Highway Patrol. (Tr. 152; SJA Ex. 9.) Similar to the two previous inspections, SJA was transporting ethanol with a cargo tank that had only passed the K-EPA 27 Test. (Tr. 152; SJA Ex. 9.) Again, the inspector found that SJA had not committed any violations. (Tr. 152; SJA Ex. 9.)

Finally, on August 1, 2016—less than five months before the December 30, 2016 alleged violation— the Ohio State Highway Patrol inspected another SJA truck that was hauling ethanol. (Tr. 153–154; SJA Ex. 10.) Again, the cargo tank had passed the K-EPA 27 Test but not the K-Test. (Tr. 153–154; SJA Ex. 10.) On this occasion, the inspector issued two violations but

neither was for using the K-EPA 27 Test in lieu of the K-Test while transporting ethanol. (Tr. 153–154; SJA Ex. 10.)

Despite these separate and distinct instances where SJA's compliance with the law was affirmed by inspectors, without notice or warning, the Transportation Department suddenly changed how it enforced the K-Test requirement and issued the alleged violation to SJA. The instant that SJA was made aware of the change in enforcement, SJA immediately began the time-consuming and expensive process of having its cargo tanks tested pursuant to the requirements of the K-Test. (Tr. 158, 165.) Thus, the Transportation Department's actions were arbitrary and capricious. For these reasons, this Commission should dismiss SJA's alleged violation of § 180.415(b). *See Morning View Care Ctr.-Fulton*, 2002-Ohio-2878, ¶ 44.

D. SJA Did Not Violate 49 C.F.R. 177.823(a).

This Commission should also dismiss SJA's alleged violation of § 177.823(a). Similar to the alleged violation of the K-Test requirement, SJA was simply operating pursuant to the direction it received from the Transportation Department. As explained below, SJA was informed by the Transportation Department that to comply with § 177.823(a) when transporting two or more hazardous materials, SJA should placard its cargo tanks according to the material with the lowest flashpoint. (Tr. 172–173.) That is exactly what SJA did but it was still issued a violation.

Section 177.823(a) states that "a carrier may not move a transport vehicle containing a hazardous material unless the vehicle is marked and placarded in accordance with part 172 or as authorized in § 171.12a of this subchapter . . . ." § 172.101, *et seq.*, requires, in pertinent part, that carriers transporting "alcohols" must have a placard with "UN1987," and that carriers

transporting combustible liquids, such as diesel fuel, must have a placard with "NA1993." (*See* § 172.101, "Hazardous Materials Table.")

Here, on February 21, 2017, SJA was transporting ethanol (an alcohol) and diesel fuel (a combustible liquid). (Tr. 53.) Mr. Byrne stated that he issued SJA the violation of § 177.823(a) because the cargo tank *only* carried the placard "1987" for ethanol (alcohol). (Tr. 53, Staff Exs. 4, 5.) Yet, Mr. Belna stated that the Transportation Department and other state inspectors have instructed him that when a cargo tank is transporting two or more substances it was only necessary to placard the cargo tank for the substance with the lowest flashpoint.[2] (Tr. 171–173.) Mr. Belna explained that because ethanol has a *lower* flashpoint than diesel fuel that the cargo tank only carried the "1987" placard for ethanol. (Tr. 172.) As Mr. Belna stated, this had been SJA's practice "for years" because "you want to placard for something that's the worst product . . . that's what we've been told, and that's even what the state inspector told this driver." (Tr. 172.)

Much like SJA's alleged violation of the K-Test requirement, SJA was simply operating in the manner in which it had been instructed—to placard its cargo tanks according to the material with the lowest flashpoint—by the regulators tasked with enforcing the requirement. Now that SJA was made aware of the expectation, it is operating in accordance with the expectation and interpretation. But, given the Transportation Department's lack of clear guidance in the past and SJA's reliance on that advice, this alleged violation should be dismissed like the alleged violation of § 180.415(b).

[2] The flashpoint of a substance is the *lowest* temperature at which vapors from the substance could ignite when exposed to a flame. (Tr. 54–55.)

IV. CONCLUSION

For these reasons, SJA respectfully requests that this Commission dismiss the alleged violation of § 180.415(b) issued on December 30, 2016, and the alleged violations of § 180.415(b) and § 177.823(a) issued on February 21, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was served via email, this 11th day of June 2018, upon the following:

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Summary: Brief Post-Hearing Brief electronically filed by Mr. Timothy J Cole on behalf of SJA Transportation Inc.