BEFORE THE
PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of SJA Transport, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	: : :	Case No. 17-0779-TR-CVF
In the Matter of SJA Transport, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	: : :	Case No. 17-1199-TR-CVF

REPLY BRIEF

SUBMITTED ON BEHALF OF THE STAFF OF THE PUBLIC UTILITIES COMMISSION OF OHIO

Michael DeWine
Ohio Attorney General

William L. Wright
Section Chief

Werner L. Margard III
Thomas G. Lindgren
Assistant Attorneys General
Public Utilities Section
30 East Broad Street, 16th Floor
Columbus, OH 43215
614.466.4397 (telephone)
614.644.8764 (fax)
werner.margard@ohioattorneygeneral.gov
thomas.lindgren@ohioattorneygeneral.gov

July 2, 2018

TABLE OF CONTENTS

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of SJA Transport, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	: : :	Case No. 17-0779-TR-CVF
In the Matter of SJA Transport, Inc., Notice of Apparent Violation and Intent to Assess Forfeiture.	: : :	Case No. 17-1199-TR-CVF

REPLY BRIEF
SUBMITTED ON BEHALF OF THE STAFF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO

I. INTRODUCTION

The actions of SJA Transport, Inc. (Respondent) in these cases put the public at risk. By transporting hazardous materials in cargo tanks that were not properly tested to ensure that they were suitable for hauling those materials, the Respondent introduced an unacceptable level of risk to the travelling public, regardless of what they believed or had been told otherwise. Respondent asks the Commission to absolve it of responsibility for endangering the public, as if having English language letters and numbers of the right height and color was all that was required of it. Doing so, however, would send a very dangerous signal to other carriers in this state – as long as you say *what* you've done you can *do* whatever you like. The Commission simply cannot condone this kind of behavior on our public highways.

II. LAW AND ARGUMENT

A. Respondent failed to comply with the Hazardous Materials Regulations.

Respondent raises two arguments to justify hauling ethanol in cargo tanks not properly tested for carrying non-petroleum distillate products. First, it claims that it did not violate the regulations since its tanks bore signage indicating that a certain test had been performed, even if it was the wrong test. Second, it claims that the citations issued here were arbitrary and capricious, the result of "undeniable confusion." Neither claim is meritorious. Nor is its argument that it did not need to placard both the ethanol and diesel that is was carrying at the time of the second inspection at issue. The Commission should find that the Respondent violated that Hazardous Materials Regulations as alleged by Staff.

1. Respondent was required to perform a leakage test, a "K" test, before hauling a non-petroleum distillate product, but failed to do so.

a. 49 C.F.R. 180.415(b) requires that cargo tanks be marked to reflect that the appropriate test has been performed.

It is not Staff's position, but rather Respondent's argument that 49 C.F.R. 180.415(b) is solely a markings requirement, that results in an illogical and absurd – and dangerous – outcome. It is true that the Commission must interpret regulations to avoid such results. Respondent Brief at 8. It is also true, however, that it is Respondent's interpretation, and not Staff's, that leads to that end.

In applying the regulations, the primary rule is to give effect to the regulation's intent. *Carter v. Division of Water*, 146 Ohio St. 203, 65 N.E.2d 63, syllabus (1946). In

determining that intent, the Commission may consider, *inter alia*, the consequences of a particular construction. If the construction of the regulation produces unreasonable or absurd results it should be avoided. *State ex rel. Bolin v. Ohio Environmental Protection Agency*, 82 Ohio App.3d 410, 413, 612 N.E.2d 498 (1992).

As Staff noted in its Post-Hearing Brief, 49 C.F.R. 180.415(b) was never intended to be solely a *markings* regulation. The Department of Transportation was very clear that the rule was issued to clarify the parameters "for *testing* and marking cargo tanks used to transport petroleum distillate fuels and equipped with vapor recovery equipment." 68 Fed.Reg. 19263 (emphasis added). Its position was crystal clear: "This final rule clarifies that the [EPA Method 27] test may be used *only* for petroleum fuel service." *Id*. (emphasis added).

The rule was *not* intended only to ensure that cargo tanks were marked in a specified fashion. To find otherwise would mean that a carrier could haul any material, whether appropriate or not, so long as the tank reflected the tests that it had passed. Indeed, such a conclusion could justify the shipment of *any* hazardous material in *any* tanker, whether tested or not. And, yet, that is exactly what the Respondent claims in this case.

> Q [Cole]: Okay. And is it your belief that there were any further requirements under 49 CFR 180.415(b) other than putting the markings for the test that has been passed?
>
> A [Belna]: No.
>
> Q. And that is regardless of what is in the cargo tank?
>
> A. Correct.

Tr. 134. The Department of Transportation never intended, and no reasonable person – regulator or carrier – could justifiably interpret the regulation in that manner.

Moreover, such an interpretation makes no sense. If the purpose was only to ensure that the tank is marked to indicate which test(s) it has passed, then the only way that an inspector could ever find a violation is by examining not only the markings, but also the test results that the markings are supposed to reflect. While the carrier must retain copies of test results, 49 C.F.R. 180.417(b)(3), there is no requirement that the driver carry and produce those results during a roadside inspection. The absurd result is that a carrier could successfully avoid ever being found in violation of 49 C.F.R. 180.415(b) unless the markings simply had no regulatory meaning. *In the Matter of National Safe T Propane*, Case No. 07-1207-TR-CVF (Opinion and Order) (Jun. 28, 2008).

The Hazardous Materials Regulations must be read together. It is undeniable that such cargo tanks required a leakage test. The testing requirements for MC-306 specifications cargo tanks, the type at issue here, Tr. 107, are contained in 49 C.F.R. 180.407. Paragraph (c) of that regulation specifies which tests and inspections must be performed, and the frequency with which they must be performed. That list includes a leakage test. How the leakage testing is to be performed is determined by 40 C.F.R. 180.407(h). Subparagraph (1) states plainly that "[e]ach cargo tank must be tested for leaks." This is what was referred to during the hearing as a "K test." Tr. 15.

Subparagraph (2) allows for an alternative leakage test – the K-EPA 27 test – to be used in limited circumstances. Specifically, that paragraph provides that "[c]argo tanks used to transport petroleum distillate fuels that are equipped with vapor collection

equipment may be leak tested in accordance with the Environmental Protection Agency's "Method 27—Determination of Vapor Tightness of Gasoline Delivery Tank Using Pressure-Vacuum Test."

But Respondent did not use its cargo tanks to transport petroleum distillate fuels. It acknowledged that it used its cargo tanks to ship ethanol products, further admitting that such products were not petroleum distillate fuels. Tr. 140-141. Because the tanks were used for non-petroleum distillate fuels, the tanks had to be leakage tested under the provisions of 49 C.F.R. 180.407(h)(1), and *not* using the K-EPA 27 test under 49 C.F.R. 180.407(h)(2).

This is critical, since 49 C.F.R. 180.415 requires that the cargo tank in question have "successfully complet[ed] the test and inspection requirements contained in §180.407" in order to be properly marked. The cargo tanks at issue in this case were *not* properly tested as required by §180.407(h)(1), but were tested relying, improperly, on §180.407(h)(2). Therefore, they did not successfully complete the test and inspection requirements contained in §180.407. Consequently, any markings, because they *could not* reflect the test that was *supposed* to have been performed, were necessarily *not* "as specified" in that section.

Respondent's reliance on the *National Safe T Propane* case is equally misplaced. The two cases are easily distinguishable. The markings in the *National Safe T Propane* case had nothing to do with markings required by the Hazardous Materials Regulations. For example, those markings included a "W" decal that the inspector in that case had never seen before, and testified had no meaning under federal rules.

It stretches the imagination to conclude, as Respondent does, that the Commission's decision in that case was "congruous" with the carrier's claim – *not* the Commission's finding – that the alleged violation did not concern whether such tests had actually occurred. Respondent Brief at 10. The problem in that case was that the Commission, like the inspector, could not discern what the markings on the tank meant. But, contrary to Respondent's claim, the Commission went further, finding that there was no evidence proving that the "tests were, as [respondent] contends, indeed conducted." *Id*. at 7.

In that significant respect, the *National Safe T Propane* case is similar to these cases. Although Respondent's tanks were marked to indicate that K-EPA 27 tests had been performed, Respondent SJA presented no evidence at hearing to demonstrate that the tests had, in fact, actually been performed. Respondent's tanks were marked, yes, but not *properly* marked. Respondent offered no evidence either that the tests had been performed, or that the tanks had passed the test marked.

b. There was no confusion about how 49 C.F.R. 180.415(b) should be enforced.

As Staff noted in its Post-Hearing Brief, it had been well known since the regulation was first adopted in 2003 that the K-EPA 27 test was only to be used for petroleum fuel service. The language of 40 C.F.R. 180.407(h) was very clear. All cargo tanks were to be "K" leakage tested. A K-EPA 27 test was permitted as a leakage test for "[c]argo tanks used to transport petroleum distillate fuels that are equipped with vapor collection equipment." That was understood by Staff witness Field Supervisor Kelli Hedglin. Tr.

62-63. That was understood by Staff witness Chief of Transportation Enforcement Ron Swegheimer. Tr. 107-108. There was no "confusion" among Staff as to how the regulation should be enforced.

Staff did request an interpretation of the regulation. That request was not made because of any confusion concerning the transportation of ethanol, however. Although ethanol transportation was not common when the regulation was finalized in 2003, Staff witness Swegheimer testified that Staff understood that cargo tanks hauling ethanol needed to be K, and not K EPA-27, tested. Tr. 102. Rather, it was the rapid development of hydraulic fracking in the Marcellus and Utica shale formations, not the transportation of ethanol, that introduced some uncertainty necessitating clarification. Mr. Swegheimer requested that clarification from the Pipeline and Hazardous Materials Safety Administration (PHMSA).

> Q [Cole]: What specifically gave rise to your request for clarification in March of 2016?
>
> A [Swegheimer]: Well, historically we've seen vapor recovery systems on low-pressure cargo tanks transporting petroleum distillate fuels, and when the regulations were changed in 2003 to allow that, we understood, you know, the enforcement of it, that ethanol was not a big commodity on the road.
>
> And there were clarifications issued throughout the years, and the last one that I had was a PHMSA response letter to Mr. Kirk of Petroleum Transport. This one is dated May 10th, 2016. It questions whether the K-EPA27 test was appropriate for ethyl alcohol and it says that it is not.
>
> The reason that I requested the clarification was in 2015-2016 we saw higher-pressure cargo tanks, such as the DOT 407, be equipped with vapor recovery systems primarily in the eastern part of the state where

> they were transporting a petroleum material that was extracted from the Marcellus and Utica shale.
>
> This was not like normal crude oil that has a low vapor pressure. This material had a lot of dissolved gases in it, and those particular cargo tanks were experiencing some problems with leakage. And some of the carriers were saying, "Hey, this is a petroleum distillate, it comes out of the ground, it's just like crude oil," and they wanted to use the K-EPA27 test.
>
> I wanted clarification as to whether that's allowed or not. I thought it was a risky procedure. And Pipeline and Hazardous Materials basically clarified and reiterated the way we had been enforcing the regulations all along.

Tr. 102-103.

A Safety Advisory was subsequently issued by the Federal Motor Carrier Safety Administration (FMCSA). Although Mr. Swegheimer did not know what led to the advisory being issued, he surmised that it was a reaction to the PHMSA's clarification interpretation. Tr. 111. That advisory, and the PHMSA interpretation, were both consistent with Staff's understanding of the regulation and how it was to be enforced.

Respondent's reliance on comments purportedly made by a FMCSA official are equally unavailing. Although Staff's objection to the use of a March 22, 2018 *Bulk Transporter* newsletter article was overruled, Staff respectfully submits that it should be given little, if any, weight by the Commission. As Staff noted at the time, this publication is apparently a trade newsletter, and the article was of unknown authorship. It purported to report the comments of named, but otherwise unidentified, FMCSA employees. While supposedly a transcription of a conference presentation, it is not complete, and it is not known whether the comments made merely reflect the personal opinions of the presenters,

or those of the agency supposedly employing them. It is, frankly, entitled to no weight at all.

Furthermore, the lack of expertise in the reported comments is evident. Beyond acknowledging that the "FMCSA does not write hazmat regulations," SJA Ex. 14 at 6, this "official" then proceeded to opine that "we're good" with ethanol as a petroleum distillate product. *Id*. This unqualified, apparently Google-based, "opinion" flies in the face of the uncontroverted expert opinion offered by Staff's expert professional engineer, Andrew Conway, that ethanol is not a petroleum distillate product as measured by Reid vapor pressures. Staff Ex. 6 at 4. And the Respondent agreed with Staff witness Conway's opinion. Tr. 140.

The Public Utilities Commission of Ohio, and the Ohio State Highway Patrol, enforce the Hazardous Materials regulations in the State of Ohio, not the FMCSA. Their understanding and interpretation of the regulations has been certain and consistent, and has been affirmed by clarifying interpretations issued in response to changed circumstances in the industry. Moreover, as Staff witness Swegheimer testified, major carriers in the state, "who were doing tank testing and maintaining a very large fleet, were in compliance." Tr. 114. Any confusion that may have existed is attributable solely to Mr. Belna and the Respondent.

c. The government cannot be estopped from its duty to protect public welfare.

Respondent further claims that it should not be responsible for the violations at issue in this case because, in part, they had not been similarly found in violation and assessed during previous inspections. The past actions of state inspectors, even inconsistent actions, are irrelevant. The Company violated the regulations, and the Commission should so find.

It is well-settled that, as a general rule, the principle of estoppel does not apply against a state or its agencies in the exercise of a governmental function. *Ohio State Bd. of Pharm. v. Frantz*, 51 Ohio St.3d 143, 555 N.E.2d 630 (1990). In a unanimous decision, the Ohio Supreme Court was very clear on this point:

> The purpose of equitable estoppel is to prevent actual or constructive fraud and to promote the ends of justice. It is available only in defense of a legal or equitable right or claim made in good faith and should not be used to uphold crime, fraud, or injustice.
>
> * * *
>
> If a government agency is not permitted to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of all citizens in obedience to the rule of law is undermined. . . To hold otherwise would be to grant defendants a right to violate the law.

Id. at 146 (citations omitted). In short, the government, including the inspectors and the Commission in these cases, cannot be estopped from its duty to protect public welfare. The fact that other inspectors on other occasions may not have found the same or a comparable violation in similar circumstances in the past, however distant, is completely irrelevant.

2. Respondent was required to display ID numbers for both ethanol and diesel residue, but failed to do so.

As Staff demonstrated in its initial brief, the evidence also fully supports a violation of 49 C.F.R. § 177.823(a) requiring proper markings and placarding for vehicles transporting hazardous materials. As noted in the February 1, 2017 inspection report, Respondent's vehicle was carrying ethanol and had previously carried diesel fuel as well, with remaining residue. Staff Ex. 3. The vehicle was therefore required to display proper markings for both materials.

Staff proved at hearing that Respondent's vehicle was only marked for ethanol. Tr. at 40. The vehicle was not marked for diesel fuel, which respondent does not dispute. Respondent relies on the theory that only the substance with the lower flashpoint needed to be marked. Respondent's Brief at 19-20. Respondent asserts that other inspectors have given that advice, and that it had followed that practice for years. *Id.;* Tr. at 172. Respondent, however, does not cite any authority to support this argument.

49 C.F.R. § 172.336(c) does provide that if cargo tanks contain more than one *petroleum distillate fuel*, then only the identification number for the fuel with the lowest flash point must be displayed. As Staff has established, however, ethanol is not a petroleum distillate. Staff Ex. 6 at 3. Therefore, this exemption does not apply, and Respondent's vehicle should have identified both materials it was carrying. As Staff proved at hearing, the vehicle only had placards with the number 1987 (alcohols). Tr. at 38. The number 1993 (diesel fuel) was not displayed. *Id.* Therefore, Respondent's vehicle was not properly placarded in accordance with 49 C.F.R. § 177.823(a).

B. The Commission has authority to assess civil forfeitures.

The Commission has the statutory power to assess monetary forfeitures against motor transportation companies for non-compliance with Federal Motor Carrier Safety and Hazardous Materials Regulations. Ohio Rev. Code § 4923.99. Pursuant to this enforcement authority, the Commission has adopted civil forfeiture and procedural rules. Ohio Admin. Code §§ 4901:2-7-01-4901:2-7-22. Respondent did not dispute that authority, nor did it challenge or question the Commission's civil forfeiture and procedural rules.

Nor did Respondent challenge or dispute the amount or reasonableness of the forfeitures proposed in these cases. Staff witness Rod Moser testified that the proposed forfeiture assessments were properly and fairly assessed. Tr. at 121 at 13. Consequently, Staff respectfully requests that the Commission hold Respondent liable for the following civil forfeitures as recommended by the Staff:

Case Number	Violation	Forfeiture
17-799-TR-CVF	49 C.F.R. § 180.415(b)	$1,260.00
17-1199-TR-CVF	49 C.F.R. § 180.415(b)	$1,260.00
17-1199-TR-CVF	49 C.F.R. § 177.823(a)	$1,260.00
TOTAL		$3,780.00.

IV. CONCLUSION

Based on the record produced at the hearing and for the reasons stated herein, the Staff respectfully requests that the Commission find that the Respondent violated Sections 177.823(a) and 180.415(b) of the Hazardous Materials Regulations, and that the Commission hold Respondent liable for the civil forfeiture of $3,780.00 as recommended by the Staff.

Respectfully submitted,

Werner. L. Margard III
Werner L. Margard III
Thomas G. Lindgren
Assistant Attorneys General
Public Utilities Commission of Ohio
30 East Broad Street, 16th Floor
Columbus, Ohio 43215
(614) 466-4395
FAX: (614) 644-8764

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Brief on Behalf of the Staff of the Public Utilities Commission of Ohio** was served by regular U.S. mail, postage prepaid, and fax, upon the following parties of record, this 2nd day of July, 2018.

Werner. L. Margard III
Werner L. Margard III
Assistant Attorney General

PARTIES OF RECORD:

Timothy J. Cole
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215
tjcole@vorys.com

Attorney for SJA Transport, Inc.

Summary: Brief Reply Brief electronically filed by Ms. Tonnetta Scott on behalf of PUC