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BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Arctic Express, Inc., : Case No(s): 01-89-TR-CVF,
Notices of Apparent Violation and Intent : 01-456-TR-CVF, 01-457-TR-
to Assess Forfeiture. : CVF, 01-866-TR-CVF

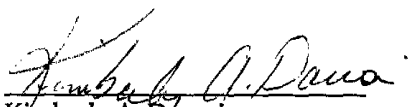
MEMORANDUM CONTRA ARCTIC EXPRESS, INC.'S
INTERLOCUTORY APPEAL

The Staff of the Transportation Department ("Staff") of the Public Utilities Commission of Ohio ("Commission"), opposes the Interlocutory Appeal of Arctic Express, Inc. ("Arctic") for the reasons set forth in the attached Memorandum in Support.

Respectfully submitted,

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MEMORANDUM

I. INTRODUCTION

The interlocutory appeal filed by Arctic fails to give reasons why the decision should be taken out of the discretion properly given the attorney examiner presiding over the case. The appeal also contains obvious procedural defects that render the appeal improper.

Arctic failed to follow the procedure mandated by Ohio Administrative Code 4901-1-15. Arctic failed to file an "application for review" as required. Arctic also failed to attach the decision appealed as required by the rule. Both defects with Arctic's pleading warrant dismissal of the entire appeal by the Commission.

There are other procedural problems with Arctic's attempted appeal. The issue concerning Staff's exemption from certain discovery procedures is not included in the list of allowable subjects for interlocutory appeals of right as Arctic has portrayed. There is a specific process that must be followed for appeals of subjects not enumerated by O.A.C. 4901-1-15(A). Arctic failed to request certification of the issue as is required by the rule. Therefore, the issue of whether Staff is subject to the certain discovery rules is not even before the Commission. Arctic also failed to present any justification why the remainder of the issues from the entry should be reversed. Arctic devotes the majority of its three and a half page pleading to an issue which has not been certified for review by the Commission. Therefore, Arctic has failed to set forth the basis of its

appeal and has failed to cite relevant authority on two of the three issues it is appealing, both of which are required by O.A.C. 4901-1-15(C).

II. LAW AND ARGUMENT

A. Requirements of Interlocutory Appeals

The rules governing interlocutory appeals before the Commission are found in Ohio Administrative Code ("O.A.C."), section 4901-1-15.¹ This section requires certain acts as prerequisites to or in connection with the filing of an interlocutory appeal. Specifically, 4901-1-15(A) lists the basis for an interlocutory appeal and provides that if the appeal relates to issues *other than* as enumerated in 4901-1-15(A), the appeal *must be certified* to the Commission by the legal director, or attorney examiner. The pertinent provisions of this rule are set forth below.

(A) Any party who is adversely affected thereby may take an immediate interlocutory appeal to the Commission from any ruling issued under rule 4901-1-14 of the Administrative Code . . . which:

- (1) Grants a motion to compel discovery . . . ;
- (2) Denies a motion to intervene . . . ;
- (3) Refuses to quash a subpoena . . . ; or
- (4) Requires the production of documents or testimony over an objection based on privilege.

(B) Except as provided in paragraph (A) . . . no party may take an interlocutory appeal from any ruling . . . unless the appeal is certified to the commission by the legal director, deputy legal director, attorney examiner . . . The legal director . . . shall not certify such appeal unless . . .

¹ Ohio Admin. Code § 4901-1-15 (Baldwin 2001).

- (1) the appeal presents a new or novel question of interpretation, law or policy . . .; and
 - (2) an immediate determination by the commission is needed to prevent the likelihood of undue prejudice . . .
- (C) Any party wishing to take an interlocutory appeal . . . must file an application for review . . . The application for review shall set forth the basis of the appeal and citations of any authorities relied upon. A copy of the ruling . . . shall be attached to the application for review"

B. FINDINGS CONTESTED BY ARCTIC

Arctic's appeal is based upon the findings against Arctic contained in the Attorney Examiner Entry dated August 8, 2001 (Entry).² The Entry ruled on three main areas all of which Arctic seeks to appeal. The specifics are fully described below.

1. Arctic's Motion to Quash

The Entry denied Arctic's Motion to Quash by observing that the subpoena at issue had been mutually agreed to by the parties, and that any document request contained in the subpoena would not force Arctic to provide duplicate copies of any item if it had already been provided. The Entry found further that the subpoena Arctic sought to quash was for the mere continuation of a deposition that had already commenced. Decisions denying a motion to quash a subpoena are subject to a proper appeal under O.A.C.(A)(3) 4901-1-15. When the deposition originally took place

² *In Re Arctic Express*, Case Nos. 01-89-TR-CVF, 01-456-TR-CVF, 01-457-TR-CVF, 01-866-TR-CVF (Entry) (August 8, 2001). A copy of the Entry is attached as Exhibit A.

opposing counsel notified Staff of his intention to leave the deposition after only one and one-half (1 1/2) hours because he had other pressing commitments; this despite the fact that the parties had three (3) weeks notice of the deposition. The subpoena stated that the deposition was to continue until completed. Since Staff was deprived of its opportunity to complete the deposition, the parties mutually agreed upon a date for continuing and completing the deposition.³

On the date that the deposition was scheduled to continue, Arctic and opposing counsel did not show up, despite the fact that the subpoena was valid and had not been quashed. There are no grounds for reversal of the decision concerning this issue from the Entry in this case.

2. Staff's Motion to Compel Discovery

The Entry found that Arctic's counsel improperly instructed his witness not to answer certain questions during the course of a deposition. The Entry also compelled the Arctic witness to answer all questions not pertaining to privileged matters at the rescheduled deposition. Decisions granting a Motion to Compel Discovery are appealable if properly pled under O.A.C. § 4901-1-15 (A)(1). The Staff sought only to instruct opposing counsel that it was improper to tell the client not to answer the questions posed during the course of a deposition. The correct deposition procedure is to note,

³ A copy of Staff's Memorandum Contra Arctic's Motion to Quash is attached as Exhibit B.

on the record, an objection to the question and then continue the deposition unless the objection is based upon an evidentiary privilege. Counsel for Staff made inquiries regarding repair and mechanical procedures at Arctic's facilities because one of the alleged violations in this case is a mechanical problem with a vehicle. The Commission found Arctic's counsel improperly instructed his client to not answer these questions. Opposing counsel's only justification for giving this improper instruction was his allegation that the information was irrelevant. There was no claim of an evidentiary privilege and indeed none existed.

Arctic's Appeal contains an inaccurate statement that Staff attempted to obtain answers to questions regardless of the relevancy of the questions. Arctic even cites Staff's Motion to Compel as evidence of this. Even a cursory reading of Staff's Motion reveals that Staff made no such argument. Staff believed the topic to be very relevant since it was asking questions to elicit information regarding one of the alleged violations. Opposing counsel instructed his client not to answer, and no evidentiary privilege was asserted. As noted in Staff's Motion, which was prepared and submitted at the request of the Attorney Examiner, this conduct was a violation of the rules of civil procedure.⁴ Arctic fails to support a reversal of the decision on this issue; therefore the

⁴ A copy of Staff's Motion to Compel is attached as Exhibit C.

Commission should uphold the finding on this issue from the Entry.

3. Arctic's Motion to Compel

The Entry denied Arctic's Motion to Compel which sought to force the Staff to reply to Arctic's Request for Production of Documents. The appeal of this issue is not an absolute right but must first be certified pursuant to O.A.C. 4901-1-15(B). Staff's reply was not, as Arctic alleges, that Staff is not subject to discovery in these proceedings. Rather, Staff responded that Arctic's Request for Production of Documents was not the type of discovery allowed under the rules.

Arctic continues to attempt to confuse the discovery issue, despite Staff's attempts to educate Arctic and clarify the issue. A copy of Staff's Memorandum Contra Arctic's Motion to Compel fully sets forth and explains the rule pertaining to discovery in motor carrier transportation cases.⁵ Arctic's Request for Production of Documents was not a proper discovery request under the discovery rules and was therefore properly denied. This appeal is improper for failure to seek certification and should either be dismissed or the Commission should decline to consider the issue.

⁵ Staff's Memorandum Contra Arctic's Motion to Compel is attached as Exhibit D.

C . ARCTIC'S FAILURE TO MEET REQUIREMENTS OF INTERLOCUTORY APPEAL PROCEDURES

O.A.C. 4901-1-15(B) provides that except as provided in paragraph (A), a party may not take an interlocutory appeal unless the appeal is *certified* to the commission by the legal director, deputy director, attorney examiner or presiding hearing officer (emphasis added).⁶ To the extent required, Arctic's appeal has not been *certified* by the legal director or anyone under his supervision. Arctic has improperly requested an interlocutory appeal on issue(s) outside O.A.C. 4901-15(A) and has not complied with the requirements of O.A.C. 4901-1-15(B). This portion of Arctic's appeal should also be dismissed as improper.

Arctic failed to request certification of the appeal concerning Staff's exemption from certain discovery procedures. Under O.A.C. 4901-1-15(B) there is a two part test to certify issues for interlocutory appeal that are not enumerated by 4901-1-15(A): 1) if the appeal presents a new or novel question of interpretation, law or policy, *and* 2) if an immediate determination by the Commission is needed to prevent the likelihood of undue justice.⁷ Both prongs of this test must be met to warrant certification of an issue for consideration on an interlocutory appeal. The findings in the Entry denying the quashing of Staff's subpoena and describing allowable deposition conduct (Staff's Motion to Compel) fall within the parameters of O.A.C. 4901-1-15(A) and thus if pled properly may be the subject of an interlocutory appeal. The denial of Arctic's

⁶ Ohio Admin Code § 4901-1-15(B) (Baldwin 2001).

⁷ Ohio Admin. Code § 4901-1-15(B)(1) and (2) (Baldwin 2001).

Motion to Compel, and resulting attempt by Arctic to raise the issue of discovery as it relates to Staff, is not within the language of O.A.C. 4901-1-15(A) and therefore must be certified as outlined in O.A.C. 4901-1-15(B).

Arctic also failed to comply with the requirements of O.A.C. 4901-1-15(C). In subpart (C), Arctic is *required* to file what is entitled an “application for review”. In the application for review, Arctic is *required* to plead the basis of the appeal including any authorities relied upon. Arctic did not file an “application for review” for *any* of the issues it raises in its interlocutory appeal; did not provide any analysis for its appeal other than the issue improperly before the Commission due to Arctic’s failure to seek certification; and did not cite any authority for the Commission to allow the appeal. Arctic also failed to attach a copy of the ruling it is seeking to reverse as required under O.A.C. 4901-1-15(C). Arctic has not complied with *any* of the requirements prescribed in O.A.C. 4901-1-15. Accordingly, the Commission should refuse to consider any of the issues set forth in Arctic’s appeal.

D. PREREQUISITES TO “CERTIFICATION” OF AN APPEAL

Even if Arctic had complied with the rule governing interlocutory appeals and had made any attempt to certify the discovery issue in the proper manner, it would have failed to meet the two-part test for certification. O.A.C. 4901-1-15(B)(1) and (2) restrict certification of legal issues unless they meet *both* required conditions. The discovery issue fails to meet either part of the test.

As discussed above, there are two (2) requirements to be met in order to certify to the Commission an argument for an interlocutory appeal not governed by O.A.C. 4901-1-15(A). First, the appeal must present a new or novel question

of interpretation, law, or policy, or be taken from a ruling which represents a departure from past precedent.⁸ Second, an immediate determination by the Commission is needed to prevent the likelihood of undue prejudice or expense to one or more of the parties, should the Commission ultimately reverse the ruling in question.⁹ Any issue not delineated in O.A.C. 4901-1-15(A) or not meeting both the requirements of O.A.C. 4901-1-15(B)(1) and (2) is an improper subject for an interlocutory appeal.

This appeal does not present a new or novel question of interpretation, law, or policy, or represent a departure from past precedent. In fact the Commission has faced the question of discovery upon Staff on numerous occasions. *In the Matter of the Amendment to Chapter 4901-1 of the Administrative Code*, Case No. 87-84-AU-ORD (October 14, 1987 at 3); *In re Sheldon Gas Company*, Case No. 84-305-GA-COI; *In re Southern Ohio Electric Company*, Case No. 77-545-EL-AIR; *In re Cincinnati Gas and Electric Company*, Case No. 91-410-EL-AIR; *In the Matter of the Commission's Promulgation of Rules for Establishment of Alternative Regulation for Large Local Exchanges Telephone Companies*, Case No. 92-1149-TP-COI (January 7, 1993); *In re Amendment of Chapter 4901-1 of the Ohio Administrative Code*, Case No. 00-2192-AU-ORD (January 30, 2001 at 13). In its most recent decision earlier this year the Commission wrote:

(T)he existing rule has been in effect for almost 20 years. Granting the request would certainly hinder the performance of the staff and result in delay of the Commission's work.¹⁰

⁸ Ohio Admin. Code § 4901-1-15(B)(1) (Baldwin 2001).

⁹ Ohio Admin. Code § 4901-1-15(B)(2) (Baldwin 2001).

¹⁰ *In re Amendment 4901-1*, Case No. 00-2192-AU-ORD, (Finding and Order) (January 30, 2001 at 13).

The issue concerning the exclusion of Staff from general discovery is neither a new or novel question.

The fact that this case involves the rules governing civil forfeiture proceedings is irrelevant to the analysis. As explained in Staff's Memorandum Contra to Arctic's Motion to Compel, O.A.C. 4901:2-7-18 is the civil forfeiture rule specifically controlling discovery and incorporates the general Commission rules concerning discovery. Included in that incorporation is the provision removing Staff in general from certain rules governing discovery.¹¹ Therefore the Commission consideration and analysis journalized for over twenty years would apply to the same issue being requested for review in this proceeding. Accordingly, the Commission should decline to certify the argument on the basis that nothing new or novel has been presented for the Commission's determination.

The ruling reinforcing Staff's exemption from discovery does not create the need for an immediate determination by the Commission to prevent undue prejudice or expense to any party should the Commission reverse the ruling. The Ohio Supreme Court has been very reluctant to allow interlocutory appeals of discovery orders. The Court has reasoned that since "interlocutory appeals of discovery orders interfere with the prompt and orderly disposition of litigation, they are allowed only with much reluctance".¹² The Court stated that discovery orders should not be granted immediate review based upon the following reasoning:

¹¹ Ohio Admin. Code 4901-1-16(I) (Baldwin 2001).

¹² *Nelson v. Toledo Oxygen & Equip. Co.*, 63 Ohio St. 3d 385, 588 N.E. 2d 789 (1992), citing *Amato v. General Motors Corp.*, 67 Ohio St. 2d 253, 258, 423 N.E. 2d 452, 455 (1981).

[A]n appellant's ultimate right of review upon an appeal from a final judgment in the action; the elimination of unnecessary appeals, since the complaining party may win the case or settle it; the absence of irreparable harm from the vast majority of orders requiring production of documents; the potential for harassment of litigants by nuisance appeals, and the fact that any appeal tends to delay or deter trial or settlement of a lawsuit; the burden on the reviewing court's docket from appeals of housekeeping matters in the [t]rial *** courts; and the slim chance for reversal of all but the most unusual discovery orders.¹³

The Court's preference is that discovery decisions stay with the whole of the case and be appealed only once a final appealable order has been issued. Until that time, the Court has determined the management of the discovery process lies within the discretion of the trial court.¹⁴ The issue concerning Staff's exemption from certain discovery procedures is required to fit both O.A.C. 4901-1-15(B)(1) and (2). An analysis of the issue shows the topic does not meet either requirement.

Arctic's claim that it is unable to do elementary discovery is simply untrue. Any carrier cited for violating a safety rule is given ample opportunity to be informed of the Staff's position relative to the violation. First, the carrier's driver is present at the scene of the investigation. The investigating Officer explains the violations to the driver and the driver signs the inspection report. The driver receives a copy of the report signed by the officer and driver and is instructed to provide a copy to the carrier. Second, the carrier receives a "Notice of Apparent Violation" pursuant to O.A.C. 4901:2-7-05. The notice includes the

¹³ *Nelson v. Toledo*, 63 Ohio St. 3d 385, citing *American express Warehousing, Ltd. v. Transamerica Ins. Co.*, 380 F. 2d 277, 280 (C.A. 2, 1967); *In re Coastal States Petroleum*, 32 Ohio St. 2d 81, 290 N.E. 2d 844 (1972), quoting *Cobbledick v. United States*, 309 U.S. 323, 60 S. Ct. 540 (1940).

¹⁴ *State ex. rel. Daggett v. Gessaman*, 34 Ohio St. 2d 55, 295 N.E. 2d 659 (1973).

date and subject matter of the violation, a reference to the rule, statute or regulation violated, a description of the alleged violation and instructions on how to contest the violation. Third, the carrier is sent a "Notice of Intent to Assess Forfeiture" as outlined in O.A.C. 4901:2-7-07 and a "Notice of Intent to Make Compliance Order" pursuant to O.A.C. 4901:2-7-08. These notices are typically sent as a combined notice.¹⁵ Both notices require an identification of the date of the violation and person, vehicle or equipment involved, reference to the rule, statute or regulation violated, a description of the violation and the manner which to request a conference to discuss the violation. Fourth, the carrier is sent a "Notice of Preliminary Determination" pursuant to O.A.C. 4901:2-7-12. This notice includes the date and equipment at issue in the investigation, reference to the rule, statute or regulation violated, a description of the violation, and instructions on how to apply for an administrative hearing. Fifth, a pre-hearing conference is held to discuss issues and witnesses prior to the hearing. Sixth, pursuant to O.A.C. 4901:2-5-12 each carrier is entitled to a copy of its Safety-Net Report from the Commission's Transportation Department. The Safety-Net Report consists of a summary of a carrier's history of motor vehicle inspections for a three-year period that is kept on file for use in figuring penalty actions at the Commission. Seventh, according to O.A.C. 4901:2-7-18, any party to a civil forfeiture proceeding may depose a Staff member if agreed upon or ordered by the attorney examiner. Eighth, since the administrative hearing is not bound by the strict rules of evidence, there is wide latitude for questioning during the hearing proceeding.

¹⁵ Ohio Admin. Code § 4901:2-7-10 (Baldwin 2001).

A carrier receives numerous opportunities to gather information from the Staff. The above listed opportunities are the avenues written in the rules. There are still other opportunities to gain information from Staff. The meetings to discuss the apparent violations allowed for in each of the notices gives the carrier an opportunity to discuss the case with the Staff and understand how the process works. Still in other situations, in an effort to provide carriers with a full understanding of the process, the Staff has been willing to treat certain discovery type requests as public record requests, to the extent possible. In this case Arctic failed to gather information through many of the available avenues and declined to review documents when offered as public records. Thus, Arctic's claim that it was unable to conduct elementary discovery to defend itself is misleading. Arctic chose not to pursue the available avenues to gather information. Arctic has the opportunity to gain an abundant amount of information and cannot claim prejudice when it fails to do so. Therefore, there is no reason to reverse the attorney examiner's decision based upon undue prejudice or expense.

III. CONCLUSION

As the Ohio Supreme Court has noted "[h]owever hurried a court may be in its efforts to reach the merits of a controversy, the integrity of procedural rules is dependent upon consistent enforcement because the only fair and reasonable alternative thereto is complete abandonment." *Miller v. Lint*, 62 Ohio St. 2d 209, 215, 404 N.E. 2d 752, 755 (1980). Based upon the law and the requirements of O.A.C. 4901-1-15, as discussed herein, Staff respectfully requests that the Commission dismiss the improperly filed appeal and affirm the findings of the Entry in this case as they relate to Staff's subpoena and Motion to Compel. Staff respectfully requests that the

Interlocutory Appeal as it relates to Arctic's Motion to Compel certain forms of discovery on Staff be *dismissed* for failure to comply with the procedural requirements contained in O.A.C. 4901-1-15. In the alternative, if the Commission considers the issue in spite of the procedural defects, Staff respectfully requests that the Interlocutory Appeal, as it relates to Arctic's Motion to Compel and discovery on Staff, not be certified for consideration since it fails to meet the two-part test. Should the Commission certify the issue for consideration, Staff respectfully requests that the Commission affirm the finding of the Entry in this case.

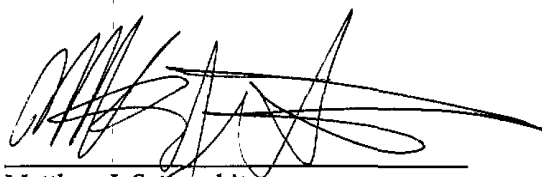
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing **Memorandum Contra B&T Express, Inc.'s Interlocutory Appeal** submitted on behalf of the Public Utilities Commission of Ohio was served by regular U.S. mail, postage prepaid, or hand-delivered, upon B&T Express Inc., by serving its attorney, Mr. Boyd B. Ferris, Carlile, Patchen, & Murphy, 366 E. Broad St., Columbus, OH 43215, this 20th day of August, 2001.

A handwritten signature in black ink, appearing to read 'Matthew J. Satterwhite', is written over a horizontal line.

Matthew J. Satterwhite
Assistant Attorney General

EXHIBIT A

BEFORE

THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Arctic Express, Inc., Notice of)	Case No. 01-89-TR-CVF
Apparent Violation and Intent To Assess)	Case No. 01-456-TR-CVF
Forfeiture.)	Case No. 01-457-TR-CVF
)	Case No. 01-866-TR-CVF

ENTRY

The attorney examiner finds:

- (1) The deposition of respondent's employee, Mr. Cipriano, was taken in this matter on July 12, 2001 and continued until a subsequent date. Thereafter, a subpoena requested by staff was issued on July 16, 2001 for Mr. Cipriano for the continued deposition on July 25, 2001.
- (2) On July 23, 2001, Arctic Express, Inc. (Arctic, respondent) filed a motion to quash staff's subpoena. In the motion, respondent states that the subpoena requires Mr. Cipriano to appear and to bring with him 18 documents. Respondent argues that its employee has no objection to appearing at a continuance of the deposition, but that it is unreasonable to require Mr. Cipriano to produce the same 18 documents already provided to staff at the July 12, 2001 deposition. Moreover, respondent states that staff has refused to comply with respondent's discovery requests, claiming that staff is not subject to discovery requests because staff is not considered a party to the proceeding. Respondent argues that Rule 4901:2-7-18, Ohio Administrative Code (O.A.C.), provides that discovery between parties shall be conducted pursuant to the Commission's discovery rules, and does not include any exclusion for staff. Arctic maintains that, if staff is not considered a party to the proceeding, it is not entitled to indulge in the discovery requested.

Arctic also requests that the hearing in this matter, which was scheduled on August 2, 2001, be continued

- (3) On July 23, 2001, Arctic filed a motion to compel the production of documents. In the motion to compel, Arctic states that it has filed a request for production of documents in this proceeding, but that staff has refused to treat Arctic's request as allowable discovery. Arctic states that staff, instead, has treated those requests as "public record requests" and refused to comply or threatened to charge Arctic for the production of those documents. Arctic further argues that if staff is correct in its interpretation of the O.A.C., it would also be precluded from conducting any discovery. In this regard, Arctic states that staff has never filed a petition to intervene in the proceeding, nor

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entered an appearance, and does not fall within the definition of a "party" as defined in Section 4901-1-10, O.A.C. Arctic argues that Rule 4901-1-10(C), O.A.C., specifically excludes staff from being considered a party for purposes of any of the rules governing discovery. Arctic states that Rule 4901-1-10(C), O.A.C., does not simply excuse staff from compliance with discovery requests, but excludes staff from the discovery rules for all purposes, except as specifically set forth in Rule 4901-1-18, O.A.C.

Arctic states that those regulatory provisions regarding staff's status as a party have been superceded by Rule 4901:2-7-1, O.A.C., which specifically provides that staff is a party to a civil forfeiture proceeding. Arctic argues that, given the Commission's determination that staff is a party in a civil forfeiture proceeding, respondent is entitled to discovery in this matter. Moreover, Arctic argues that the Commission adopted Rule 4901:2-7-18, O.A.C., directing specifically that discovery be conducted in accordance with the Commission's discovery rules, and omitting the exclusion of the staff in other proceedings.

- (4) On July 23, 2001, staff filed a motion to compel discovery. In the motion, staff states that, during the July 12, 2001 deposition of Mr. Cipriano, opposing counsel objected to questions relating to the repair and maintenance of respondent's vehicles based on relevance and instructed Mr. Cipriano not to answer. Staff noted that, one alleged violation in this matter is for a flat tire on one of respondent's vehicles, and thus questions concerning aspects of respondent's repair and maintenance program are relevant to that mechanical violation issue. Staff argues that, under the Ohio Rules of Civil Procedure, it is impermissible to instruct a witness not to answer questions during a deposition unless claiming a legal privilege. Staff, therefore, requests that Mr. Cipriano be instructed to answer questions and inquiries directed toward respondent's maintenance and repair policies and operations and that opposing counsel be advised that it is impermissible to instruct a witness not to answer questions during a deposition unless claiming a legal privilege.
- (5) On July 25, 2001, staff filed a motion contra respondent's motion to quash. In the motion, staff states that the July 25, 2001 date for the continued deposition in this proceeding was mutually agreed to by all concerned. Staff notes that the July 16, 2001 subpoena merely contains the same language as the prior subpoena for documentation to be brought by respondent to the deposition and that staff does not ask that respondent provide duplicate copies of any items already provided. Staff, however, does note that, apart from documentation provided

by respondent, it desires to make inquiries in traditional deposition format. Staff also states that it has not refused to comply with respondent's request for production of documents. Staff states that, instead, it has asked for more specificity with respect to some data requests, and has indicated that some items are not subject to public record requests. In addition, staff maintains that its status as a party to this proceeding is not at issue in the matter regarding the quashing of a validly issued subpoena.

- (6) On July 31, 2001, staff filed a memorandum contra respondent's motion to compel. In the memorandum contra, staff states that Rule 4901:2-7-18, O.A.C., provides that, in civil forfeiture proceedings, the types of discovery that are permitted are depositions and any additional discovery conducted in accordance with Rules 4901-1-16 to 4901-1-24, O.A.C. Staff notes that Rule 4901-1-16(I), O.A.C. states that "Rules 4901-1-16 to 4901-1-24 of the Administrative Code do not apply to Commission staff." Staff, therefore, argues that respondent's request for production of documents is an improper discovery request and should be denied.
- (7) Arctic's motion to quash staff's subpoena should be denied. The date for the continued deposition was mutually agreed upon by the parties, and staff seeks, in addition to traditional deposition inquiry, only those documents of respondent not already provided at the prior deposition. Staff's July 16, 2001 subpoena for Arctic's witness, Mr. Cipriano, and for the production of Arctic's documents is still outstanding and valid. Staff, however, should reissue the subpoena scheduling a new, mutually agreeable date for the deposition, and the parties should allow ample time for the witnesses to be deposed.
- (8) Arctic's motion to compel discovery should be denied. Under Rule 4901:2-7-02(F), O.A.C., staff is considered a party to a civil forfeiture proceeding. As noted by staff, Rule 4901:2-7-18(B), O.A.C. provides that additional discovery in civil forfeiture cases shall be conducted pursuant to Rules 4901:1-16 to 4901-1-24, O.A.C. Further, under Rule 4901-1-16(I), O.A.C., those discovery rules are not applicable to Commission staff. Accordingly, while staff is a party to these cases, discovery may not be conducted on staff. Documents, however, may be obtained from staff through a public records request, if the document requested is a matter of public record and if the request for those documents is specific enough to narrow a search through Commission files.
- (9) Staff's motion to compel should be granted. The examiner agrees with the staff on this issue. Under the applicable rules of

procedure and Commission practice, any opposing counsel may object to a line of questioning based on any valid reason, but, unless a legal privilege is being claimed, it is improper to instruct a witness not to answer. When the deposition in this proceeding is rescheduled, all parties should observe proper procedure and conduct the questioning of witnesses accordingly.

- (10) The hearing in this proceeding, which was scheduled for August 2, 2001, should be continued. The parties should submit a mutually agreeable hearing date to the examiner. Thereafter, an entry rescheduling the hearing will be issued.

It is, therefore,

ORDERED, That Arctic's motion to quash staff's subpoena be denied. It is, further,

ORDERED, That Arctic's motion to compel discovery be denied. It is, further,

ORDERED, That the July 16, 2001 subpoena in this matter is still valid and that the parties reschedule the deposition of Arctic's witness in accordance with Finding (7). It is, further,

ORDERED, That staff's motion to compel be granted and that questioning proceed at the rescheduled deposition in these cases in accordance with Finding (9). It is, further,

ORDERED, That the August 2, 2001 hearing be continued in accordance with Finding (10). It is, further,

ORDERED, That a copy of this entry be served upon each party of record.

THE PUBLIC UTILITIES COMMISSION OF OHIO

By: Kerry K. Sheets
Kerry K. Sheets
Attorney Examiner

RC/vrm

Entered in the Journal
AUG 8 2001

A True Copy

George Vigorito
George Vigorito
Secretary

EXHIBIT B

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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Notices of Apparent Violation and Intent : 01-456-TR-CVF, 01-457-TR-
to Assess Forfeiture. : CVF, 01-866-TR-CVF

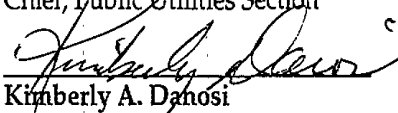
MOTION CONTRA ARCTIC EXPRESS, INC.'S
MOTION TO QUASH SUBPOENA AND
MEMORANDUM IN SUPPORT

The Staff of the Transportation Department ("Staff") of the Public Utilities Commission of Ohio ("Commission"), by and through counsel, hereby opposes the Motion to Quash filed by Arctic Express, Inc. ("Respondent"). Staff requests that the Motion to Quash be denied, and that the subpoena described herein continue in full force and effect. The basis for Staff's position is set forth in the attached Memorandum in Support.

Respectfully submitted,

Betty D. Montgomery
Attorney General

Duane W. Luckey
Chief, Public Utilities Section


Kimberly A. Dahosi
Matthew J. Satterwhite
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 466-4395
Fax: (614) 644-8764

MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT

It must be noted at the outset that Respondent filed its Motion to Quash just forty-eight hours prior to the scheduled continued deposition which is the subject of Respondent's motion. Respondent filed its motion on July 23, 2001 and the continuance of the prior deposition is set for July 25, 2001. Respondent states that the Subpoena Duces Tecum was issued to Respondent on July 16, 2001. Even though Respondent had ample time to file its motion upon receiving the subpoena, it chose to wait until only a forty-eight hour time period remained. This causes a hardship not only upon the Staff, but also the court reporter who has been scheduled to attend the deposition on July 25, 2001.

The July 16, 2001 subpoena was issued to remind the parties of the continued deposition date as further discussed herein. Respondent now, *almost one month after* the issuance of the original subpoena, and a mere forty-eight hours before the scheduled deposition, objects to the date mutually agreed upon to continue the deposition. Respondent's arguments are completely lacking in any legal basis, and factually distorted as represented.

II. ARGUMENT

Counsel for Staff scheduled a deposition of Respondent's safety director on July 12, 2001. The deposition was to be taken pursuant to a validly issued Commission subpoena dated June 20, 2001, and the date of the deposition was arrived at by mutual agreement of the parties. The subpoena specified the date and time, and provided that the deposition would continue *until completed*.

At the outset of the July 12, 2001 deposition scheduled to begin at 1:30 p.m., opposing counsel advised that he (and his client) would be leaving at 3:15 p.m. due to a "conflict", which conflict was later described as a conference call opposing counsel needed to make relating to some other matter.

Due to the time limitation placed upon the deposition by opposing counsel, counsel for Staff was unable to complete all matters intended to be the subject of the deposition. When opposing counsel advised it was time for him and his client to leave, the parties agreed to continue the deposition. The date of July 25, 2001 was the first convenient date for Respondent, and was therefore agreed upon by all parties. As a reminder of the next scheduled deposition date, the Commission issued a subpoena on July 16, 2001 containing the new date and time.

Staff hereby responds to Respondent's alleged grounds for quashing the subpoena as follows (the numbering below is matched to Respondent's numbered items in its motion):

1. The Staff issued a subpoena on July 16, 2001. It was a confirmation of the continuation of the deposition. The July 25, 2001 date was agreed to by all parties.

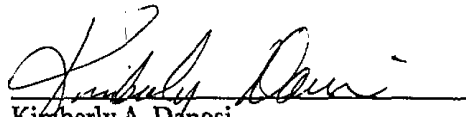
2. The July 16, 2001 subpoena merely contains the same language as the prior subpoena for documentation to be brought by Respondent to the deposition.
3. Respondent claims it responded to eighteen (18) document requests made by Staff. In fact, at the deposition on July 12, 2001, Respondent provided only four (4) personnel files and three (3) handbooks (publications). There are numerous items which have not yet been provided by Respondent pursuant to the list of the items requested. Staff *does not* ask that Respondent provide duplicate copies of any item it has already provided. Additionally, Staff states that apart from the documentation provided by Respondent, Staff desires to make inquiries in traditional deposition format.
4. Staff has not refused to comply with Respondent's request for production of documents. Staff has asked for more specificity with respect to some data requests, and has indicated that some items are not subject to discovery. Staff's position on these issues is not relevant to the quashing of the subpoena.
5. Staff states that its status as a party to this proceeding is not at issue in this matter regarding the quashing of a validly issued subpoena.
6. Respondent's recent filing of other motions in this case is not relevant to the issue of quashing the validly issued subpoena.
7. Respondent's allegations that all other pending legal issues in the case need to be resolved *prior* to deposition pursuant to a validly issued subpoena are without any legal merit.

8. Respondent's letter request for a continuance of the scheduled hearing in this case is not relevant to the quashing of a validly issued subpoena.

III. CONCLUSION

Staff respectfully requests that the Commission deny Respondent's motion, and allow the subpoena to remain in full force and effect.

Respectfully Submitted,



Kimberly A. Danosi
Matthew J. Satterwhite
Assistant Attorneys General
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180 East Broad Street
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F: 614/644-8764

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion Contra Arctic's Express, Inc.'s Motion to Quash Subpoena and Memorandum in Support was served by regular U.S. mail, postage prepaid, or hand-delivered, upon Boyd B. Ferris, Carlile, Patchen & Murphy, 366 East Broad Street, Columbus, Ohio, 43215, this 23rd day of July, 2001.

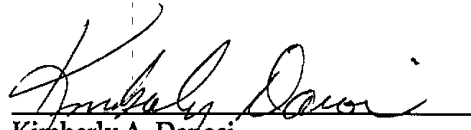

Kimberly A. Danosi
Assistant Attorney General

EXHIBIT C

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

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In the Matter of Arctic Express, Inc., : Case No(s): 01-89-TR-CV
Notices of Apparent Violation and Intent : 01-456-TR-CVF, 01-457-TR-
to Assess Forfeiture. : CVF, 01-866-TR-CVF

FUCO


MOTION AND SUPPORTING MEMORANDUM
TO COMPEL DISCOVERY

The Staff of the Transportation Department of the Public Utilities Commission of Ohio (Staff) respectfully moves the Public Utilities Commission of Ohio (Commission) to instruct opposing counsel in this case to follow established law and rules governing depositions and advise opposing counsel that it is impermissible to instruct a witness not to answer questions unless a valid legal privilege applies. Further, Staff requests that the witness in this particular matter, Mr. Ed Cipriano, be instructed to answer all questions and inquiries directed toward Respondent's maintenance and repair policies and operations.

Respectfully submitted,

Betty D. Montgomery
Attorney General

Duane W. Luckey
Chief, Public Utilities Section


Kimberly A. Danosi
Matthew J. Satterwhite
Assistant Attorneys General
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MEMORANDUM IN SUPPORT

I. INTRODUCTION AND STATEMENT

In response to the Attorney Examiner's request, the Staff of the Transportation Department of the Public Utilities Commission of Ohio moves the Public Utilities Commission of Ohio ("PUCO") to compel Respondent to answer questions and inquiries relating to Respondent's vehicle maintenance and repair operations.

On July 12, 2001, Staff, through counsel, attempted to take the deposition of Mr. Ed Cipriano, safety director of Arctic Express, Inc. ("Arctic" or "Respondent"). During the course of the deposition, opposing counsel, Mr. Boyd Ferris, objected concerning the content of the line of questioning relating to Respondent's maintenance and repair operations. Specifically, opposing counsel instructed the witness not to answer the questions, alleging vaguely that the information sought was irrelevant.

Counsel for Staff inquired of Mr. Ferris whether he was claiming a privilege with respect to the subject matter of the questioning. Mr. Ferris indicated that he was not claiming a privilege, but merely that he believed the information sought was irrelevant and/or inadmissible. Counsel for Staff reiterated the questions to the witness who would not respond after being advised by Mr. Ferris not to respond.

Staff has assessed a civil forfeiture against Respondent for four (4) alleged violations of the motor carrier safety regulations. Three (3) of the alleged violations relate to drivers' hours of service. The fourth such alleged violation is for a flat tire on one of Respondent's vehicles. Staff counsel attempted to elicit from the witness information concerning aspects of Respondent's repair and maintenance operations. Opposing

counsel objected to this line of questioning. In addition to voicing an objection on the record, Mr. Ferris *wrongfully advised his client not to answer any questions relating to Respondent's repair and maintenance operations.*

II. APPLICABLE LAW

A. Authority to Take Depositions

The authorization to take the deposition in this case is contained in both the Ohio Revised Code and the Ohio Rules of Civil Procedure. Specifically, Rule 26(B)(1) of the Ohio Rules of Civil Procedure provides that parties may obtain discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action"¹ "Additionally, the Ohio Revised Code provides for the taking of depositions and that depositions shall be taken in the manner prescribed for depositions in civil actions."²

B. Permissible Scope of Deposition Testimony

There are few valid limitations on the type of evidence that may be solicited during a deposition. The civil procedure rules and the case law described below delineate acceptable versus non-acceptable discovery limitations present in the context of depositions. There may exist limitations on the *use* of deposition evidence during a trial; but the deposition process and framework is not the appropriate forum for a battle over the actual admissibility of evidence at trial.

Rule 26(B) of the Ohio Rules of Civil Procedure provides in pertinent part:

¹ Ohio R. Civ. P. 26(B)(1).

² Ohio Rev. Code Ann. § 4903.06 (Baldwin 2001).

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . It is not grounds for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.³

There are two (2) distinct concepts involved in discussing the scope of testimony solicited during a deposition. First, the concept of "privilege" is a limitation on the testimony sought or solicited.⁴ As the *Smith* court noted, "the word "privileged", as used in the rule, refers to evidentiary privileges such as attorney-client or work product"⁵

The second limitation on testimony solicited in a deposition involves "admissibility" of the evidence or testimony solicited. As the rule provides, the test is *not* whether the testimony will be admissible at trial, but whether the information sought appears *reasonably calculated* to lead to the discovery of admissible evidence.⁶

Insofar as deposition conduct is concerned, the treatment of these two (2) "limiting" testimony factors is vastly different. In the case of a valid assertion of an actual evidentiary privilege, a witness may be instructed not to answer the question.⁷ But, in the case where the objection to the question is based upon "irrelevance" or any matter *other than privilege*, the proper course for opposing counsel is to enter the objection on

³ Ohio R. Civ. P. 26(B)(1).

⁴ *Smith v. Klein*, 23 Ohio App. 3d 146, 492 N.E. 2d 852 (1985) at 857, citing, *State ex. rel. Daggett v. Gessamen*, 34 Ohio St. 2d 55, 56 (1973).

⁵ *Id.* at 857, note 7.

⁶ Ohio R. Civ. P. 26(B)(1).

⁷ *Ethicon Endo-Surgery v. U.S. Surgery Corp.*, 160 F.R.D. 98 (S.D. Ohio) (1995) at 99.

the record (emphasis added).⁸ Counsel does not have the right to unilaterally decide such issues by instructing the witness not to answer.⁹

The Ohio Rules of Civil Procedure specifically mandate that, "Evidence objected to shall be taken subject to the objection" ¹⁰ In the *Lamb* decision, the Court stated that an attorney may instruct a deponent not to answer a question *only* in order to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion to limit or terminate the deposition (emphasis added).¹¹

III. ARGUMENT

A. Improper Conduct of Opposing Counsel

In the instant case, the attorney for Staff questioned the deponent about matters relating to the repair and maintenance of Respondent's vehicles. Opposing counsel objected that the information sought was irrelevant. Counsel for Staff again pursued this line of questioning and, in violation of the law and court rules, *opposing counsel instructed his client not to answer.*

As officers of the court, attorneys should conduct themselves in a professional manner during a deposition. Conduct that is not permissible in the courtroom during the questioning of a witness is ordinarily not permissible at a deposition. Where irrelevant questioning occurs, the appropriate course for opposing counsel is to enter an

⁸ *Id.*

⁹ *Id.*

¹⁰ Ohio R.Civ. P. 30(C).

¹¹ *Laura Lamb v. M&M Associates, Inc.*, 1998 U.S. Dist. LEXIS 13733 (1998) at 6.

objection.¹² The Ohio Court of Appeals in the *Dupont* case found that refusing to answer at a deposition is equivalent to failing to appear at a deposition.¹³ Both types of conduct lead to a waste of time and resources of the parties. The *Dupont* Court further found that since the courts of Ohio have the power to compel attendance and testimony, an "integral component of this power to compel is the authority to impose sanctions".¹⁴ This would help alleviate the financial burden on a party who has incurred costs only to have the deposition either not occur or occur in a meaningless fashion.

B. Actual Relevance of Testimony Solicited

In the instant case involving four (4) alleged violations of the motor carrier safety regulations, it must be noted that one such alleged violation is for a *flat tire* on Respondent's vehicle. Thus, the matters concerning Respondent's maintenance and repair policies are extremely relevant to this portion of the case. Not only did opposing counsel violate court rules and case law mandates in instructing his client not to answer, he was factually mistaken in even attempting to allege that such matters were "irrelevant".

The Staff alleges a violation for a mechanical condition on one of Respondent's vehicles. Matters pertaining to Respondent's maintenance and repair policies will provide evidence relevant to the mechanical violation issue.

¹² *Ethicon, supra*, at 100.

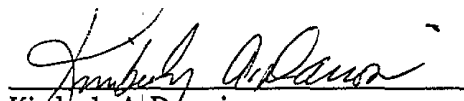
¹³ *E.I. Dupont De Nemours & Company, Inc. v. Thompson et al.*, 29 Ohio App. 3d 272, 504 N.E. 2d 1195 (1986).

¹⁴ *Id.* at 275.

IV. CONCLUSION

Based upon governing rules of civil procedure and case law, Staff respectfully requests that the Commission instruct opposing counsel to follow the well established law and rules governing depositions and advise opposing counsel that it is impermissible to instruct a witness not to answer questions during a deposition unless claiming a legal privilege. Further, Staff requests that the witness, Mr. Ed. Cipriano, be instructed to answer questions and inquiries directed toward Respondent's maintenance and repair policies and operations.

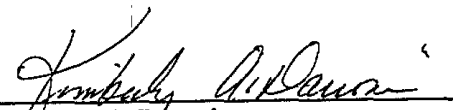
Respectfully Submitted,



Kimberly A. Danosi
Matthew J. Satterwhite
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, OH 43215-3793
T: 614/466-4395
F: 614/644-8764

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Motion to Compel Discovery and Memorandum in Support was served by regular U.S. mail, postage prepaid, or hand-delivered, upon Boyd B. Ferris, Carlile, Patchen & Murphy, 366 East Broad Street, Columbus, Ohio, 43215, this 23rd day of July, 2001.



Kimberly A. Danosi
Assistant Attorney General

EXHIBIT D

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of Arctic Express, Inc., : Case No(s): 01-89-TR-CVF,
Notices of Apparent Violation and Intent : 01-456-TR-CVF, 01-457-TR-
to Assess Forfeiture. : CVF, 01-866-TR-CVF

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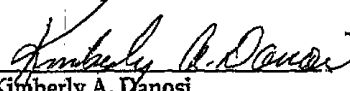
MEMORANDUM CONTRA ARCTIC EXPRESS, INC.'S
MOTION TO COMPEL

The Staff of the Transportation Department ("Staff") of the Public Utilities Commission of Ohio ("Commission"), by and through counsel, hereby opposes the Motion to Compel of Arctic Express, Inc. for the reasons set forth in the attached Memorandum in Support.

Respectfully submitted,

Betty D. Montgomery
Attorney General

Duane W. Luckey
Chief, Public Utilities Section


Kimberly A. Danosi
Matthew J. Satterwhite
Assistant Attorneys General
Public Utilities Section
180 East Broad Street
Columbus, Ohio 43215-3793
(614) 466-4395
Fax: (614) 644-8764

This is to certify that the foregoing are an accurate and complete transcription of a case file document delivered in the regular course of business
Technician gl Date Processed 7-31-01

MEMORANDUM

I. INTRODUCTION

Arctic Express, Inc. ("Respondent"), through counsel, has requested a listing of seven (7) categories of documents from the Staff. Respondent's request is in the form of a Request for Production of Documents (see Exhibit attached). Staff, through counsel, previously replied that Staff is not subject to discovery in this manner. Opposing counsel filed a Motion to Compel which is the subject of this Memorandum.

II. LAW AND ARGUMENT

The Ohio Revised Code specifically empowers the Commission to adopt rules governing its proceedings.¹ In the exercise of this power, the Commission adopted comprehensive administrative rules to govern, *inter alia*, the procedural aspects of hearings conducted before the Commission ("Rules").² The Legislature gave the Commission even broader discretion to determine the rules governing discovery in Commission proceedings.³

In promulgating the Rules, the Commission dedicated specific sections to rules governing civil forfeiture and compliance proceedings.⁴ Rule 4901:2-7-18 of

¹ Ohio Rev. Code § 4901.13 (Baldwin 2001).

² 1999 Public Utilities Commission of Ohio Rules Annotated, as amended (Baldwin).

³ Ohio Rev. Code § 4903.082 (Baldwin 2001).

⁴ Ohio Admin. Code §§ 4901:2-7-01 through 4901:2-7-22 (Baldwin 2001).

the Ohio Administrative Code ("O.A.C.") describes (2) types of discovery in civil forfeiture cases.

4901:2-7-18 DISCOVERY

- (A) Depositions will be permitted only upon agreement of all parties or motion granted by the Commission, the legal director, the deputy legal director, or the attorney examiner assigned to the case, which leave shall not be unreasonably withheld.
- (B) Any additional discovery shall be conducted in accordance with rules 4901-1-16 to 4901-1-24 of the Administrative Code.⁵

The two (2) types of discovery are depositions and "any additional discovery." The discovery sought by Respondent's Motion to Compel falls within subpart B of this rule which incorporates Rule 4901-1-20, entitled "Production of documents and things."⁶ It is not a deposition and is therefore "additional discovery" which must, by virtue of Rule 4901:2-7-18(B) above, be conducted in accordance with Rules 4901-1-16 to 4901-1-24. These rules (4901-1-16 to 4901-1-24) are the general discovery rules applicable to Commission proceedings. Arctic misinforms the Commission when claiming that 4901:2-7-18 omits the exclusion of the Staff applicable in other proceedings.⁷ In fact the rules incorporated through Rule 4901:2-7-18(B) reaffirm that exclusion. Rule 4901-1-16(I) states that "Rules 4901-1-16 to 4901-1-24 of the Administrative Code *do not apply to commission staff* (Emphasis added)."⁸

⁵ Ohio Admin. Code § 4901:2-7-18 (Baldwin 2001).

⁶ Ohio Admin. Code § 4901-1-20 (Baldwin 2001).

⁷ Respondent's Motion to Compel at 2.

⁸ Ohio Admin. Code § 4901-1-16(I) (Baldwin 2001).

III. CONCLUSION

The Commission is by statute duly authorized and empowered to exercise its discretion and promulgate rules to govern Commission proceedings. In exercising this power and discretion, it has provided specific rules applicable to civil forfeiture and compliance proceedings such as the instant case. Respondent's Request for Production of Documents constitutes an improper discovery request. The Staff, through counsel, requests that Respondent's Motion to Compel be denied.

Exhibit

BEFORE
THE PUBLIC UTILITIES COMMISSION OF OHIO

In the Matter of the Proposed Civil)	Case No. 01-89-TR-CVF; 01-456-TR-
Forfeiture to be Assessed against)	CVF; 01-457-TR-CVF; 01-866-TR-CVF
Arctic Express, Inc.)	

ARCTIC EXPRESS, INC.'S FIRST
REQUEST FOR PRODUCTION OF DOCUMENTS
TO THE PUBLIC UTILITIES COMMISSION OF OHIO

Arctic Express, Inc. (hereinafter "Arctic"), by and through its attorneys, requests the Public Utilities Commission of Ohio (hereinafter the "Commission") produce and permit examination of the documents stated below. Said production is to be made at the offices of Carlile Patchen & Murphy LLP, 366 East Broad Street, Columbus, Ohio 43215. This request for production of documents shall be deemed continuing so as to require supplemental answers if you or your attorneys obtain additional information between the time answers are given and the time of the hearing and you are under a duty to correct an answer which you know or later learn is incorrect.

INSTRUCTIONS

- a. "Documents" as requested herein, whether or not the term "document" is actually used in any particular request, refers to any paper, note, writing, page, photocopy, whether printed, typewritten, hand-written, or generated by any other means; computer disk, hard drive, or any other electronically or magnetically-stored information, including electronic mail, that is in the possession or control of the Commissions or its agents, including the Ohio State Highway Patrol.

- b. Responses to requests for production of documents are requested by July 5, 2001.

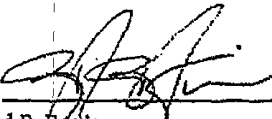
REQUEST FOR PRODUCTION OF DOCUMENTS

- (1) An electronic copy of the program utilized by each investigating officer in preparing, or in facilitating the preparation of, the reports of investigation involved in these proceedings.
- (2) Written documentation and instructions regarding the manner in which the electronic program described in Paragraph 1, above, may be accessed and utilized; including all access codes and passwords as might be required.
- (3) A copy of any instruction manual provided each investigating officer pertaining to the computer program/software referred to in Paragraph 1, above.
- (4) Copies of any instructions, guidelines, letter opinions, correspondence, manuals or other materials received from the U.S. Department of Transportation; the Federal Highway Administration; or the Federal Motor Carrier Safety Administration pertaining to the interpretation or enforcement of 49 C.F.R. §§100 - 399.
- (5) As to each Notice of Preliminary Determination involved in these proceedings:
 - (A) Copies of all, including electronic, documents used or considered by the Commission Staff in preparing the Notice of Preliminary Determination; or the amount of the proposed forfeiture.
 - (B) Copies of all correspondence or communications, electronically or otherwise, pertaining to the proceeding involved between members of the Commission Staff, on the one hand and, on the other, the investigating officer; any other member of the Commission Staff; or any other person.
- (6) Any and all documents, pictures or reports which the Commission Staff intends to introduce in the hearings in these proceedings as substantive evidence.

- (7) Copies of any Commission memoranda, policy statements, correspondence or other documents, electronic or otherwise, pertaining to Commission policy, whether written or unwritten, regarding the promulgation of Notices of Preliminary Determination or Notices of Intent to Impose a Forfeiture.

Respectfully submitted,

CARLILE PATCHEN & MURPHY LLP

By: 

Boyd B. Pettis

Supreme Court No. 0032143

CARLILE PATCHEN & MURPHY LLP

366 East Broad Street

Columbus, Ohio 43215

Tele: (614) 228-6135

Fax: (614) 221-0216

Attorneys for Arctic Express, Inc.

CERTIFICATE OF SERVICE

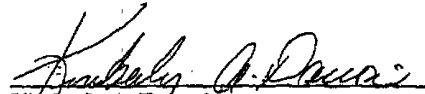
I hereby certify that a true and accurate copy of the foregoing Arctic Express, Inc.'s First Request for Production of Documents was served by regular U.S. mail, postage prepaid, upon the following party of record this 20th day of June, 2001.

Kimberly A. Danosi
Assistant Attorney General
Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793


Boyd B. Ferris

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Memorandum Contra Arctic Express, Inc.'s Motion to Compel Discovery was served by regular U.S. mail, postage prepaid, or hand-delivered, upon Boyd B. Ferris, Carlile, Patchen & Murphy, 366 East Broad Street, Columbus, Ohio, 43215, this 31st day of July, 2001.


Kimberly A. Danosi
Assistant Attorney General