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VIA ELECTRONIC FILING

March 28, 2016

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

RE: Proposed Rulemaking at Docket No. L-2015-2507592

Comments of the Greater Pennsylvania Taxicab Association.

Dear Secretary Chiavetta,

Please find attached, the Public Comments of the members of the Greater Pennsylvania Taxicab Association relative to the Proposed Rulemaking Docketed at L-2015-2507592, proposing to eliminate the public need requirement in passenger carrier application proceedings.

Thank you for your time and consideration. Please feel free to contact me with any questions or concerns.

Sincerely,

John W. Sweet, Esq.
Supreme Court ID 320182
*Counsel for the Greater Pennsylvania
Taxicab Association*

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encl.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Proposed Rulemaking to Reduce : Commission Docket No.
Barriers to Entry for Passenger : L-2015-2507592
Motor Carriers :

**COMMENTS OF
THE GREATER PENNSYLVANIA TAXICAB ASSOCIATION**

I. INTRODUCTION AND PROCEDURAL HISTORY

On or about November 5, 2015, the Pennsylvania Public Utility Commission (“Commission”) adopted a proposed rulemaking order (“November 2015 Order”) that would eliminate the requirement that an applicant for passenger motor carrier authority demonstrate that approval of the application will serve a useful public purpose, responsive to a public demand or need. The Commission also proposes to eliminate the territorial restrictions that accompany a carrier’s certificate.

The Commission’s Order in this proceeding provided that written comments were to be submitted within thirty days of publication. Publication occurred on Saturday, February 27, 2016 in Vol. 46, No. 9, page 322 of the Pennsylvania Bulletin. These comments are submitted in response to Ordering paragraph 5 of the Commission’s November 5, 2015 Order.

Historically, the Commission has required applicants to establish that there is a public demand or need for the proposed service. In this proceeding, the commission seeks to (1) eliminate the requirement that the applicant demonstrate public need, (2) remove the territorial restrictions on certificates of public convenience, thus conveying

statewide authority to all currently certificated carriers and turning every new application into an application for statewide authority, (3) remove the regulations related to restrictive amendments to applications, (4) remove certain requirements for larger carriers who wish to change their rates and (5) remove the regulations related to emergency temporary authority.

Several companies which are members of the Greater Pennsylvania Taxicab Association ("Commentators") oppose the elimination of the public need requirement, removal of the territorial restrictions on certificates of public convenience, and removal of the regulations related to restrictive amendments. Commentator believe that the proposed changes will have a deleterious effect on small business applicants and currently certificated small businesses throughout the state, and may harm the traveling public in underserved areas of the state.

II. PROPOSED CHANGES

Commentators applaud the Commission's decision to streamline the application process and to reduce the barriers to qualified applicants. Commentators agree that the current standards for demonstrating public need in a passenger carrier application hearing are not well defined, and this lack of clear standards can lead to a complex and time consuming process. However, Commentators believe that the public would be better served if the Commission were to set forth clearer standards for establishing public need, rather than eliminate the requirement entirely. Commentators support establishing a clearer standard rather than elimination of the need requirement because

eliminating the need requirement and territorial restrictions may adversely affect small businesses and the traveling public in underserved areas.

A. Elimination of Need Requirements.

In its November 2015 Order, the Commission proposes to eliminate the requirement that an applicant for passenger motor carrier authority establish that approval of the application will serve a public purpose responsive to a public demand or need. The Commission's rationale is that eliminating the requirement that an applicant establish need for the proposed service will promote increased competition by reducing the current barriers to entry for qualified applicants. The Commission asserts that this change will relieve applicants of the burden of establishing public need by means of a complex, costly, and time consuming administrative process.

Currently, an applicant must demonstrate by a preponderance of the evidence that approval of the application will serve a useful public purpose responsive to a public demand or need. This requirement springs from language in the Commission's legislative mandate at 66 Pa. C.S. § 1103(a) that states the Commission should only grant a certificate of public convenience if it finds the proposed service is "necessary or proper for the service, accommodation, convenience, or safety of the public."

Elimination of the public need requirement will have minimal effect on the administrability of the application standards because the "need" requirement is the least burdensome of the three prong test applied to passenger carrier applicants. The Commission evaluates applications for motor carrier passenger authority by applying the standards set forth in 52 Pa. Code § 41.14. Currently, § 41.14(a) requires that an

applicant demonstrate that approval of the application will serve a useful public purpose, responsive to a public demand or need. § 41.14(b) requires the applicant to demonstrate that it possesses the technical and financial ability to provide the proposed service. The Commission reserves the right to withhold authority if the record demonstrates that the applicant lacks a propensity to operate safely and legally. Additionally, § 41.14(c) provides that the Commission may withhold authority if the Protestant can establish that entry of a new carrier into the field would endanger or impair the operations of existing common carriers to an extent that, on balance, the granting of authority would be contrary to the public interest.

Even if the proposed changes take effect, applicants will still be required to prove that they are technically and financially fit under § 41.14(b). This prong of the test usually takes up most of the time and cost associated with an application proceeding. The process of demonstrating the technical and financial fitness of the applicant is the most complex and time consuming burden under § 41.14. In evaluating whether a motor carrier applicant is technically and financially fit, the Commission ordinarily examines a six factors; however, the list is inexhaustive and the Commission may take other factors under consideration.

The first factor is whether an applicant has sufficient capital, equipment, facilities and other resources necessary to serve the territory requested. Evaluation of this factor usually involves examination of the applicant's business plan and pro forma financial projections, as well as the owner's net worth and any other type of financing. This data can be costly and time consuming to compile.

The second factor is whether an applicant and its employees have sufficient technical expertise and experience to serve the territory requested. This factor usually involves an intensive review of the applicant's owners', managers', and employees' respective experience in the transportation industry.

The third factor is whether an applicant has or is able to secure sufficient and continuous insurance coverage for all vehicles to be used or useful in the provision of service to the public. The Commission has strict requirements for insurance coverage on vehicles used to transport the public. This factor requires the applicant to obtain an insurance quote for the proposed service that will satisfy the Commission's requirements. The quote is then compared against the financial information provided by the applicant to evaluate if the applicant will be able to maintain sufficient coverage.

The fourth factor is whether the applicant has an appropriate plan to comply with the Commission's driver and vehicle safety regulations and service standards contained in Chapter 29 (relating to motor carriers of passengers). This factor requires the applicant to articulate its plan to comply with the Commission's safety regulations, record keeping regulations, and driver discipline and screening regulations. The Commission will also evaluate the applicant's plan to comply with the rules of the Pennsylvania Department of Transportation, and other applicable laws.

The fifth factor is the applicant's record, if any, of compliance with the public utility code and the Commission's orders. This factor is usually only relevant if the applicant already holds operating authority; however, violations such as unauthorized

transportation for compensation can weigh negatively on an applicant's propensity to operate safely and legally.

The sixth factor is whether an applicant or its drivers have been convicted of a felony or crime of moral turpitude and remains subject to supervision by a court or correctional institution. While an affirmative answer to this inquiry is will not automatically disqualify an applicant, it will usually reflect negatively on the applicant's propensity to operate safely and legally.

Although not as difficult a burden to carry as demonstrating financial and technical fitness, § 41.14's public need requirement can be cumbersome and confusing. The standards for demonstrating need within a proposed territory are not well defined. While an applicant is not required to prove that need exists at every point within the proposed territory, it must demonstrate that need exists within the area generally served.¹ Such need is generally shown by offering testimony of witnesses who comprise a cross section of the traveling public. There is no clear measurement of how many witnesses comprise a cross section of the traveling public.

Otherwise fit applicants have had their applications dismissed for failure to demonstrate need. Conversely, some applicants feel the only way to avoid dismissal for failure to establish need is to present a parade of witnesses to testify to a single issue, "yes we need a new service in the area." The Commission is correct in its assertion that this process of demonstrating need is complex, costly, and time consuming, thus rendering it antiquated.

¹ See *Application of Blue Bird Coach Lines, Inc.*, 72 Pa. PUC 262 (1990).

While healthy competition among carriers is universally regarded as beneficial to the traveling public, the Commission has a duty to maintain a level playing field. The Commission's legislative directive is to promote healthy competition among carriers, but also to prevent destructive and unrestrained competition.² Totally eliminating the need requirement may lead to destructive and unrestrained competition among carriers because it makes it easier for large companies expand into smaller territories and push out small businesses.

A better solution may be to establish clearer guidelines as to how to determine whether need for a proposed service exists within the requested territory. Commission regulations provide for other, less cumbersome methods for demonstrating need. 52 Pa. Code §3.382 specifically excepts service request evidence from the rule against hearsay. Since the regulation already allow written service requests as a method of proving need, a petition³ containing a certain number of signatures per capita within the proposed service area may suffice to show need without subjecting the applicant to the complex, costly, and cumbersome process of finding and presenting live witnesses.

B. Removal of Territorial Restrictions.

In its November 2015 Order, the Commission asserts that eliminating the public need requirement for passenger carrier applications will eliminate the necessity for territorial restrictions on certificates of public convenience. Thus, if the proposed change takes effect, all currently certificated carriers will be deemed to have statewide authority

² *Seaboard Tanklines, Inc. v. Pa. P.U.C.*, 502 A.2d 762, 765 (Pa. Commw. 1985).

³ *Modad Taxicab Co. v. Pennsylvania Public Utility Com.*, 415 A.2d 126 (Pa. Commw. Ct. 1980). (signatures on petition allowed as service request evidence for the purpose of demonstrating public need for the proposed service).

and all new applications will be considered statewide applications unless otherwise indicated by the applicant.

The Commission's rationale is that, due to the elimination of the need requirement, the Commission will no longer need to limit carrier's authority to territories where the applicant has demonstrated need. This assumption is incorrect. The territorial restrictions will still be necessary, even if the need requirement is eliminated.

The Commission's rationale for elimination of the need requirement is to reduce the barriers to entry for qualified applicants and promote increased competition. Removal of the territorial restrictions on carriers without changing the current standards for protesting an application may create a barrage of protests to nearly all applications. Thus, the proposed rule change will actually erect new barriers to entry for qualified applicants rather than removing them.

Under 52 Pa. Code 5.51, a person objecting to the approval of an application filed with the Commission may file a protest to the application. When an applicant files an application for passenger carrier authority, it is published in the Pennsylvania Bulletin. Upon publication, any carrier with operating authority in actual or potential conflict, with the authority sought by an applicant may protest the application.

Currently, in order to have standing to protest an application for passenger carrier authority, a protestant must satisfy the criteria articulated in the *Application of Carriage Limousine Company*.⁴ Under this standard, a protestant must possess some operating authority in actual or potential conflict, with the authority sought by an applicant. Thus,

⁴ *Application of Carriage Limousine Services, Inc.*, Docket No. A-00108361, Initial Decision (Dated: October 12, 1994; Served: December 23, 1994)).

only carriers who possess the same or similar classification of authority within the proposed territory have standing to protest an application. For example, if an applicant files an application for call or demand authority in Dauphin County, a call or demand provider in Monroe County would not have standing to protest the application because the territories do not overlap.

If the proposed changes take effect and every certificated carrier is deemed to have statewide authority, every certificated carrier will have standing to challenge every application for authority within its classification. The removal of territorial restrictions will make every application far more complex, costly, and time consuming than the current process. The potential result is a virtual freeze on the number of certificates of public convenience and a complete bar to small business applicants. Even if an applicant chooses to limit its proposed service to a relatively small territory, every certificated carrier within the same classification will have standing to challenge the application. For example, if the same applicant referred to above files an application for call or demand authority in Dauphin County, a call or demand provider in Monroe County, or anywhere in Pennsylvania, would be conferred standing to protest the application under the proposed rule.

Removal of the territorial restrictions may prevent new services from opening in underserved areas. Although these territories may not be deemed "profitable" enough for the larger carriers to serve, the larger carriers would still have standing to protest smaller applicants seeking to serve the area. The larger carrier may protest the application in order to keep the proposed territory open for expansion or to prevent the

new company from having the chance to expand into areas served by the larger company. Although the smaller company could limit its application to the smaller territory in an attempt to avoid offending the larger providers, the larger providers would still have standing to challenge the application because they have statewide authority.

Large certificated carriers have an interest in protecting their service territory and seeking out new territories for expansion. It is common practice for larger call or demand providers throughout the state to retain in house counsel. One of the main duties of these attorneys is to protect the carrier's territory by monitoring the Pennsylvania Bulletin and protesting any application to serve that territory. If these larger carriers are deemed to have statewide authority, the entire state will be considered their territory. Commentators anticipate that the large carriers will protect this newly vested territory with the same vigor that they expend to protect their currently held territory, and they will now have standing to protest any applicant who seeks to enter any potentially profitable market. Small businesses applying for passenger carrier authority simply do not have the resources to weather this amount of challenges to their applications. Thus, eliminating the territorial restrictions on certificates of public convenience would actually erect new barriers to entry for qualified applicants rather than reducing them. Therefore, Commentators suggest that the Commission keep the territorial restrictions on certificates, even if the Commission eliminates the requirement that an applicant demonstrate need.

C. Removal of regulations dealing with restrictive amendments

The Commission's November 2015 Order also proposes to strike the regulations dealing with restrictive amendments. However, removal of the ability to enter into a restrictive amendment would be counterproductive to the Commission's policy of encouraging settlements.⁵ If the territorial restrictions are removed and new applications are subject to protest by all statewide carriers, applicants for passenger authority may be flooded with protests. The only way for the applicant to move forward without having to fight off the numerous protests filed by certificated carriers would be to enter restrictive amendment agreements.

With the territorial restrictions in place, there are two ways for an applicant to shed a protest by reducing the proposed service territory. The first is to unilaterally amend the application, limiting the proposed territory to areas where the protestants do not hold authority. The applicant can then file a motion to dismiss the application based on lack of standing.⁶ With territorial restrictions no longer in place, this method will no longer be effective because carriers with statewide authority would still have standing and could still force the applicant to proceed with the costly and time consuming process of conducting discovery and attending an administrative hearing.

The second and more popular way for an applicant to shed a protest by reducing the proposed service territory is by settlement. Settlement agreements in passenger application proceedings are referred to as restrictive amendment agreements. Under such an agreement, the applicant agrees to amend its proposed service territory to an area that does not conflict with the protestant, and in return the protestant agrees to

⁵ "It is the policy of the Commission to encourage settlements." 52 Pa. Code 5.231 (a).

⁶ See *Application of Carriage Limousine Services, Inc.*, *supra* (A protestant must possess some operating authority in actual or potential conflict, with the authority sought by an applicant.).

conditionally withdraw its protest. Unlike the first method, the restrictive amendment would retain its efficacy in the absence of territorial restrictions because the protestant would withdraw by agreement, regardless of its standing.

Thus, by eliminating the code provisions that provide for restrictive amendments, the Commission would take away the primary tool that could help prevent administrative gridlock caused by the removal of territorial restrictions on certificates. Therefore, Commentators suggest that the Commission keep the regulations related to restrictive amendments.

III. CONCLUSION

Commentators applaud the Commission's decision to streamline the application process and to reduce the barriers to qualified applicants. However, Commentators believe that total elimination of the need requirement is an excessive step. Commentators believe that providing clearer guidelines as to how to establish need would better serve the Commission's legislative directive to promote healthy competition.

Elimination of the need requirement, combined with the removal of territorial restrictions on carriers would be counterproductive to the asserted goal of reducing barriers to entry for qualified applicants. The proposed changes would expose applicants to statewide protests by currently certificated carriers vested with statewide authority. Additionally, Commentators contend that removal of the provisions allowing for restrictive amendments would take the primary means for applicants to overcome protests without conducting discovery and proceeding to an administrative hearing.

Date: March 28, 2016

Respectfully submitted,

A handwritten signature in blue ink that reads "John W. Sweet". The signature is stylized with a large "J" and "S" and a cursive "W".

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