**BEFORE THE**

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

88 Transit Lines, Inc. :

:

v. : C-2009-2116699

:

Mid Mon Valley Transit Authority :

**INITIAL DECISION**

Before

Mark A. Hoyer

Administrative Law Judge

# I. HISTORY OF THE PROCEEDING

On June 29, 2009, 88 Transit Lines, Inc. (“88 Transit”) filed a formal complaint against Mid Mon Valley Transit Authority (“MMVTV” or “Respondent”) with the Pennsylvania Public Utility Commission. The complaint alleges that Respondent, a municipal corporation, was providing service originating beyond its corporate limits without securing authority from the Commission in violation of the Pennsylvania Public Utility Code, 66 Pa. C.S. §101 *et seq*. Specifically, 88 Transit alleges that Respondent may not transport passengers picked up along Route 88 in the Township of Union and the Borough of Finleyville, Washington County, and transport them to and from the City of Pittsburgh since these municipalities are not members of the MMVTA. 88 Transit requests that the Commission order Respondent not to provide any service beyond its corporate limits and order such other remedies as the Commission may deem appropriate.

On July 29, 2009, Respondent filed an Answer to Complaint and New Matter. Respondent requests that 88 Transit’s complaint be dismissed and avers in New Matter, *inter alia*, that service coordinated by MMVTA from points in Washington County outside of the MMVTA’s member’s corporate limits (Township of Union and Borough of Finleyville) is performed with the approval of, and is partially funded by, Washington County, the incorporating municipality of the Washington County Transit Authority (“WCTA”). On August 12, 2009, 88 Transit filed its Reply to New Matter.

An initial in-person hearing was scheduled for Wednesday, February 24, 2010, at 10:00 a.m. in Pittsburgh. A Prehearing Order was issued on December 21, 2009. The hearing was held as scheduled. William A. Gray, Esquire, represented Complainant, 88 Transit. 88 Transit presented the testimony of one witness, Stanley Nabozny. In addition, 88 Transit presented three exhibits which were marked and admitted into the record as Complainant’s Exhibit 1 through and including Complainant’s Exhibit 3. John A. Pillar, Esquire represented Respondent, MMVTA, at the hearing. MMVTA presented the testimony of the following four witnesses: Valerie Kissell, Shiela Gombita, Stephen Parish and Michael Kutsek. In addition, MMVTA offered four exhibits which were marked and admitted as Respondent’s Exhibit 1 through and including Respondent’s Exhibit 4.

On March 30, 2010, the undersigned sent a letter to the parties requesting main briefs to be filed on or before April 29, 2010, and reply briefs to be filed on or before May 14, 2010. Both parties timely submitted main and reply briefs.

The record was closed by Interim Order Closing the Hearing Record issued on May 17, 2010. The record consists of a hearing transcript containing 104 pages, the aforementioned 7 exhibits, and the aforementioned briefs. This matter is now ripe for disposition.

# II. FINDINGS OF FACT

1. MMVTA is a municipal corporation, incorporated under the Municipal Authorities Act of 1945 and amendments thereto. MMVTA was incorporated in 1985 (Complainant’s Ex. 1 and Respondent’s Ex. 1).

2. The member municipalities of MMVTA consist of 21 townships, cities and boroughs. The Township of Union and the Borough of Finleyville, in Washington County, are not members of the MMVTA (Tr. 37-38; Complainant’s Ex. 1).

3. 88 Transit Lines, Inc. holds a certificate of public convenience from the Pennsylvania Public Utility Commission (Docket No. A-88581) authorizing it to provide scheduled route service from the Borough of Charleroi to the City of Pittsburgh, and vice versa, including service from The Township of Union and the Borough of Finleyville, in Washington County, to the City of Pittsburgh and vice versa. 88 Transit is not currently operating under its regular route authority and said authority has been placed in inactive status (Tr. 27; Complainant’s Ex. 1).

4. MMVTA does not hold a certificate of public convenience from the Pennsylvania Public Utility Commission authorizing it to provide scheduled route service from The Township of Union and the Borough of Finleyville, in Washington County to the City of Pittsburgh, and vice versa (Complainant’s Ex. 1).

5. Since July 1, 2009, First Transit, Inc. (Contractor), pursuant to a contract with MMVTA, has provided scheduled route service along Route 88, which includes picking up passengers in the Township of Union and Borough of Finleyville and transporting them to the City of Pittsburgh, and return. Contractor does not have a certificate of public convenience issued by the Commission. The contract is for three years (Tr. 58; Complainant’s Ex. 1).

6. Prior to July 1, 2009, 88 Transit provided scheduled route service along Route 88 pursuant to a contract with MMVTA, which included picking up passengers in the Township of Union and Borough of Finleyville and transporting them to the City of Pittsburgh, and return.

7. Washington County Transportation Authority (“WCTA”) is a municipal corporation formed under the Municipal Authorities Act of 1945 (Respondent’s Ex. 3).

8. MMVTA entered into a written contract with WCTA which provides, in part, that WCTA “agrees to permit the MMVTA to continue to operate its long standing service along the Route 88 corridor consisting of fixed route, scheduled service.” The Township of Union and the Borough of Finleyville are located in Washington County along Route 88. WCTA provides funding to MMVTA for the scheduled route service it provides in Washington County (Tr. 54; Respondent’s Ex. 2).

9. MMVTA, which has an annual budget of $3,800,000.00, is funded by the Federal Transit Administration (FTA), the member municipalities of MMVTA, PennDOT, WCTA, Washington County, and the Port Authority of Allegheny County (PAT). PAT provided funding to MMVTA for the scheduled route service it provides in Allegheny County (Tr. 38-40, 54).

10. FTA regulates the competitive bidding process employed by MMVTA, and other municipal corporations, to promote fair and open competition (Tr. 44).

11. MMVTA establishes all rates for the scheduled route service performed by its Contractor (First Transit, Inc.) and coordinates all transportation services (Tr. 58-59).

12. Rates charged to passengers who board the buses in the Township of Union and the Borough of Finleyville are not greater than the fares paid by passengers boarding the bus in the member municipalities (Tr. 58-59).

13. 88 Transit did not charge its filed tariff rates for services it provided from the Township of Union and the Borough of Finleyville to and from the City of Pittsburgh while under contract with MMVTA (Tr. 30-31).

III. DISCUSSION

As the party seeking affirmative relief from the Commission, 88 Transit bears the burden of proof. 66 Pa. C.S. §332(a). 88 Transit must present evidence that is more convincing, by even the smallest amount, than that presented by the other party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, any finding of fact necessary to support the Commission’s adjudication must be based upon substantial evidence. Mill v. Pa. P.U.C., 67 Pa. Cmwlth. 597, 447 A.2d 1100 (1982). More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk and Western Ry. v. Pa. P.U.C., 489 Pa. 109, 413 A.2d 1037 (1980).

Respondent, MMVTA, is providing fixed route, scheduled service to transport passengers along the Route 88 corridor from the Borough of Charleroi to the City of Pittsburgh, and vice versa, including service from The Township of Union and the Borough of Finleyville, in Washington County, to the City of Pittsburgh and vice versa. Neither MMVTA nor the contractor it has obtained to provide this service, First Transit, Inc. (“First Transit”), has a certificate of public convenience from the Commission to provide fixed route, scheduled service from the Township of Union and the Borough of Finleyville, in Washington County, to the City of Pittsburgh and vice versa. MMVTA is a municipal corporation, incorporated under the Municipal Authorities Act of 1945 and amendments thereto. The Township of Union and the Borough of Finleyville are *not* “member municipalities” of MMVTA.

The parties essentially stipulated to the relevant facts necessary to adjudicate this matter. MMVTA is providing extraterritorial fixed route scheduled service without a certificate of public convenience from the Commission. Its Contractor, First Transit, Inc. likewise does not have a certificate of public convenience. 88 Transit argues that MMVTA is violating the Public Utility Code (“the Code”), specifically Sections 1102(a)(5) and 1501 of the Code, 66 Pa. C.S. §1102(a)(5) and 66 Pa. C.S. §1501, by providing this extraterritorial service. MMVTA contends that it can provide this extraterritorial service, using a contractor that does not hold a certificate of public convenience (First Transit), pursuant to a written Memorandum of Understanding it entered into with the WCTA. MMVTA also claims that it is within the Commission’s discretion to permit continuation of service in the aforementioned borough and township because the service is in the public interest, is non-discriminatory, and would result in an undue hardship if discontinued. The positions of the parties will now be set forth, in more detail, below.

88 Transit’s Position

88 Transit asserts that the Public Utility Code requires a certificate of public convenience for “any municipal corporation to acquire . . . or begin to operate, any plant, equipment or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits . . . .” (emphasis added) 66 Pa. C.S. §1102(a)(5). 88 Transit further asserts that the Code also provides that “any public utility service being furnished or rendered by a municipal corporation beyond its corporate limits shall be subject to regulation and control by the commission as to service and extensions, with the same force and in like manner as if such service were rendered by a public utility.” 66 Pa. C.S. §1501. MMVTA is a “municipal corporation” pursuant to the definition of that term in the Code. A “municipal corporation” is defined in the Code as “all cities, boroughs, towns, or counties of this Commonwealth, and also any public corporation, authority, or body whatsoever created or organized under any law of this Commonwealth for the purpose of rendering any service similar to that of a public utility.”[[1]](#footnote-1) 66 Pa. C.S. §102. 88 Transit Main Brief, pp. 11-12.

According to 88 Transit, it is well established by case law that if a municipal authority provides service originating outside of its corporate limits, the PUC has jurisdiction over that service. Borough of Ridgeway v. Pennsylvania Public Utility Commission, 83 Pa. Cmwlth Ct 379, 480 A.2d 1253 (1984); County of Dauphin v. Pa. P.U.C., 159 Pa. Cmwlth Ct 649, 634 A.2d 281 (1993). As indicated in County of Dauphin v. Pa. P.U.C., supra*,* 88 Transit asserts,“. . . the purpose of subjecting a municipally operated public utility which renders service beyond its corporate limits to the jurisdiction of the PUC is to protect users of the service who are not residents of the municipality.” 88 Transit Main Brief, p. 12.

88 Transit claims MMVTA has attempted to do an end run around the requirement that it must secure PUC scheduled route authority to provide pickups outside of its corporate limits in the Township of Union and the Borough of Finleyville by entering into a Memorandum of Understanding, dated August 7, 2009, with the WCTA. According to 88 Transit, this Memorandum of Understanding does not eliminate the need for MMVTA to have PUC authority to provide this service since it is MMVTA, not the WCTA, that is providing the service. 88 Transit claims the Memorandum of Understanding provides that MMVTA will continue to fix the rates and collect the fares. Respondent’s Ex. 2. 88 Transit quotes the following language from the Memorandum of Understanding:

The MMVTA does not have specific statutory authority to operate in Finleyville and Union Township in Washington County. The Washington County Transportation Authority hereby agrees to permit the MMVTA to continue to operate its long standing service along the Route 88 corridor consisting of fixed-route, scheduled service.

Respondent’s Ex. 2; 88 Transit Main Brief, p. 13.

88 Transit asserts that a witness for MMVTA, Valerie Kissell, admitted that the WCTA was not providing the buses or the employees to drive the buses making pickups in the Borough of Finleyville and Township of Union. Tr. 69. 88 Transit cites the testimony of Shiela Gombita, the executive director of the WCTA, who testified that the WCTA does not provide scheduled route bus service and instead primarily provides shared ride service through subcontractors. Tr. 86-87. 88 Transit further claims that Ms. Gombita admitted that one of the reasons mentioned to her for entering into the Memorandum of Understanding was that the Borough of Finleyville and Township of Union are outside of the corporate limits of the MMVTA. Tr. 94-95. According to 88 Transit, it is simply not sufficient for the Washington County Transportation Authority to give its permission to the Mid Mon Valley Transit Authority to provide this service without a certificate of public convenience. 88 Transit Main Brief, pp. 13-14.

In its Reply Brief, 88 Transit asserts that,

…the Memorandum of Understanding entered into between Respondent (MMVTA) and WCTA provides that Respondent will continue to fix the rates and they will not be fixed by WCTA …WCTA will not provide the buses or the drivers to drive the buses that will make pickups in Finleyville Borough and Union Township, but rather the buses will be owned by Respondent and the drivers will be provided by Respondent…

88 Transit Reply Brief, p. 4.

In its Reply Brief, 88 Transit asserts that the situation involving the Port Authority of Allegheny County is completely different from the situation presented in this case. According to 88 Transit,

The Port Authority of Allegheny County is not subject to the Municipality Authorities Act of 1945[*sic.*], as is Respondent, but rather is subject to the Second Class County Port Authority Act, 55 P.S. §551 et seq. This statute gives the Port Authority of Allegheny County exclusive jurisdiction over all transportation in Allegheny County. . . *See* Port Authority of Allegheny County v. Pennsylvania Public Utility Commission, 494 Pa. 250, 256, 431 A.2d 243, 246 (1981). The Port Authority of Allegheny County is authorized by the Second Class County Port Authority Act to make arrangements with anyone it wants to provide service in Allegheny County since it has exclusive jurisdiction over service within Allegheny County. The PUC does not have the power to grant someone authority to provide scheduled route service in Allegheny County because of the Second Class County Port Authority Act. The Municipality Authorities Act does not confer in a municipal corporation exclusive jurisdiction, as evidenced by the fact that both WCTA and the Respondent provide service in Washington County….

88 Transit Reply Brief, p. 4 (emphasis in original).

88 Transit goes on in its Reply Brief to argue that MMVTA’s reliance on the Borough of Phoenixville v. Pa. P.U.C., 3 Pa.Commw. 56, 280 A.2d 471 (1971) is misplaced. According to 88 Transit, the rationale in the Phoenixville case is to prohibit a municipal corporation that has taken it upon itself to provide extra territorial service from then not providing extra territorial service to a certain segment of the public. In the Phoenixville case, 88 Transit asserts, the court noted in a footnote that 800 of Phoenixville’s 4500 water customers were actually located outside of its boundaries. Phoenixville then decided not to extend its service to someone else. The key language in the Phoenixville case, according to 88 Transit, is the following:

As soon as a borough holds itself out to render uncertificated extraterritorial service and renders such service, it is within the jurisdiction of the commission to determine whether extension of such service should be granted. In effect, if a municipality decides that it will not apply to the commission for a certificate of public convenience to delineate its utility service area outside its boundaries, then as each new proposed extension is presented to the Commission, the Commission has jurisdiction to determine the extent of the extraterritorial utility service area for the municipality. (emphasis added)

88 Transit Reply Brief, pp. 6-7.

88 Transit argues that MMVTA is not seeking to extend its uncertificated extraterritorial service from Finleyville Borough and Union Township, but rather is seeking to continue to provide that uncertificated extraterritorial service in Finleyville Borough and Union Township without holding a Certificate of Public Convenience.

88 Transit asserts that MMVTA’s position in this case would defeat the entire certification process established in the Code which specifically requires a certificate of public convenience for “any municipal corporation to acquire . . . or begin to operate, any plant, equipment or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits …” 66 Pa.C.S. §1102(a)(5) (emphasis added). 88 Transit requests that the Commission require MMVTA to comply with the Code and direct MMVTA to cease and desist from providing service outside of its corporate limits until such time as it becomes properly certificated.

MMVTA’s Position

According to MMVTA, the WCTA (principal) has delegated to MMVTA, as its agent, to coordinate transit services to and from Washington County subject to the WCTA’s oversight as stated in the agreement (Memorandum of Understanding). MMVTA submits that since WCTA had the capacity to provide service directly or by a subcontractor to and from Township of Union and Borough of Finleyville, it could delegate this action to another municipal corporation acting as its agent, here MMVTA. MMVTA asserts that, in controlling rates, routes and service between the Township of Union and Borough of Finleyville and other points, it stands in the shoes of WCTA, as its agent. According to MMVTA, this is not unlike the situation that exists in Allegheny County where PAT delegates to MMVTA the right to transport passengers within Allegheny County along Route 88 to and from the City of Pittsburgh. MMVTA Main Brief, p. 10.

MMVTA claims that under its contract with WCTA, MMVTA has been authorized to extend its mass transit coordination to and from other points in Washington County. Since MMVTA has the equipment and management to coordinate such service, MMVTA asserts that the public interest is served by permitting WCTA to delegate the coordination of mass transit to MMVTA. MMVTA Main Brief, pp. 10-11.

MMVTA admits that it can cite no precedent for its contention that a municipal corporation may delegate to another municipal corporation a coordinated transportation service that could be provided by the former municipal corporation. However, MMVTA also points out that no precedent can be found that would preclude such a conclusion. MMVTA Main Brief, p. 9.

MMVTA cites the Borough of Phoenixville case for the proposition that the Commission has the power to order extraterritorial service where a municipal corporation holds itself out to render uncertificated extraterritorial service. MMVTA Main Brief, p. 11. In Borough of Phoenixville, the court stated as follows:

So long as Phoenixville continues to render uncertificated extraterritorial service, it will be within the discretionary power of the Commission, on the basis of reasonableness, to determine questions of extensions of service.

280 A.2d at 474; MMVTA Main Brief, p. 12.

MMVTA submits that the continuation of service by its subcontractor in the Township of Union and the Borough of Finleyville may be permitted in the Commission’s discretion based on the fact that the service is clearly in the public interest, is non-discriminatory, and would result in an undue hardship if discontinued. MMVTA Main Brief, p. 13.

According to MMVTA, the continuation of service along Route 88, including service to the Township of Union and the Borough of Finleyville, is a natural extension of the authorized service of MMVTA. MMVTA claims that the residents of the Township of Union and the Borough of Finleyville are not discriminated against in any way such as by paying higher rates. MMTVA claims the two municipalities have established natural and special locations for the buses to stop, including a large park-and-ride lot located across the street from the boundary of Carroll Township, which is a member municipality. According to MMVTA, in County of Dauphin v. Pa. P.U.C., *supra*, the Court held that “the reason for regulating extraterritorial service is so that the municipality cannot discriminate against users who are outside the corporate limits”. 634 A.2d at 282; MMVTA Main Brief, p. 13.

In its Reply Brief, MMVTA claims that no carrier can provide scheduled route service between MMVTA’s communities and from the City of Pittsburgh and return as a common carrier. Also in the Reply Brief, MMVTA claims that WCTA has oversight of MMVTA’s coordination of scheduled route service because the Memorandum of Understanding provides that all rates must “not conflict with the policies and purposes of the WCTA.” MMVTA Reply Brief, pp. 3-4.

Extraterritorial Schedule Route Service by a Municipal Authority

Section 1102(a)(5) of the Code entitled “Enumeration of acts requiring certificate,” is clear and unambiguous. Approval of an application for a certificate of public convenience by the Commission is necessary in the following instance:

[f]or any municipal corporation, to acquire, construct, or begin to operate, any plant, equipment, or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits.

66 Pa. C.S. §1102(a)(5).

MMVTA is admittedly providing scheduled route service beyond its corporate limits. A certificate of public convenience is necessary to do so. MMVTA claims that it can provide service outside its corporate limits in the Borough of Finleyville and the Township of Union pursuant to a Memorandum of Understanding, a contract, with the WCTA. MMVTA claims that, by virtue of this agreement, it can act as an “agent” for the WCTA. MMVTA cites no legal authority for its claim of right here to act as an agent for another municipal authority. The undisputed facts of this case, read in conjunction with Section 1102(a)(5) of the Code, require the undersigned to conclude that a certificate of public convenience is needed by MMVTA to provide scheduled route service in the aforementioned borough and township. Accordingly, MMVTA must cease and desist from providing the scheduled route service at issue. 88 Transit has met its burden of proof here.

Both parties discussed the case of Borough of Phoenixville v. Pa. P.U.C., 3 Pa. Commw. 56, 280 A.2d 471 (1971). The undersigned agrees with 88 Transit. The rationale in the Phoenixville case is to prohibit a municipal corporation that has taken it upon itself to provide extra territorial service from then not providing extra territorial service to a certain segment of the public. The key language in the Phoenixville case is the following:

As soon as a borough holds itself out to render uncertificated extraterritorial service and renders such service, it is within the jurisdiction of the commission to determine whether extension of such service should be granted. In effect, if a municipality decides that it will not apply to the commission for a certificate of public convenience to delineate its utility service area outside its boundaries, then as each new proposed extension is presented to the Commission, the Commission has jurisdiction to determine the extent of the extraterritorial utility service area for the municipality.

IV. CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding.

2. Complainant has the burden of proof in this proceeding. 66 Pa. C.S. §332(a).

3. Complainant has met its burden of proof.

4. Respondent must apply for and obtain a certificate of public convenience from the Commission in order to provide scheduled route service from the Township of Union and the Borough of Finleyville, in Washington County, to the City of Pittsburgh and vice versa. 66 Pa. C.S. §1102(a)(5).

5. Respondent’s provision of scheduled route service from the Township of Union and the Borough of Finleyville, in Washington County, to the City of Pittsburgh and vice versa, from July 1, 2009 to the present, violates Section 1102(a)(5) of the Pennsylvania Public Utility Code. 66 Pa. C.S. §1102(a)(5).

V. ORDER

THEREFORE,

IT IS ORDERED:

1. That the formal complaint of 88 Transit Lines, Inc. against Mid Mon Valley Transit Authority at Docket No. C-2009-2116699 is sustained.

2. That Mid Mon Valley Transit Authority and First Transit, Inc. shall cease and desist from providing scheduled route service from the Township of Union and the Borough of Finleyville, in Washington County, to the City of Pittsburgh, and vice versa.

Date: August 5, 2010 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Mark A. Hoyer

Administrative Law Judge

1. The parties stipulated that MMVTA is a municipal corporation formed under The Municipal Authorities Act of 1945 and amendments thereto. (Complainant’s Ex. 1). [↑](#footnote-ref-1)