#  PENNSYLVANIA

 **PUBLIC UTILITY COMMISSION**

 **Harrisburg, PA 17105-3265**

 Public Meeting held February 24, 2011

Commissioners Present:

 James H. Cawley, Chairman

 Tyrone J. Christy, Vice Chairman

 John F. Coleman, Jr.

 Wayne E. Gardner

 Robert F. Powelson

88 Transit Lines, Inc. C-2009-2116699

 v.

Mid Mon Valley Transit Authority

 **OPINION AND ORDER**

**BY THE COMMISSION:**

 Before the Commission for consideration and disposition are the Exceptions filed by Mid Mon Valley Transit Authority (Authority or Respondent) on September 10, 2010, in response to the Initial Decision of Administrative Law Judge (ALJ) Mark A. Hoyer issued herein on August 27, 2010. Also before the Commission are the Reply Exceptions filed on September 24, 2010, by 88 Transit Lines, Inc. (88 Transit or Complainant).

**Background**

Prior to July 1, 2009, Complainant[[1]](#footnote-1) provided scheduled route service pursuant to a contract with the Authority, which included picking up passengers in the Township of Union and the Borough of Finleyville in Washington County, transporting them to the City of Pittsburgh, and return. Finding of Fact No. 6. 88 Transit holds a Certificate of Public Convenience, at Docket No. A-88581, authorizing it to provide scheduled route service, including service from the Township of Union and the Borough of Finleyville in Washington County, to the City of Pittsburgh, and vice versa. Finding of Fact No. 3.

In 2009, the Authority awarded the contract to a new vendor. Since July 1, 2009, First Transit, Inc. (Contractor) has provided the service formerly provided by 88 Transit, pursuant to a contract with the Authority. Finding of Fact No. 5.

Neither the Contractor nor the Authority holds a certificate of public convenience issued by the Commission. Finding of Fact Nos. 4 and 5. Since the service in question is outside the boundaries of the municipalities that are members of the Authority, 88 Transit claims that the Authority’s new arrangement violates the Public Utility Code (Code), 66 Pa. C.S. § 101 *et seq.* By this Formal Complaint, 88 Transit seeks an order preventing the Authority from providing the service in question directly or indirectly (i.e., through the Contractor) in the absence of a certificate of public convenience from the Commission.

 **History of the Proceeding**

 On June 29, 2009, 88 Transit filed a Formal Complaint against the Respondent with the Commission alleging that the Authority was in violation of the Code because it was providing public utility service beyond the boundaries of its member municipalities without a Certificate of Public Convenience from the Commission. Complaint at 2 and 3. On July 29, 2009, the Respondent filed an Answer to Complaint and New Matter. The Respondent alleged that it was not providing the service in question directly, but rather was providing that service through the Contractor. Answer and New Matter at 3. The Respondent further alleged that its service in Washington County is performed with the approval of, and is partial funded by, Washington County – the municipality incorporating the Washington County Transit Authority (WCTA). *Id*. at 4. On August 12, 2009, 88 Transit filed its Reply to New Matter.

 An in-person hearing was held on February 24, 2010. The Complainant was represented by counsel and presented the testimony of one witness, Stanley Nabozny. In addition, 88 Transit presented three exhibits which were marked and admitted into the record. The Respondent was also represented by counsel at the hearing and presented the testimony of the following four witnesses: Valerie Kissell, Shiela Gombita, Stephen Parish and Michael Kutsek. In addition, the Respondent offered four exhibits which were marked and admitted into the record.

 Both Parties timely submitted Main and Reply Briefs. The record was closed on May 17, 2010. The record consists of a hearing transcript containing 104 pages, seven exhibits, and the aforementioned Briefs.

In his Initial Decision, issued on August 27, 2010, ALJ Hoyer recommended that 88 Transit’s Complaint be sustained, and that the Respondent be directed to 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. I.D. at 14. Exceptions and Reply Exceptions were filed as above noted.

**Discussion**

 Initially, we are reminded that we are not required to consider expressly or at great length each and every contention raised by a party to our proceedings. *University of Pennsylvania, et al. v. Pa. P.U.C.*, 485 A.2d 1217, 1222 (Pa. Cmwlth. 1984). Any exception or argument that is not specifically addressed herein shall be deemed to have been duly considered and denied without further discussion.

 In his Initial Decision, ALJ Hoyer reached thirteen Findings of Fact, I.D. at 2-4, and five Conclusions of Law, I.D. at 13. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law unless they are either expressly or by necessary implication overruled or modified by this Opinion and Order.

 Section 332(a) of the Code, 66 Pa. C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In this proceeding, the Complainant is the party seeking affirmative relief from the Commission, and therefore it is the party with the burden of proof. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950).

 In *Se-Ling Hosiery*, the Pennsylvania Supreme Court held that the term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the evidence presented by the opposing party. Additionally, the Commission must ensure that the decision is supported by substantial evidence in the record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion; more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Railway v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980); *Murphy v. Pa. Dept. of Public Welfare, White Haven Center*, 480 A.2d 382 (Pa. Cmwlth. 1984).

As stated previously, the essence of 88 Transit’s Complaint is that the Authority needs a certificate of public convenience to provide the service in question because that service is outside the boundaries of the municipalities that are members of the Authority. Relying on 66 Pa. C.S. §§ 102 (defining a “municipal corporation”) and 1102(a)(5) (enumerating the acts requiring a certificate of public convenience), as well as *Phoenixville v. Pa. PUC,* 3 Pa. Commw. 56, 280 A.2d 471 (1971), the ALJ agreed.

The Authority filed Exceptions arguing that the ALJ erred because the service in question is within the boundaries of Washington County, the municipality incorporating the WCTA.[[2]](#footnote-2) The Authority contends that it has a contract with the WCTA, and is acting as the agent of the WCTA, to provide the service in question. Therefore, the Authority concludes that it does not need a certificate of public convenience from the Commission to provide the service. Exceptions at 2-6.

The Authority further contends that the Commission has discretionary power to authorize service by a municipal corporation beyond its corporate boundaries where the service is clearly in the public interest, is non-discriminatory, and would result in undue hardship if the service were discontinued. *Id*. at 6-9.

In response, 88 Transit argues that the Authority cannot avoid the need to obtain a certificate of public convenience from the Commission “by merely securing the permission of WCTA” to provide public utility service within the boundaries of Washington County. Exceptions at 6. According to 88 Transit:

WCTA cannot delegate to Respondent, as its agent, the right to provide service from these two specific points in Washington County, merely to divest the PUC of jurisdiction over that service under the Public Utility Code. The attempt by Respondent in its Exceptions to establish a principal/agent relationship between Respondent and WCTA must fail.

*Id*. at 5. In addition, 88 Transit contends that the Respondent incorrectly reads the *Phoenixville* decision*, supra,* as holding that the Commission may allow a municipal corporation to extend public utility service beyond its corporate limits without obtaining a certificate of public convenience. *Id*. at 6.

We agree with the Authority that the ALJ erred in holding that the Authority needs a certificate of public convenience to provide the service in question. We do not, however, agree with the reasoning advanced by the Authority. We will therefore grant the Exceptions in part and deny them in part.

This precise question has been addressed by both the Commonwealth Court and this Commission in several previous cases. In *Garver v Pa. PUC*, 469 A.2d 1154 (Pa. Cmwlth. 1984), the Commonwealth Court analyzed the provisions of the repealed Public Utility Law, the then-newly enacted Public Utility Code, the Municipality Authorities Act of 1945, and relevant case law, in affirming the Commission’s decision that it does not have jurisdiction over the rates charged or services provided by a municipal authority beyond the limits of the municipality that created it.

 The Court reached a similar conclusion in *White Rock Sewage Corp. v. Pa. PUC*, 578 A.2d 984 (Pa. Cmwlth. 1990). In that case, the Court concluded:

Municipal authorities are not creatures, agents or representatives of municipalities which organize them, but rather are independent agencies of the Commonwealth and a part of its sovereignty. As such, South Middleton Authority may provide services to many different areas of the Commonwealth and has no boundaries within which it must limit its services. However, even if we were to find that South Middleton was offering services outside of its boundaries, the PUC has determined that it does not have jurisdiction over the reasonableness of the rates fixed or over the services provided by a municipal authority beyond the limits of the municipality which created it, based on the holding in [*Graver, supra*].

578 A.2d 987 (citations omitted).

 Similarly, in the case of *In Re: Application of Rheems Water Company for approval, Nunc Pro Tunc, of the right to begin to offer or furnish water service to the public in Rheems, West Donegal Township and portions of East Donegal and Mt. Joy Townships, Lancaster County*, 1992 Pa. PUC LEXIS 50, at \*10-11, we stated:

Based on our review of the record, we believe that the Mt. Joy Township Authority may engage in activities outside of the township wherein it was organized without first obtaining the approval of this Commission. This principle was clearly enunciated by the Commission in *Re: Mid-County Transit Authority*, Docket No. A-00105978, F.2, 65 Pa. P.U.C. 439 (1987). Furthermore, a municipal authority organized pursuant to the Municipal Authorities Act (53 P.S. § 303 *et seq*.) is a corporate agency of the Commonwealth of Pennsylvania, created by the Commonwealth. It is not a creature, agent, or representative of the municipality which organized such authority. Unless otherwise limited by the ordinance which organized it or by its articles of incorporation, such an authority is entitled to perform in the Commonwealth of Pennsylvania – without geographical restrictions – vast private and certain limited public functions. See *Re: Municipal Authority of Township of Upper St. Clair*, 408 Pa. 464, 184 A.2d 695 (1962); *Highland Sewer and Water Authority v. Engelbach*, 220 A.2d 390 (Pa. Super. 1966).

We note that the Municipality Authorities Act of 1945 was repealed and replaced in 2001 by the Municipality Authorities Act. 53 Pa. C.S. §§ 5601, *et seq.* We see nothing in the new statute that requires us to modify our conclusion that a municipal authority providing public utility service outside the boundaries of its member municipalities does not need a certificate of public convenience from the Commission.

The instant case is very similar to *Borough of Sewickley Water Authority v. Mollica*, 544 A.2d 1122 (Pa. Cmwlth. 1988). In that case, the trial court relied on *ACORN v. Guarino*, 512 A.2d 1312 (Pa. Cmwlth. 1986), which held that, although a municipality which provides utility service within its boundaries is exempt from regulation by the Commission, when that municipality provides services outside of its boundaries, it becomes a public utility subject to the jurisdiction of the Commission. On appeal, the Commonwealth Court stated “In applying *ACORN* to this case, the trial court did not recognize the distinction between a municipality providing water service and a *municipal authority* providing water service.” *Borough of Sewickley Water Authority*, *supra*, at 1124 (emphasis in original). Similarly, in the instant case, the ALJ did not recognize the distinction between a municipality and a municipal authority, primarily because he emphasized the fact that each is considered a “municipal corporation” under the Code. 66 Pa. C.S. § 102.

Finally, we note that the Authority is not providing the service in question itself. Rather, the Authority has contracted with the Contractor to provide the service in question. The Contractor does not have a certificate of public convenience. We find that such a certificate is not needed:

It is well settled in the law that a motor carrier operating under contract with a municipal authority is not required to obtain a certificate of public convenience since this Commission has no jurisdiction over the authority or its agents. *Brocal Corporation v. Wheels, Inc.*, 57 Pa. P.U.C. 322 (1983); *Application of Richard C. Hubbard, t/d/b/a Hubbard Bus Service*, Docket No. A-00104631, F.2 (Order entered September 22, 1988).

*In Re: Application of George Stouffer and Robert Sellers, Co-Partners, t/d/b/a Diamond “S” Cab Company for a Certificate of Public Convenience evidencing the Commission’s approval of the right and privilege of operating motor vehicles as a motor carrier for the transportation of persons,* 1989 Pa. PUC LEXIS at \*9-10.

## Conclusion

 We have reviewed the record as developed in this proceeding, including the ALJ’s Initial Decision, the Respondent’s Exceptions and the Complainant’s Replies. For the reasons stated above, we will grant the Exceptions in part and deny them in part, reverse the Initial Decision, and dismiss the Complaint, all consistent with this Opinion and Order; **THEREFORE,**

 IT IS ORDERED:

 1. That the Exceptions filed by Mid Mon Valley Transit Authority, to the Initial Decision of Administrative Law Judge Mark A. Hoyer, issued on August 27, 2010, are granted in part and denied in part, consistent with this Opinion and Order.

 2. That the Initial Decision of Administrative Law Judge Mark A. Hoyer herein is reversed.

 3. That the Formal Complaint of 88 Transit Lines, Inc., against Mid Mon Valley Transit Authority at Docket No. C-2009-2116699 is dismissed.

 4. That the proceeding at Docket No. C-2009-2116699 is marked closed.

 **BY THE COMMISSION,**

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 Rosemary Chiavetta

 Secretary

(SEAL)

ORDER ADOPTED: February 24, 2011

ORDER ENTERED: February 25, 2011

1. We note that, by correspondence dated November 23, 2010, in a proceeding at Docket Nos. A-00088581, F.3 *et al*., 88 Transit notified the Commission that it has been out of business since June 30, 2009, and that it had no objection to its Certificate of Public Convenience being revoked. By the terms of the Order in the proceeding, *Pa. PUC v. 88 Transit Lines, Inc.,* which was entered on January 19, 2011, the Commission, *inter alia*, cancelled 88 Transit’s Certificates of Public Convenience. We do not believe this action moots the instant proceeding, however. 88 Transit still appears to exist as a legal entity, as it is still listed as a corporation on the Department of State’s website. In addition, 88 Transit never withdrew the instant Complaint although most of this proceeding has occurred after 88 Transit ceased doing business.  [↑](#footnote-ref-1)
2. We note that neither Washington County nor the WCTA is a party to this proceeding. [↑](#footnote-ref-2)