

PENNSYLVANIA PUBLIC UTILITY COMMISSION
Harrisburg, Pennsylvania 17105-3265

Pa. Public Utility Commission
v.
Blue & White USA, Inc., t/a
Altoona USA & Transfer

Public Meeting: April 28, 2011
2189008-OSA
Docket No. C-2010-2189008

Dissenting Statement of
Commissioner James H. Cawley

This is a Petition for Reconsideration of our January 19, 2011 Order in which we sustained the complaint and imposed a civil penalty of \$1,100 after Petitioner, Blue & White USA Inc., t/a Altoona USA & Transfer, failed to respond to the complaint.

The Commission attempted to serve the complaint at the Petitioner's address of record by certified mail. After it was returned unopened to the Commission by the U.S. Postal Service, alternative service was provided by the publication of the complaint in the *Pennsylvania Bulletin* pursuant to 52 Pa. Code §1.53(e). That section provides:

Alternative service. If the Commission is unable to serve a party by mail at the party's last known address, the Commission may make service by publication in a newspaper of general circulation in the same area as the party's last known address. In the alternative, service may also be accomplished by publication in the *Pennsylvania Bulletin* or by service on the Secretary of the Commonwealth, if appropriate.

The Commission sustained the complaint and imposed the fine when the Petitioner failed to respond to the complaint after the *Bulletin* publication.

Petitioner requests that it be given the opportunity to submit evidence regarding the non-receipt of the complaint and also the opportunity to answer the complaint. In this instance, the complaint was sent via certified mail to Petitioner on October 7, 2010. It was returned by the U.S. Postal Service as "undeliverable" to the Commission's Secretary's Bureau on October 15, 2010. Subsequently, the Commission's Order of January 17, 2011 was sent to the Petitioner at the same address of record as that of the complaint that had been sent by certified mail. That Order gave rise to this petition.

The opinion and order states that "the Complaint and Notices via Certified mail in October of 2010 was returned as undeliverable. The record does not indicate why this occurred." The Commission's envelope which contained the complaint is marked "NOT DELIVERABLE

AS ADDRESSED UNABLE TO FORWARD.” The U.S. Postal Service website states that such a designation means “Mail undeliverable at address given; no change-of-address order on file; forwarding order expired.” Commission records indicate the filing of the instant petition subsequent to the delivery of the order at the address to which the complaint was directed.

Clearly, something is amiss. If the order was delivered to the same address and received, why was not the complaint mailed to the same address delivered and received?

First, the period between the mailing of the complaint and the return by the Postal Service was approximately 5 business days (October 15 and not October 22 as referenced in the Opinion and Order). Second, the complaint was in the name of “Blue & White USA Inc. t/a Altoona USA & Transfer” and thus a quick reading of the addressee’s name might have confused the deliverer of the certified letter. Both of those factors indicate a possibility that a mistake was made by the Postal Service in declaring the letter to be “undeliverable.” There may be additional reasons for the Postal Service’s failure to make the delivery.

The intent of Commission’s regulations governing service of complaints and other documents is to give the party due process and the opportunity to be heard. The alternative publication in the *Pennsylvania Bulletin* provides a modicum of due process in the event that the party has moved and failed to notify the Commission or otherwise refuses service. It is not a satisfactory or fair alternative if the party has not moved and has not received service through no fault of its own or through the fault of a third party. A party should be given the opportunity to present evidence that it did not move and that the delivery failure was due to some reason beyond its control. Failure to allow that opportunity is a manifest deprivation of due process.

Finally, I must wonder why the Commission mailed its order to an undeliverable address (a triumph of hope over experience?). The fact that the order was delivered surely raises sufficient doubt about the first attempt that the Petitioner ought at least to be given the opportunity to explain the discrepancy.

I would therefore grant the instant Petition under the standards enunciated in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 1982 Pa. P.U.C. LEXIS 4 (1982).



James H. Cawley
Commissioner

Dated: April 28, 2011