



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
P.O. BOX 3265, HARRISBURG, PA 17105-3265

IN REPLY PLEASE
REFER TO OUR FILE
C-2011-2271305

November 16, 2012

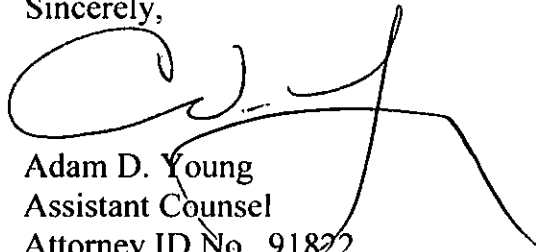
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Re: Pennsylvania Public Utility Commission, Bureau of Investigation and
Enforcement v. Gary Polzot t/a Airport Executive Car Services
No. C-2011-2271305

Dear Ms. Chiavetta:

Enclosed for filing are an original and nine (9) copies of the Exceptions of the Bureau of Investigation and Enforcement of the Pennsylvania Public Utility Commission in the above-referenced case. Copies have been served on the parties of record in accordance with the Certificate of Service.

Sincerely,



Adam D. Young
Assistant Counsel
Attorney ID No. 91822

ADY/lmm

Enclosure

cc: As per certificate of service

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**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

**Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement**

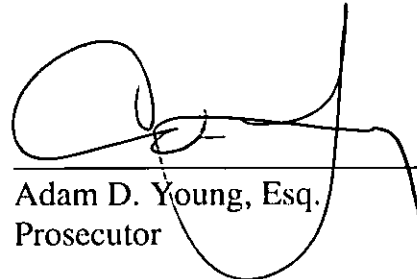
v.

**Gary Polzot t/a Airport Executive Car
Services**

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Docket No. C-2011-2271305

EXCEPTIONS OF THE BUREAU OF INVESTIGATION AND ENFORCEMENT



Adam D. Young, Esq.
Prosecutor

Wayne T. Scott, Esq.
First Deputy Chief Prosecutor

Counsel for the Bureau of Investigation
and Enforcement

P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 787-5000

Dated: November 16, 2012

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INTRODUCTION

The Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission), through its Prosecuting Attorneys, Adam D. Young, and Wayne T. Scott now files the following Exceptions to the Initial Decision of Administrative Law Judge Katrina L. Dunderdale (ALJ), which sustained the Complaint against Respondent Gary Polzot t/a Airport Executive Car Services (Respondent), but imposed a negligible civil penalty, and states as follows:

EXCEPTIONS

1. The ALJ erred in Ordering that Respondent pay a civil penalty in the amount of only \$50 for failing to file a vehicle list in 2010 (Initial Decision at 8) (Conclusion of Law No. 4) (Ordering Paragraph No. 2).

2. The ALJ erred in concluding that I&E did not meet its burden in justifying a civil penalty of \$250. (Ordering Paragraph No. 1).

3. The ALJ erred in concluding that it is the burden of I&E to present a witness to specify how it calculates a proposed civil penalty. (Initial Decision at 4).

4. The ALJ erred in concluding that no evidence exists as to Respondent's compliance history and in not taking judicial notice of readily available information, such as Respondent's compliance history, or the Commission approved Penalty guidelines. (Initial Decision at 7).

5. The ALJ erred in intimating that I&E was required to present for consideration the list of non-complaint motor carriers for the 2010 calendar year, which was created by I&E's witness. (Initial Decision at 4).

6. The ALJ made no Findings of Fact mitigating Respondent's conduct, which would warrant a reduction in the civil penalty from \$250 to \$50.

ARGUMENT

ALJ Katrina L. Dunderdale (ALJ) issued an Initial Decision that fined Respondent only \$50 instead of the requested \$250 fine in the Complaint. In support of this conclusion, the ALJ states that, (1) I&E failed to specify how it calculated that proposed civil penalty (I.D. at 4); (2) I&E presented no evidence concerning what penalty it thought should be imposed, why it should be imposed, or how the amount could or should be calculated (I.D. at 5).

The ALJ's reasoning in this regard is seriously flawed. The very filing of the Complaint demanding a \$250 civil penalty is evidence enough of "what penalty [I&E] thought should be imposed." (I.D. at 5). At that point, all that needs to be determined is whether I&E established a *prima facie* case and whether the penalty sought is permissible under the statute. In her Initial Decision the ALJ correctly found that I&E established a *prima facie* case but, for some reason, reduced the fine to nothing more than a slap on the wrist. Simply stated, it is our position that I&E established a *prima facie* case that Respondent violated the Public Utility Code, Respondent offered no

mitigating circumstances; therefore, the full requested civil penalty should have been awarded.

It is not incumbent upon I&E to present evidence as to how the fine is calculated. The only issue is whether the penalty recommended is permitted by law. The ALJ, apparently, doesn't appreciate this or the potential effects of her decision. It appears from this Initial Decision that it is the expectation of the ALJ that I&E present several witnesses to make its case in chief, when in reality, only one is needed. Thus, the application of the ALJ's Initial Decision provides for an absurd result.

If the Commission follows the ALJ's Initial Decision, it would frustrate I&E's ability to prosecute these cases and cost the Commission and its employees unnecessary time and considerable expense. Using this case as an example, I&E would have to have one witness testify that Respondent did not file its vehicle list with the Commission as required. Then a second witness with knowledge of the *PUC Motor Carrier Services & Enforcement Penalty Guidelines, approved April 1, 2011 (Penalty Guidelines)* would have to testify as to the existence of the guidelines themselves, how they were created, the civil penalty suggested therein and, of course, the penalty guidelines would have to be offered as an exhibit. Then a third witness would have to testify as to Respondent's compliance history and any other relevant factors in 52 Pa. Code § 691201(c), and of course any and all documents relating to prior complaints would have to be offered as exhibits as well. Accordingly, three witnesses and one prosecutor from I&E would have to travel to various venues throughout the Commonwealth, with all of the associated and

time and expense, to present a case which could, in many cases, be finished in 30 minutes. This is absolutely unnecessary.

These witnesses and exhibits are superfluous and unnecessary to the successful resolution of cases such as this. No witness need testify as to the proposed fine, how it was calculated, or why it is justified. Section 3301(a) of the Public Utility Code authorizes the Commission to levy civil penalties of up to \$1,000 per violation. However, in assessing civil penalties for motor carrier complaints, the Commission's Bureau of Technical Utility Services (TUS) follows Commission-approved penalty guidelines. *See* 66 Pa. C.S. § 3301(a); *Penalty Guidelines* (attached as Attachment A). In this case, TUS followed the penalty guidelines in assessing a civil penalty of \$250 for failure to file a vehicle list, in violation of 52 Pa. Code § 29.314(c). As indicated on page four (4) of the penalty guidelines, failure to file a vehicle list is listed as a \$250 violation. (*See Penalty Guidelines* page 4 (approved 4-1-2011)). Although TUS has the authority to levy civil penalties of up to \$1,000 per day that the violation continues, it generally follows the penalty guidelines to ensure consistency and fairness among companies committing similar offenses. In this case, TUS followed the penalty guidelines and proposed civil penalties consistent with the Commission's approved penalty guidelines and consistent with the Commission's actions in similar cases. The ALJ, for some unknown reason, decided to ignore the Commission guidelines, ignore Commission precedent, and ignore the statute.

The ALJ then suggests that no evidence was presented of Respondent's compliance history, therefore, none exists and a finding cannot be made. This assertion is equally ridiculous. Under 52 Pa. Code § 5.408(a), the ALJ can take judicial notice of facts. The compliance history of Respondent is a matter of public record on file with the Commission and can be taken into account by the ALJ *sua sponte* or upon request. Therefore, there is sufficient evidence of Respondent's compliance history; one need only take the time to look.

The ALJ then erred in concluding that I&E was required to present for consideration the list of non-complaint motor carriers for the 2010 calendar year, which was created by I&E's witness. I&E's witness, Barry Keener, testified at length about how the vehicle lists are received, compiled into a list, how the list of all received vehicle lists is compared to a master list of all carriers, and how complaints are generated against those carriers that didn't file a vehicle list. Mr. Keener testified that he is the person that receives the vehicle lists and is the creator of the spreadsheet of received vehicle lists. He further testified that he did not receive a vehicle list from Respondent in 2010. Presenting the actual spreadsheet with all the other compliant or non-compliant carriers is unnecessary, especially when there is no evidence to the contrary and, in fact, the Respondent admitted on the record that he didn't file a vehicle list in 2010, claiming he didn't know he had to file one annually. Therefore, the only material fact is that the Respondent did not file that list. Interestingly, though, Respondent filed one in 2007 and 2009, assuming incorrectly, that he had been sent a reminder by the Commission to do so.

Finally, the ALJ didn't make any Findings of Fact to support mitigating the civil penalty to \$50. Nor did Respondent offer any testimony that would warrant mitigating the civil penalty. The ALJ does, at one point, state that Respondent "testified in a sincere manner" as to the actions he did and did not take. (I.D. at 7-8). However, the ALJ went on to state that "Respondent admitted ... he did not act promptly and voluntarily to correct the cited violations." (I.D. at 7). This latter fact is indicative of Respondent's lackadaisical attitude regarding regulatory compliance, and weighs in favor of the full fine amount.

The Commission expended significant resources in prosecuting this case, only to have the recommended civil penalty reduced to a negligible amount. I&E's attorney attempted to contact Respondent in June to discuss the case and possible amicable resolution, but Respondent did not return the phone call, thereby necessitating the time and expense of a full hearing. Respondent was rewarded for this behavior by reducing the penalty to an amount that is probably little more than a long fare. At the hearing Respondent offered no mitigating factors, and readily admitted not filing a vehicle list in 2010. Respondent even admitted he didn't take immediate steps to correct the violation after being served with a Complaint. And yet for reasons unknown the ALJ recommends a \$50 civil penalty.

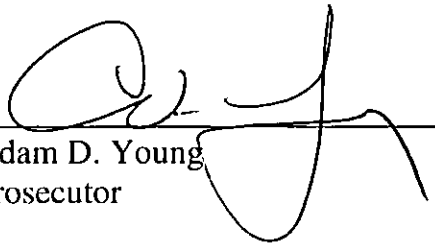
If the commission denies these exceptions and does not modify the ALJ's Initial Decision it will send a message to other carriers that they can ignore the commission's regulations, admit the violation, and receive no more than a "slap on the wrist." It will be

worth it to carriers to be able to ignore the Commission's regulations for a mere \$50.00. Certainly, fines such as those imposed by the ALJ in this case will deter no one.

CONCLUSION

For the foregoing reasons and for the reasons set forth in these Exceptions, I&E respectfully requests that the Commission issue an Opinion and Order granting these Exceptions and imposing the requested civil penalty of \$250.

Respectfully submitted,



Adam D. Young
Prosecutor

Wayne T. Scott
First Deputy Chief Prosecutor

Counsel for the Bureau of Investigation and
Enforcement of the Pennsylvania Public Utility
Commission

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ATTACHMENT A

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**PA PUBLIC UTILITY COMMISSION
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PENALTY GUIDELINES

PUC Motor Carrier Services & Enforcement

(\$10,000 cap on complaints, unless safety related)
(fine amount format)

Certificate Cancellation plus \$1000 per violation per day
(this is the maximum fine permitted)

Operating while certificate is under suspension –
when a lapse in insurance coverage occurred. 52§32.2, 52§32.11, 66§501(c)

Certificate Cancellation plus \$500

Failure to file evidence of insurance –
no evidence of operating during suspension. 52§32.2, 52§32.11

Failure to pay past due fines. 66§501(c)

Failure to pay past due assessments. 66§510

Certificate Cancellation plus \$250

Failure to submit to SFR. 66§501(c) & 66§1501

Certificate Cancellation

Abandonment of service. 52§3.381(a), 66§1102(a)(2)

Failure to pass Safety Fitness Review. 66§501(c) & 66§1501

Failure to file tariff with rates based on: Meter – Taxis 52§29.314(b)(6)
Time – Limos 52§29.334
(after one complaint adjudication for same violation)

PENALTY GUIDELINES

(continued)

\$1000 per violation

All Critical* violations found during Bus/Truck Audits
(plus cancellation if over \$10,000)

| | | |
|---|--|-----------------|
| False documentation to cover violations. | Logs - | 52 §29.313(c) |
| | Receipts - | 52 §29.313(f) |
| | Character - | 66 §1501 |
| Operating without holding a certificate of public convenience. (Maximum \$1,000 per complaint) (The carrier's vehicle registration will also be suspended by PDOT.) | | 66§1101 |
| Disqualified driver operated a vehicle. (convicted of felony or misdemeanor relating to Suitability to provide safe and legal service). | | 52§29.505(c) |
| Disqualified hhgs worker. | | 52§31.134(c) |
| Controlled substance/alcohol found during roadside inspections or investigations. | Alcohol | 52§29.506 |
| | Controlled Substance | 52§29.507 |
| Household Goods violations - | | |
| Failure to relinquish goods upon payment of estimate + 10% or \$25. | | 52§31.123 |
| Disqualified employee (convicted of felony or misdemeanor relating to suitability to provide safe & legal service) packed/unpacked, loaded/unloaded, or operated a vehicle. | | 52§31.134(c) |
| Unauthorized transportation (service type violation only; Example - limos performing taxi service). | All types. | 66§1102 |
| | Limo as taxi - no advance order for service. | 52§29.332(1) |
| | Limos soliciting passengers. | 52§29.332(3) |
| | Meter in limo. | 52§29.334 |
| Household goods carriers - no weight tickets for moves over 40 miles - if found arising from a consumer complaint about overcharge. | | 52§31.125 |
| Operating Out-Of-Service vehicle before being repaired. | | 52§29.406(e) |
| No meter in taxi. | | 52§29.314(b)(1) |
| Inoperative meter. | | 52§29.314(b)(7) |

* Critical Violations are those which pose an imminent hazard and have the greatest potential to cause or contribute to an accident.

PENALTY GUIDELINES

(continued)

\$500 per violation per day

| | | |
|--|--|--|
| Operating while under suspension for insurance – no lapse in coverage. | | 52§32.2, 52§32.11, 66§501(c) |
| Any refusal of service. | | 52§29.313(a) |
| Lack of control of transportation (leasing authority to others or to drivers). | passenger, except taxi taxi | 52§29.101(a)(5) 52§29.101(f)(2)(i) |
| Inadequate, unreasonable service – major violations: (not showing up, more than ½ hr late, etc. – fine will be \$500). (for minor violations of unreasonable, unsafe service: smoking, unsafe cell phone usage while customer in vehicle, etc. – fine will be \$250). | | 66§1501 66§1501 |
| All Serious** violations (except hrs of service) found during Bus/Truck Audits. | | |
| Tariff overcharge violation. (No refunds ordered under \$10) (if an audit – undercharge violations due to fuel surcharge, one fine for entire audit) See \$250 page also. | All types PT Taxi GP AT HHG | 66§1303 52§29.255 52§29.314(b)(6) & 29.316 52§29.324 52§29.343 52§31.27 |
| Failure to cooperate with an officer's investigation. Each day is a separate violation, with a maximum penalty of \$10,000/month of not producing documents requested during investigation or refusing to allow investigation. (20 working days x \$500) | | 66§505 |
| Void in service longer than 5 days w/o notifying Commission. | | 52§29.62 |
| False Record of Duty Status violations found on random inspections or investigations. | | 52§29.508 (a)(2) |
| Unauthorized transportation (outside area). | | 66§1102 |
| Over-aged vehicle. | Taxi Limo | 52§29.314(d) 52§29.333(e) |

** Serious Violations are those which indicate the carrier has ineffective safety management controls and/or regulatory non-compliance problems attributing a high probability to cause or contribute to an accident.

PENALTY GUIDELINES

(continued)

\$250 per violation

Hours of Service violations (4 or more) found during Bus/Truck Audits.

| | |
|--|--------------------------|
| Tariff undercharge violations (except limousines or GP-15). *** All types. | 66§1303 |
| PT | 52§29.255 |
| Taxi | 52§29.314(b)(6) & 29.316 |
| AT | 52§29.343 |
| HHG | 52§31.27 |

Taxi – no tariff submitted with rates based on meter. 52§29.314(b)(6)

Limos charging rates other than those based on time
OR no tariff submitted with rates based on time. 52§29.334

Invalid State Inspection. 52§29.405

No dome light on taxi. (see pg 5 for non-illuminated dome light) 52§29.314(e)

No criminal history record on driver. 52§29.505(a)
(see next page for no **current** criminal history record
and for no driver history record)

Household Goods Carriers Violations:

| | |
|---|--------------|
| Information for Shippers not provided to shipper 48 hours prior to move. | 52§31.121(c) |
| Estimated Cost of Service not provided to shipper 48 hours prior to move. | 52§31.122(a) |
| Bill of Lading not provided to shipper within 15 days of move. | 52§31.132(b) |
| Insurance Claim violations. | 52§32.16 |
| No criminal history record on employees. (see next page for no current criminal history record) | 52§31.134(a) |

Failure to File Assessment Report. 66§510(b)

| | | |
|--|------|--------------|
| No vehicle list filed. | Taxi | 52§29.314(c) |
| (See next page for list filed with missing info) | Limo | 52§29.333(d) |

***Note to Specialist: To impose a penalty, the undercharge must be more than 10% and an informal complaint investigation or audit must have been involved.

PENALTY GUIDELINES

(continued)

\$200 per violation

Operating while driver's motor vehicle license is under suspension, revoked or expired. 52§29.502 & 75§1543(a)

\$100 per violation

| | | |
|-------------------------|------------|-----------|
| Tariff undercharges***. | All types. | 66§1301 |
| | GP 11-15 | 52§29.324 |
| | Limo | 52§29.334 |

Non-illuminated dome light when required or dome light not visible from 100 ft front and rear (example: obscured by ad) - (taxi) 52§29.314(e)

No driver history obtained. 52§29.504
No **current** criminal history obtained. 52§29.505(b) or (a) if initial one

Hours of Service violations (1-3) found during Bus/Truck Audits.

Minor**** violations (1st group of 3 + each subsequent violation) found during Bus/Truck Audits.

Out of Service***** Safety violations 67§229.16 or 231.9
(one fine per type of violation per vehicle). (Example: door violation)

Non-Out of Service***** Safety violations (1st group of 5). 67§229.14 or 231.7
Exception: no Medical Certificate or expired - \$100 each 52§29.508(a)(1) & 52§37.204(3)
Who must have one 49CFR§391.45(b)
May not operate 49CFR§391.41(a)

| | | |
|---|------|--------------|
| Vehicle list missing required information. (See previous page for NO vehicle list filed) | Taxi | 52§29.314(c) |
| | Limo | 52§29.333(d) |

***Note to Specialist: To impose a penalty, the undercharge must be more than 10% and an informal complaint investigation or audit must have been involved.

**** Minor Violations are those which indicate the carrier has ineffective safety management controls or regulatory non-compliance problems. Example: failing to maintain a driver qualification file on each driver employed containing each of the items required for the specified time period.

***** The OOS Criteria for small vehicles is based upon the rejection criteria from the PA DOT's Vehicle Equipment and Inspection standards, 67 Pa. Code §175.

PENALTY GUIDELINES

(continued)

\$100 per violation (continued)

Household Goods Carriers -

| | | |
|--|---|--------------|
| Information for Shippers - | not retained by carrier | 52§31.121(b) |
| | no shipper signature | 52§31.121(a) |
| | Commission supplied form not used | 52§31.121(a) |
| Estimate - | not maintained by carrier | 52§31.122(b) |
| | required information missing | 52§31.122(a) |
| Underestimate Report - | not filed | 52§31.124 |
| No weight tickets for moves over 40 miles (if violation found during audit) | | 52§31.125 |
| Inventory list or waiver - | not prepared before shipment loaded (under 40 miles) | 52§31.133(b) |
| No current criminal history record on employee. | | 52§31.134(b) |

| | | |
|---|--------------------------|--------------|
| ***** Passenger Service vehicle violations. | Unclean vehicle | 52§29.403(2) |
| | No heater | 52§29.403(3) |
| | Unsuitable/unclean trunk | 52§29.403(4) |
| | Dents/gouges exterior | 52§29.403(6) |
| | Unmatched wheel covers | 52§29.403(7) |
| | No air conditioning | 52§29.403(8) |
| | Damaged/unsecured seats | 52§29.403(9) |
| Shortest practical route not used. | | 52§29.313(b) |
| Under-age driver. | | 52§29.503 |

***** One fine per type of violation per vehicle on random inspections, one fine per violation for entire fleet on annual inspections.

PENALTY GUIDELINES

(continued)

\$50 per violation

Non-OOS safety violations (6th or more).

| | | |
|-------------------------------------|----------------------------|----------------------------|
| *****Markings violations. | Passenger | 52§29.71 |
| | Property | 52§31.33 |
| Advertising not on roof. | | 52§29.402(3) |
| Certificate # not on advertisement. | | 52§21.2 |
| *****Administrative violations. | | |
| Logs - taxi | | 52§29.313(c) |
| Trip sheet - limo | | 52§29.335 |
| Lease – passengers | | 52§29.101(b)(2) |
| Lease – property | | 52§31.32(c)(2)(vii) |
| Receipt – taxi | | 52§29.313(f) |
| Fare posting – taxi | | 52§29.316(c) |
| Consumer info | Decal | taxi 52§29.318 |
| | Decal or receipt | scheduled route 52§29.306 |
| | Decal or receipt | airport transfer 52§29.344 |
| | Decal or receipt | paratransit 52§29.356 |
| | Decal, receipt or contract | limo 52§29.336 |

***** One fine per type of violation per vehicle on random inspections, one fine per violation for entire fleet on annual inspections.

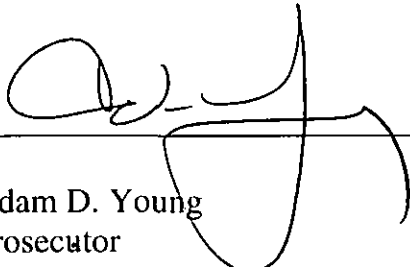
NOTE: All fines are doubled if the same safety violation is found during another inspection before it has been corrected.

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document, Exceptions of the Bureau of Investigation and Enforcement, in accordance with the requirements of 52 Pa. Code § 1.54 *et seq.* (relating to service by a participant).

Notification by first class mail addressed as follows:

GARY POLZOT
T/A AIRPORT EXECUTIVE CAR SERVICE
P.O. BOX 60081
PITTSBURGH, PA 15211



Adam D. Young
Prosecutor
Attorney ID No. 91822

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