



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

IN REPLY PLEASE
REFER TO OUR FILE
C-2012-2334904

July 1, 2013

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. Scott A. Dechert t/a Distinctive Limousine Service;
Docket No. C-2012-2334904

Dear Secretary Chiavetta:

Enclosed for filing is the original copy of the **Exceptions** of the Bureau of Investigation and Enforcement in the above-captioned proceeding. Copies of the Exceptions have been served in accordance with the attached Certificate of Service.

Sincerely,

Stephanie M. Wimer
Prosecutor

Enclosures

cc: Honorable Susan D. Colwell
Per Certificate of Service

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BEFORE THE
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PA PUC
SECRETARY'S BUREAU

Pennsylvania Public Utility Commission :
Bureau of Investigation and Enforcement :

v. :

Docket No. C-2012-2334904

Scott A. Dechert :
t/a Distinctive Limousine Service :

EXCEPTIONS OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT

Pursuant to Section 5.533 of the Commission's regulations, 52 Pa. Code § 5.533, the Pennsylvania Public Utility Commission's ("Commission") Bureau of Investigation and Enforcement ("I&E") files the following Exception to the Initial Decision ("I.D.") of Administrative Law Judge ("ALJ") Susan D. Colwell issued on June 12, 2013.

I. Introduction

I&E is the entity responsible for enforcing compliance with the Public Utility Code and Commission regulations. See 66 Pa. C.S. § 308.2(a)(11) and *Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

This proceeding began on November 19, 2012, when I&E filed a complaint against Scott A. Dechert t/a Distinctive Limousine Service ("Distinctive" or "Respondent").¹ Distinctive is a jurisdictional public utility that provides passenger transportation services in its certificated territory. I&E's complaint alleged that

¹ I&E's complaint, which was served by certified mail, was returned as unclaimed. The complaint was re-served and eventually received by Distinctive.

Distinctive violated Section 510(c) of the Public Utility Code, 66 Pa. C.S. § 510(c), in that it failed to pay the amount it was assessed for the July 1, 2010 to June 30, 2011, and July 1, 2011 to June 30, 2012 fiscal years. I&E sought \$581 as payment for the delinquent assessments and a civil penalty of \$85, or 15% of the outstanding amount due.

On January 8, 2013, Distinctive filed a letter disputing that it received the Commission's assessment invoices for the 2010-2011 and 2011-2012 fiscal years. In the letter, Distinctive indicated that it would pay the outstanding assessment amount, but not the civil penalty.

In January 2013, the Commission's Fiscal Office received payment from Distinctive for the 2010-2011 and 2011-2012 fiscal year assessments. (Notes of Transcript p. 13, 18, hereinafter referred to as "N.T."). This payment did not include the civil penalty.

An Initial Hearing in this matter was held on April 30, 2013. Distinctive did not attend. (I.D. 2). At the hearing, I&E presented one witness and six exhibits, which were admitted into evidence, to show that Distinctive owed the assessments, received notice of those assessments, and failed to pay those assessments within 30 days after receiving notice. With respect to the civil penalty, I&E requested an amount of \$85, or 15% of the outstanding amount due, and noted that this civil penalty had been approved by the Commission in numerous orders regarding the same violation. (N.T. 20).

After the presentation of I&E's case, the presiding ALJ required counsel for I&E to present additional evidence on each factor and standard of the Commission's Policy Statement for evaluating litigated and settled proceedings. *See* 52 Pa. Code

§ 69.1201(c)(1)-(10).² Counsel for I&E did not have Distinctive's compliance history available at the hearing because it is the position of I&E that the compliance history and *Rosi* standards are not relevant to this type of proceeding. However, I&E researched it and offered to provide this information by letter filed with the Commission's Secretary's Bureau. (N.T. 23, 24). This was acceptable to the presiding ALJ, who gave counsel one week to provide the compliance history. *Id.*³

The presiding ALJ subsequently issued the I.D., which affirmed I&E's proposed civil penalty only after applying each factor and standard of the Commission's Policy Statement for evaluating litigated and settled proceedings. *See* 52 Pa. Code § 69.1201. (I.D. 8-13).

I&E files this Exception because we disagree with the application of the factors in these guidelines, most notably a utility's regulatory compliance history, to cases alleging a failure to pay the Commission's assessment.

² This standard was developed in *Joseph A. Rosi v. Bell-Atlantic – Pennsylvania, Inc. and Sprint Communications, L. P.*, Docket No. C-00992409 (Order entered March 16, 2000).

³ In the I.D., the ALJ indicates that the record was left open for the submission of a late-filed exhibit. (I.D. 2). However, the record closes at the conclusion of the hearing unless otherwise directed by the presiding officer or the Commission. 52 Pa. Code § 5.431. During the hearing, there was no direction that the record would be left open. Further, at the hearing, the ALJ and counsel for I&E discussed that I&E would provide Distinctive's compliance history by filing a letter with the Secretary's Bureau. (N.T. 23, 24).

II. Exception

The ALJ Erred In Applying The Factors That Are Established In A Policy Statement For The Purpose Of Evaluating Whether A Civil Penalty Is In The Public Interest In Cases Alleging A Failure To Pay The Commission's Assessment

At the outset, I&E appreciates that the civil penalty it requested was affirmed and believes that the ALJ's decision is generally well-reasoned. However, I&E excepts to the ALJ's application of these factors and standards in litigated cases alleging a failure to pay a statutorily required assessment when: (1) I&E requested the same civil penalty in each case alleging a failure to pay an assessment; and (2) the Commission has upheld the civil penalty. I&E seeks this clarification because the Commission's Policy Statement at 52 Pa. Code § 69.1201 is not a binding regulation. *See Borough of Pottstown v. Pa. Mun. Ret. Bd.*, 712 A.2d 741 (Pa. 1998) (holding that "statements of policy" or agency pronouncements are not intended to bind the public and agency personnel, but rather, merely express an agency's tentative and future intentions). For the reasons that are explained in greater detail below, I&E respectfully submits that the factors in the Policy Statement should not be interpreted to be binding or considered to be relevant when determining a civil penalty in cases involving a failure to pay an assessment.

A. Significance of Failing to Pay a Commission Assessment

I&E asserts that unpaid assessment cases should be viewed differently from prosecutions alleging other regulatory violations, such as motor carrier safety violations, due to the financial ramifications to the Commission's budget. Each year, the Commission's budget is appropriated before assessments are issued. *See* 66 Pa. C.S.

§ 510. The Commission depends on receiving assessments to fund its operations and if a public utility fails to timely pay its assessment, the Commission's budget is adversely affected.

Shortly after I&E was created,⁴ it began working with the Fiscal Office of the Commission's Bureau of Administrative Services to enforce the collection of delinquent assessments. When the Fiscal Office gave I&E a list of over one hundred utilities that failed to pay their assessments, it was imperative for I&E to initiate enforcement proceedings to seek collection of the assessments, no matter how small the outstanding amount may be, because the Commission's budget relies on receiving this money.

B. Commission Precedent Exists to Impose a Uniform Civil Penalty in Outstanding Assessment Cases

Since 2012, I&E has filed numerous complaints against public utilities that failed to pay their assessment. In each complaint, I&E sought the same civil penalty of 15% of the unpaid assessment amount. I&E argues that a civil penalty of 15% of the outstanding amount due is a reasonable fit for the violation because it is enough to deter a utility from failing to pay the Commission's assessment in the future, but not so much as to interfere with a utility's business. *See F.R. & S. v. Dep't of Env'tl. Res.*, 761 A.2d 634, 639 (Pa. Cmwlth. 2000) (noting that a penalty does not reasonably fit the violations where it would strike at one's conscience as being unreasonable). Further, I&E uniformly applied this civil penalty to each utility with an unpaid assessment. Thus, no discriminatory enforcement occurred.

⁴ *See Implementation of Act 129 of 2008; Organization of Bureaus and Offices*, Docket No. M-2008-2071852 (Order entered August 11, 2011).

I&E's civil penalty of 15% of the outstanding assessment amount due was upheld by the Commission on many occasions,⁵ including an unpaid assessment case that was litigated.⁶ Thus, a strong Commission precedent exists in finding that this uniform civil penalty is appropriate and in the public interest.

⁵ *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. K.G. Trucking, LLC*, Docket No. C-2012-2327785 (Order entered February 14, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Potoka Trucking, Inc.*, Docket No. C-2012-2327789 (Order entered February 28, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Jodie L. Binner t/a JRSB Hauling*, Docket No. C-2012-2318302 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Anthony Rodilosso*, Docket No. C-2012-2318060 (Order entered March 14, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Wills Trucking, Inc.*, Docket No. C-2012-2318070 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Eugene R. Mowery*, Docket No. C-2012-2318088 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. John R. Pierce*, Docket No. C-2012-2318094 (Order entered March 26, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Andres Rolando Hernandez Diaz*, Docket No. C-2012-2317467 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Floyd C. Matthews t/a F.C. Matthews Trucking*, Docket No. C-2012-2316193 (Order entered November 8, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Ralph J. Knott*, Docket No. C-2012-2316006 (Order entered December 5, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Hathaway Specialized Hauling, Inc. t/a Fantasia Machinery Transport*, Docket No. C-2012-2325066 (Order entered March 14, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. North East Transfer, Inc.*, Docket No. C-2012-2315998 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Beverly A. Hall and Rich Lengel t/a Lemirage Limousine*, Docket No. C-2012-2315795 (Order entered January 24, 2013); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Eastern Connection Operating, Inc.*, Docket No. C-2012-2313522 (Order entered February 28, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Walter H. McKeon, Inc.*, Docket No. C-2012-2312445 (Order entered February 28, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Trimac Transportation East, Inc.*, Docket No. C-2012-2311750 (Order entered December 20, 2012); *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Lower Bucks Transportation Service, Inc.*, Docket No. C-2012-2310181 (Order entered December 20, 2012); and *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Majesty Company, Inc.*, Docket No. C-2012-2310196 (Order entered December 5, 2012).

⁶ See *Bureau of Investigation and Enforcement v. Ultimate Medical Services, Inc.*, Docket No. C-2012-2310173 (Order recognizing finality of Initial Decision entered March 26, 2013);

C. The Application of the Factors and Standards for Evaluating a Civil Penalty in Unpaid Assessment Cases Is Illogical Since the Only Variable Even Remotely Applicable Is the Utility's Compliance History

I&E submits that the only question that needs to be answered with relation to the civil penalty in these particular cases is whether the respondent timely paid the assessment. Once that is established, no further inquiry is necessary. However, even if one would attempt to apply the other factors, a practical application of the standards for evaluating a civil penalty in an unpaid assessment case demonstrates that the sole factor that will vary is a utility's compliance history. This is so because the factors in the Policy Statement are largely used to determine whether a civil penalty is appropriate compared to the alleged misconduct. In all failure to pay assessment cases, the conduct is the same.

For example, the conduct in failing to pay the Commission's assessment is serious in that it is willful. 52 Pa. Code § 69.1201(c)(1). There will never be consequences that result in personal injury or property damage in an unpaid assessment matter. 52 Pa. Code § 69.1201(c)(2). Failing to pay a Commission assessment is negligent. 52 Pa. Code § 69.1201(c)(3). Whether a utility modifies its internal practices and procedures, such as training and improving company techniques, is not relevant in a case alleging a failure to pay the Commission's assessment. 52 Pa. Code § 69.1201(c)(4). No customers are or will be affected. 52 Pa. Code § 69.1201(c)(5). Failing to pay an assessment does not require an extensive investigation that depends on cooperation from the utility. 52 Pa. Code § 69.1201(c)(7). A civil penalty based on a percentage of the utility's outstanding assessment balance will coincide with the size of the utility and the revenues that it earns. 52 Pa. Code § 69.1201(c)(8). The civil penalty in unpaid assessment prosecutions has

been the same and has been upheld in numerous Commission decisions, which are mentioned above. 52 Pa. Code § 69.1201(c)(9).

The sole variable is consideration of a utility's compliance history, pursuant to 52 Pa. Code § 69.1201(c)(6). I&E respectfully submits that this factor should bear no weight in prosecutions alleging a failure to pay the Commission's assessment. A failure to pay the Commission's assessment is different than other regulatory violations. A utility's obligation to pay the Commission's assessment on an annual basis is determined by statute and a failure to pay an assessment directly impacts the Commission's budget. The presence or absence of any past regulatory misconduct should not impact this obligation. Similarly, the presence or absence of prior regulatory violations should not increase or lessen the civil penalty for failing to pay an assessment. Simply put, whether a utility failed to file a vehicle list with the Commission, pursuant to 52 Pa. Code § 29.333(d), as was the case in the instant proceeding, should have no bearing on the amount of the civil penalty imposed in an unpaid assessment matter.

When an individual or business fails to pay its federal income tax, the Internal Revenue Service ("IRS") does not consider whether this person or business has paid taxes in a timely manner in previous years in determining whether to assess a penalty or the amount of the penalty. The IRS also does not consider whether an individual or business has a criminal history or committed other unlawful conduct in determining the amount of the tax penalty. Rather, the IRS imposes a penalty that consists of a percentage of the amount of the tax. *See* 26 USCS § 6651(a). The same standards should apply to the Commission's assessments.

Like unpaid federal income taxes, prosecutions involving a failure to pay the Commission's assessment lend itself to a uniform civil penalty for several reasons. First, the conduct in all unpaid assessment prosecutions is the same and a uniform civil penalty is equitable in identical proceedings. Secondly, since the number of these prosecutions is often quite large, it is administratively more efficient for I&E to request a uniform civil penalty.⁷ Third, new public utilities and other regulated entities come under the Commission's jurisdiction each year. These companies have no compliance history and should not be in a better position than companies that have been certificated or licensed for longer periods of time with respect to the same violation - failing to pay the Commission's assessment.

I&E also believes that a proceeding involving a failure to pay an assessment is no different from other enforcement proceedings in which companies failed to pay statutorily required fees to the Commission. Recently, the Commission received responsibility for overseeing new duties that could lead to enforcement proceedings seeking the collection of fees. Under Act 13 of 2012, the Unconventional Gas Well Impact Fee Act, ("Act 13") producers with spud unconventional gas wells are required to pay an impact fee to the Commission by April 1 of each year. 58 Pa. C.S. § 2303. The Commission is then responsible for distributing fees to state and local governments. 58 Pa. C.S. § 2314. The Commission has the authority to enforce the producer's obligation to pay impact fees, including civil penalties without considering compliance history. 58 Pa. C.S. § 2310.

⁷ In 2012, I&E prosecuted over 100 formal complaints alleging a failure to pay the Commission's assessment. (N.T. 23).

Similarly, under Act 127 of 2011, the Gas and Hazardous Liquids Pipelines Act (“Act 127”), the Commission is charged with the duty to maintain a registry of all pipeline operators. 58 P.S. § 801.301. Pursuant to 58 P.S. § 801.301, the Commission developed an annual registration form and directed payment of a registration fee. Failing to register and pay the fee subjects the pipeline operator to civil penalties again, without considering compliance history. 58 P.S. § 801.502.

I&E believes that all prosecutions seeking collection of the same fee, whether it be a fee under Act 13 or Act 127, should carry a uniform civil penalty that is a reasonable fit for the violation and is designed to deter a company’s failure to pay the fee in the future. Application of the factors and standards set forth in the Commission’s Policy Statement at 52 Pa. Code § 69.1201 does nothing to assist in the evaluation of whether a civil penalty in fee-based cases is in the public interest. Act 13 producers and Act 127 pipeline operators have no compliance history with the Commission and compliance history should not have a place in the consideration of assessment prosecutions, such as the case at bar.

Finally, I&E respectfully submits that the practical effect of the Commission considering compliance history in these types of cases is to require I&E to research the compliance history of each utility that failed to pay a Commission assessment prior to issuing a complaint. This, in turn, would create a significant burden and unnecessary expense, not only on I&E, but the Fiscal Office as well. Moreover, this would cause further delay the Commission’s receipt of the money.

III. Conclusion

I&E respectfully requests that the Commission grant the foregoing Exception and permit the use of a uniform civil penalty in unpaid assessment cases of 15% of the outstanding assessment balance without requiring the prosecuting bureau to present evidence pertaining to each factor that is set forth in the Commission's Policy Statement at 52 Pa. Code § 69.1201.

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing document, Exceptions, upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Notification by First Class Mail:

Scott A. Dechert, President
Scott A. Dechert t/a Distinctive Limousine Service
1224 Oak Street
Lebanon, PA 17042

Notification by Electronic Mail:

Office of Special Assistants
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Stephanie M. Wimer
Prosecutor
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Bureau of Investigation and Enforcement

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Dated: July 1, 2013

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