**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held August 15, 2013

Commissioners Present:

Robert F. Powelson, Chairman

John F. Coleman, Jr., Vice Chairman

Wayne E. Gardner

James H. Cawley

Pamela A. Witmer

Pennsylvania Public Utility Commission, C-2011-2245312

Bureau of Transportation and Safety C-2011-2244900

v.

Blue and White USA, Inc. t/d/b/a

Altoona USA & Transfer

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of the Commission’s Bureau of Investigation and Enforcement (I&E) filed on January 7, 2013, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Mary D. Long, issued December 18, 2012. No Replies to Exceptions were filed. For the reasons set forth herein, we shall grant the Exceptions, in part, and modify the Initial Decision, consistent with this Opinion and Order.

**History of the Proceeding**

On July 29, 2011, the Commission’s Bureau of Transportation and Safety (BTS), now I&E,[[1]](#footnote-1) filed a Formal Complaint at Docket No. C-2011-2245312 (July 2011 Complaint) against Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer (Respondent). In the July 2011 Complaint, I&E stated that a Commission enforcement officer conducted an annual inspection of the Respondent’s vehicles on June 3, 2011. The officer found that one taxi failed to have operative air conditioning. I&E assessed a civil penalty of $100 for the violation. Tr. at 8. In the July 2011 Complaint, I&E alleged that the Respondent committed the following violation:

By failing to have operative air conditioning, violated 52 Pa. Code § 29.403(8). I&E staff’s proposed civil penalty for this violation is $100.00.

July 2011 Complaint at 2.

An Answer to this Complaint was filed on August 8, 2011.

On August 16, 2011, I&E filed a second Formal Complaint at Docket No. C‑2011-2244900 (August 2011 Complaint) against Respondent. The August 2011 Complaint alleged that, during an annual inspection of the Respondent’s vehicles on June 3, 2011, the officer found that another taxi did not have operative air conditioning and was missing a battery securement device. I&E assessed a civil penalty of $100 for each of these violations. Tr. at 8. In the August 2011 Complaint, I&E alleged that the Respondent committed the following violations:

1. By failing to [have] operative air conditioning, violated 52 Pa. Code § 29.403(8). I&E staff’s proposed civil penalty for this violation is $100.00.

2. By failing to have a secured battery in its vehicle while in operation, violated 52 Pa. Code § 29.402(1) and 67 Pa. C.S. § 175.66(n). I&E staff’s proposed civil penalty for this violation is $100.

August 2011 Complaint at 2.

An Answer to the August 2011 Complaint was filed on September 13, 2011.

An initial hearing was held on September 27, 2012. I&E was represented by counsel, presented the testimony of one witness, and sponsored one exhibit. The Respondent was not represented by counsel and therefore was not permitted to offer testimony or other evidence.[[2]](#footnote-2) During the hearing, I&E reported that it had reached a Settlement Agreement (Settlement) with the Respondent for the July 2011 Complaint.

The ALJ consolidated the two Complaints and directed I&E to file a memorandum of law in support of the penalty in the August 2011 Complaint, and a statement in support of the Settlement reached in the July 2011 Complaint, following the receipt of the transcript.

The record closed on December 3, 2012.

In an Initial Decision, issued December 18, 2012, the ALJ approved the Settlement of the July 2011 Complaint, and sustained the August 2011 Complaint as to the facts of the violations and dismissed that Complaint as to the assessment of a civil penalty. I.D. at 12-13. As previously indicated, I&E filed Exceptions on January 7, 2013. No Replies to Exceptions were filed.

**Discussion**

We begin by noting that neither Party has filed Exceptions with regard to the ALJ’s decision to approve the settlement of the July 2011 Complaint. We agree with the ALJ that this settlement is in the public interest, and we will approve it. With regard to the ALJ’s decision concerning the August 2011 Complaint, the only issue in dispute is the proper amount of the civil penalty. We will therefore focus our discussion on this issue.

**Legal Standard**

In this proceeding, the allegations concern the condition of the vehicles that the Respondent uses to provide service to the public. Therefore, the burden of proof is on the utility, the Respondent, to show that its service and facilities are adequate, efficient, safe and reasonable. 66 Pa. C.S. § 315(c). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied,* 529 Pa. 654, 602 A.2d 863 (1992). 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. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (1950). Additionally, this Commission’s decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & Western Ry. Co. v. Pa. PUC,* 489 Pa. 109, 413 A.2d 1037 (1980).

In the Initial Decision, ALJ Long made six Findings of Fact and reached five Conclusions of Law. I.D. at 3, 12-13. We shall adopt and incorporate herein by reference the ALJ’s Findings of Fact and Conclusions of Law, unless they are reversed or modified by this Opinion and Order, either expressly or by necessary implication.

As a preliminary matter, we note that any issue or Exception that we do not specifically address has been duly considered and will be denied without further discussion. It is well settled that we are not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corporation v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also*, *generally*, *University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

**ALJ’s Recommendation**

The ALJ stated that the facts regarding the August 2011 Complaint are straightforward. An annual inspection of the Respondent’s vehicles took place on June 3, 2011. A Commission Enforcement Officer inspected a vehicle referred to as “Cab No. 3.” He observed that the battery had no securement device, and that the air conditioning did not cool the air inside the vehicle to a temperature lower than the outside temperature. Failure to have operative air conditioning is a violation of the Commission’s Regulation at 52 Pa. Code § 29.403(8). Failure to have a battery securement device is a violation of 52 Pa. Code § 29.402(1). I.D. at 8.

The ALJ noted that I&E relies on an internal guidance document entitled “Penalty Guidelines” in order to determine a civil penalty for certain violations. The ALJ noted that, while such guidance may be useful for assessing penalties with consistency, in her opinion, the factors set forth in the Policy Statement at 52 Pa. Code § 69.1201 should guide the consideration of whether the assessment of a civil penalty for the two violations noted is reasonable and appropriate. I.D. at 9.

Section 3301 of the Public Utility Code (Code), 66 Pa. C.S. § 3301, authorizes the Commission to levy a civil penalty for violations of the Code, Commission Regulations, or Orders of the Commission. The maximum penalty permitted by statute is $1,000 per day for each violation.[[3]](#footnote-3) As noted by the ALJ, the Commission has a Policy Statement that sets forth ten factors which should be considered in determining a proper penalty for violations. 52 Pa. Code § 69.1201. The ALJ’s recommendation is garnered from the following analysis. I.D. at 9-11.

The first and second factors are whether the violations were of a serious nature and resulted in serious consequences. A serious violation of the Commission’s Regulation or a violation which results in personal injury or property damage may warrant a higher penalty. There is no evidence in the record as to whether these violations were serious. There is no evidence that the air conditioning was inoperative, or the battery securement device was missing, for a long period of time, or put the public safety at risk. *Id*. at 10.

Similarly, an intentional violation of the Regulations may merit a higher penalty. Here, there is no evidence that the Respondent intentionally allowed the air conditioning to become inoperative or knew about the lost battery securement device and failed to correct it. *Id*.

The fourth factor is whether the carrier made efforts to modify internal practices to address the conduct at issue and the amount of time it took the carrier to correct the violations once they were discovered. Here the Enforcement Officer testified that he provided an inspection report to the Respondent to inform it of the violations he found, but he did not offer any testimony that the Respondent failed to correct the violations in a timely manner. *Id*.

The fifth factor is the number of customers affected and the duration of the violation. There is no evidence that any customers were affected, or as noted above, that it took the Respondent a long time to correct the violations. *Id*.

The sixth and seventh factors are consideration of the carrier’s compliance history and cooperation with the Commission’s investigation. There is no evidence of the Respondent’s compliance history other than the July 2011 Complaint that was resolved by the Settlement Agreement. I&E avers that the Respondent cooperated with the Commission’s investigation of the inoperative air conditioning in the other taxi and acted in good faith in resolving the July 2011 Complaint. There is no evidence in the record that the Respondent acted differently in relation to the violations resulting from the inspection of Cab No. 3, which occurred on the same day. *Id*.

The final considerations are the amount of civil penalty necessary to deter future violations, past Commission decisions and other relevant factors. The ALJ found that deterrence is not a significant factor in considering these violations. There is no evidence that this carrier is a habitual violator or lacks the ability and intent to comply with Commission regulations. The ALJ was further persuaded by the fact that the Respondent’s President travelled from Altoona to Pittsburgh to represent it at the hearing on what appear to be minimal violations and minimal penalties. A carrier who did not have respect for the Commission and the importance of compliance with the Commission’s regulations would likely not have made that trip. *Id*. at 10-11.

Viewed in totality, the ALJ concluded that it is not necessary or appropriate to assess a civil penalty in this case. Although the Commission is authorized to assess a civil penalty, it is not required to do so. Indeed, the Commission does not require its jurisdictional utilities to be perfect or to operate flawlessly. The ALJ noted that there is no evidence that the Respondent has a history of violating Commission Regulations or that its President is insensitive to the Commission’s requirements. There is also no evidence that the annual inspection revealed violations in many of the taxis in the Respondent’s fleet. The violations noted in the inspection do not appear to have placed the public at any risk. The Respondent did agree to pay a penalty for a similar violation in another taxi in the July 2011 Complaint and cooperated with the Commission’s investigation. Further, the Respondent is now on heightened notice of the Commission’s equipment requirements for taxis. Therefore, according to the ALJ, there is no public purpose to be served by assessing further penalties for the violations cited in the August 2011 Complaint. *Id*. at 11.

**I&E’s Exceptions**

As previously noted, I&E states that the only issue is the proper amount of the civil penalty. The record was uncontradicted that the penalty requested in the Complaint by I&E, $200, was consistent with the Commission's penalty guidelines. I&E also argues that the Respondent appeared at the hearing, unrepresented, and did not offer any mitigating facts that would justify reducing the civil penalty. Subsequent to the hearing, I&E submitted a Memorandum in support of the $200 civil penalty. The Respondent did not submit any additional documentation contesting the $200 penalty. Exc. at 1-2.

I&E avers that the ALJ erred in placing the burden on it to establish the Respondent's state of mind or any other mitigating factors regarding the civil penalty reduction. Contrary to the ALJ's decision, the burden of proof is not on I&E, but on the Respondent. 66 Pa. C.S. § 315(b). It is not incumbent upon I&E to establish the wisdom of the Commission-approved penalty schedule. The appropriate penalty is established by looking to the Commission’s approved penalty guidelines, barring any mitigation that the Respondent may establish. I&E further states that, in this case, the Respondent failed to establish any mitigating factors that warrant deviating from the proposed penalty. Furthermore, it is the Commission's policy to impose the civil penalty recommended in the Complaint based on the penalty schedule. Exc. at 2-3, citing *Pa. PUC v. Tropiano Airport Shuttle,* Docket No. A-00110899C9601 (Order entered May 27, 1997).

I&E contends that, should the Commission adopt the ALJ's Initial Decision, as written, it will have the practical effect of rendering the transportation regulations virtually unenforceable. I&E would then need to prove a Respondent's state of mind and intention, when the mere proof of the violation should be sufficient to warrant a penalty. I&E also argues that the Commission has consistently applied a penalty schedule for certain violations. The ALJ in this case has elected to unilaterally ignore the Commission's guidelines and substitute her own. I&E opines that the ALJ found that the Respondent violated the regulations and, nonetheless, assessed no penalty. The Respondent committed the violations and should be penalized appropriately. I&E requests that the Commission sustain the Complaint and impose the civil penalty as requested. Exc. at 3-4.

**Disposition**

Based on our review of the record and the applicable law, it is clear that the Commission has jurisdiction over the Respondent’s operations, and, as such, that the Commission has the authority to impose civil penalties upon the Respondent for violations of the Commission’s Regulations. The Respondent received a Certificate of Public Convenience issued by the Commission on August 8, 2005, for call or demand authority, at Docket No. A-00119928.

It is clearly the role of I&E to institute prosecutions and to request civil penalties for alleged violations, in accordance with the Commission’s general guidelines. However, it is equally clear that the ALJ (and, upon review, the Commission) is not bound by the civil penalty requested by I&E. The ten factors listed in the Policy Statement are to be applied to the unique facts of each specific case, and the ALJ and the Commission will determine “if a fine for violating a Commission order, regulation or statute is appropriate” and, if so, the amount of that civil penalty. 52 Pa. Code § 69.1201.

Applying those factors in the instant case, we believe this case turns on “other relevant factors.” 52 Pa. Code § 69.1201(c)(10). The Respondent and I&E settled the July 2011 Complaint by agreeing to a $50 civil penalty in lieu of the $100 penalty initially requested by I&E for the Respondent’s failure to have operative air conditioning in the vehicle. We find that the same penalty should apply in the August 2011 Complaint, for the same violation. Similarly, we find a $50 penalty is appropriate for the failure to have a battery securement device in the vehicle. While we agree with the ALJ’s application of most of the factors set forth in the Policy Statement, we believe that a small penalty is warranted in this case to help deter future violations by this and other utilities. In short, we will impose a total civil penalty of $100 for the violations found at Docket No. C-2011-2244900. Therefore, we shall grant, in part, I&E’s Exception and modify the ALJ’s Initial Decision.

**Conclusion**

We have reviewed the record as developed in this proceeding, including the ALJ’s Initial Decision, and the Exceptions. Premised upon our review of the record, and consistent with this Opinion and Order, we shall grant, in part, the Exceptions and modify the ALJ’s Initial Decision; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of the Bureau of Investigation and Enforcement, filed on January 7, 2013, to the Initial Decision of Administrative Law Judge Mary D. Long, are granted, in part.

2.That the Initial Decision of Administrative Law Judge Mary D. Long, issued December 18, 2012, is modified by this Opinion and Order.

3. That the Settlement Agreement between the Bureau of Investigation and Enforcement and Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer at Docket No. C-2011-2245312 is approved.

4. That the Complaint of the Bureau of Investigation and Enforcement against Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer at Docket No.   
C-2011-2244900 is sustained.

5. That, in accordance with Section 3301 of the Public Utility Code, 66 Pa. C.S. § 3301, within thirty (30) days of entry of the instant Opinion and Order, Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer shall pay a civil penalty in the amount of $150 (less any monies already paid to the Commission). Said check or money order shall be made payable to “Commonwealth of Pennsylvania” and shall be sent to:

Secretary

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

6. That a copy of this Opinion and Order shall be served upon the Financial and Assessment Chief, Office of Administrative Services.

7. That a copy of this Opinion and Order shall be served on the Bureau of Investigation and Enforcement for monitoring.

8. That the Secretary’s Bureau shall mark this proceeding closed upon payment of the penalty described in Ordering Paragraph No. 5.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 15, 2013

ORDER ENTERED: August 15, 2013

1. By Order entered August 11, 2011, at Docket No. M-2008-2071852, the Commission reorganized this function of BTS into the new Bureau of Investigation and Enforcement. For purposes of consistency, this Opinion and Order shall use the term “I&E” throughout. [↑](#footnote-ref-1)
2. A corporation cannot represent itself in an adversarial Commission proceeding. 52 Pa. Code §§ 1.21 and 1.22. [↑](#footnote-ref-2)
3. 66 Pa. C.S. § 3301. [↑](#footnote-ref-3)