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November 25, 2013

Via FedEx Overnight Delivery

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
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Harrisburg, PA 17120

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

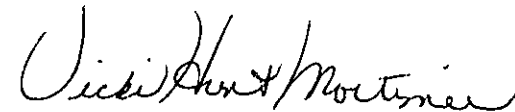
RE: PUC v YELLOW CAB CO. OF PITTSBURGH
Docket No.: C-2012-2249031
Our File No.: 12506

Dear Secretary Chiavetta,

Enclosed please find Replies of Respondent Yellow Cab Company to the Exceptions of the Bureau of Investigation and Enforcement for filing. Kindly time stamp the additional copy of this correspondence and return it to me in the envelope enclosed.

Please do not hesitate to contact me should you have any questions or need anything further from my office.

Sincerely,



Vicki H. Mortimer, Esq.

/clt

Enclosures

**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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PA PUBLIC UTILITY COMMISSION
SECRETARY'S BUREAU

PENNSYLVANIA PUBLIC UTILITY :
COMMISSION BUREAU OF INVESTIGATION :
AND ENFORCEMENT :

vs. :

YELLOW CAB CO. OF PITTSBURGH, :

Docket No. C-2012-2249031

**REPLIES OF RESPONDENT YELLOW CAB COMPANY
TO THE EXCEPTIONS OF
THE BUREAU OF INVESTIGATION AND ENFORCEMENT**

I. STATEMENT OF THE CASE

This action was commenced by Complaint filed by the Bureau of Investigation and Enforcement (the "Bureau") on or about July 26, 2013. The Bureau filed an Amended Complaint on or about August 6, 2012. The Bureau alleged that a Yellow Cab driver failed to accept a fare in violation of 52 Pa.Code §29.313(a);66 Pa.C.S. §1501. On or about August 30, 2013, Yellow Cab filed its Answer and New Matter, denying the material allegations of the Bureau's Amended Complaint, and averring that the driver did not refuse service because he was already committed to another fare.

A hearing was held in this matter before Administrative Law Judge (ALJ) Mary D. Long on September 5, 2013. ALJ Long issued her Initial Decision on or about October 24, 2013. ALJ Long found that there was no evidence that a driver of Yellow Cab improperly refused to provide taxi service. The Bureau filed its Exceptions to the Initial Decision on or about November 13, 2013.

Respondent Yellow Cab now presents its Replies in Opposition to those Exceptions. For the reasons that follow, the Findings of Fact and Conclusions of Law of Judge Long are amply

supported by the evidence of record, and the Exceptions of the Bureau of Investigation and Enforcement should be denied in their entirety.

II. REPLIES TO EXCEPTIONS

The Complaint in this matter alleges that a Yellow Cab driver failed to accept a fare in violation of 52 Pa.Code §29.313(a). That section provides that:

Required to provide service. A driver of a call or demand vehicle shall, at all times when on duty **and not engaged**, furnish trip service on demand to an orderly person for lawful purposes (emphasis added)

This was the only violation alleged by the Bureau.

The Bureau filed two Exceptions to the Initial Decision. The first does not specifically except to a particular Finding of Fact or Conclusion of Law. The second is directed to Conclusion of Law No. 2, which states: “There is no evidence that a driver of Yellow Cab improperly refused to provide taxi service....” It should be noted that the Bureau takes no exception to any of the Findings of Fact made by ALJ Long. ALJ Long specifically found that “Before arriving at the Amtrak Station Mr. Jones had accepted a fare from the Yellow Cab dispatcher to pick up a passenger at the Renaissance Hotel on 6th Avenue in downtown Pittsburgh for transport to the airport.” Finding of Fact No. 4. This is fatal to the Bureau’s case and its Exceptions, as there is no violation of 52 Pa.Code §29.313(a) if the driver is engaged. Therefore, ALJ Long correctly found that the Bureau did not prove its case and that there was no violation of Yellow Cab of 52 Pa.Code §29.313(a).

For the above reasons and those that follow, the ALJ was correct in finding that the Bureau did not prove its case because there was no violation by Yellow Cab’s driver. The Exceptions of the Bureau of Investigation and Enforcement’s Exceptions should therefore be denied.

REPLY TO EXCEPTION NO. 1

THE BUREAU'S EXCEPTION NO. 1 FAILS TO EXCEPT TO A SPECIFIC FINDING OF FACT OR CONCLUSION OF LAW AND SHOULD BE DENIED

With regard to Exception No. 1, it should be noted that the Bureau failed to except to a specific Finding of Fact or Conclusion of Law. It refers only to "p. 4" of the Initial Decision. 52 Pa.Code §5.533(b) provides that: "Each exception must be numbered and identify the finding of fact or conclusion of law to which exception is taken and cite relevant pages of the decision." Exception No. 1 should therefore be summarily denied and dismissed for failure to comply with 52 Pa.Code §5.533(b).

However, should the Commission deem Exception No. 1 to be procedurally sufficient, and to consider the merits of that Exception, Yellow Cab replies to Exception No. 1 as follows:

IN THE ALTERNATIVE, THE FINDING OF THE ALJ THAT THE BUREAU DID NOT OFFER ANY EVIDENCE TO REFUTE THE TESTIMONY OF YELLOW CAB'S WITNESS, MR. JONES, IS SUPPORTED BY THE RECORD

In its Complaint, the Bureau alleges that Enforcement Officer Christopher Urey conducted a follow-up interview with John Hooker in reference to a Complaint that Yellow Cab refused to render trip service to him on June 22, 2011. Amended Complaint at para. 3. At the hearing on September 5, 2013, the Bureau presented the testimony of Dr. John Hooker, the person who complained that he had improperly been denied service by Yellow Cab's driver, Charles Jones. The Bureau also submitted as evidence Dr. Hooker's mobile phone bill, showing the calls allegedly made to Yellow Cab that morning, as well as Mr. Jones' Trip Log for June 22, 2011.

The Bureau states that its burden of proof in this case, the preponderance of the evidence, is the “lowest evidentiary standard; a ‘more likely than not’ standard, and that the Bureau has only to meet this “minimal evidentiary standard.” The Bureau cites to Comm. v. Assorted Consumer Fireworks, 16 A.3d 554 (Pa.Cmwlt. 2011), citing Comm. v. \$6,425.00 seized from Esquilin, 880 A.2d 523, 555(Pa.2005). A review of the Assorted Consumer Fireworks opinion does not at any time refer to the preponderance of evidence standard as “minimal,” and does not cite to the Esquilin case. Of course, the preponderance of evidence standard is not so high as that of the reasonable doubt standard of criminal cases, but it does require “a greater weight of the proof.” Equal evidence on the part of the Bureau and the Respondent is not sufficient. Agostino v. Twp. of Collier, 968 A.2d 259(Pa.Cmwlt. 2009, citing Cmwlt. v. Williams, 557 Pa. 207, 732 A.2d 1167 (1999).

The Bureau forgets that this is a case where it has alleged **improper** failure to provide service. The crux of this matter is whether Mr. Jones was available at the time he was approached for service by Dr. Hooker. As stated by ALJ Long on p. 4 of the Initial Decision, “In this case, the testimony of Mr. Jones is that is that he was already engaged by a customer at the Renaissance Hotel. The BIE did not impeach his testimony or offer any other evidence to refute his testimony.”

None of the evidence proffered by the Bureau is sufficient to refute that evidence. Moreover, it is well settled that the issue of credibility of witnesses, and the weight to be given that testimony is within the purview of the presiding ALJ in an evidentiary proceeding before the Commission. The ALJ is the person who has the opportunity to observe the manner of testifying of the witnesses, and to evaluate their candor, intelligence, personal intent and bias or lack of it. Danovitz v. Portnoy, 161 A.2d 146 (1960).

As set forth in her Findings of Fact, the ALJ correctly found that before arriving at the Amtrak station, Mr. Jones had accepted a fare from the Yellow Cab dispatcher to pick up a passenger at the Renaissance Hotel for transport to the airport (Finding of Fact No. 4). The Bureau has filed no exception to this Finding of Fact. This Finding of Fact was based on Mr. Jones testimony, where he stated that when he was approximately seven minutes from downtown Pittsburgh with a fare, he got a call from the Yellow Cab dispatcher. The dispatcher gave him a fare for Sixth Avenue at the Renaissance. Mr. Jones testified that he was told to pick up the new fare immediately after he dropped off his other fare. N.T. 41. Mr. Jones told Dr. Hooker that he already had another fare when Dr. Hooker requested service. N.T. 40-41. This was not contested by the Bureau. As noted by the ALJ on p. 4, Dr. Hooker testified that Mr. Jones told him this when he approached Mr. Jones for service. N.T. 12.

The Bureau attempts to make much of Mr. Jones' Trip Log, which they fault for Mr. Jones' not documenting the trip to the Amtrak Station on June 22, 2013. As correctly noted by the ALJ at footnote 5 on p. 4 of the Initial Decision: "Although the complaint mentions Mr. Jones' failure to log a trip, a violation of the Commission's regulations was not charged on this basis..." In addition, it is not relevant to this matter whether Mr. Jones logged this trip. What is relevant is whether Mr. Jones had accepted a fare and was not available at the time that Dr. Hooker requested service. The ALJ also correctly noted in Footnote 5 on p. 4 of the Initial Decision: "...Nor did BIE allege a failure by Yellow Cab to provide taxi service in a timely manner to Dr. Hooker.

The ALJ obviously found Mr. Jones to be credible which is supported by the record. Mr. Jones, in response to ALJ Long's questions, answered that the service requested by Dr. Hooker to Regent Square would have earned him a fare of \$20 and a fare to the airport \$35. N.T. 45.

Mr. Jones also testified that in his world, a trip to Regent Square would have earned him a decent fare. N.T. 42. Mr. Jones also testified:

MR. MIDDLEMAN:

Q. If you had taken Mr. Hooker to Regent Square, do you think it would've taken 25 minutes out there...and then you'd have to come back in to get the other fare?

A. Right.

Q. It would have been there?

A. The fare would have been there...almost a full hour involved there.

Q. And in your experience, having done this since—

A. 1971.

Q. —1971, I thought I heard you say that you make, you make money if people are sitting in the back seat of your cab?

A. Well, if my wheels are moving, I'm making money.

N.T. 46.

There was no evidence to refute this testimony. The ALJ obviously accepted Mr. Jones' testimony, because there was no reason for him for him to turn down a "decent" fare of \$20 to take his chances that he might find another one. It is much more likely that Mr. Jones would not have turned down a fare unless he had already committed to another fare, and was therefore, unavailable.

For these reasons, Exception No. 1 should be summarily denied and dismissed for failure to comply with 52 Pa.Code §5.533(b). In the alternative, for the foregoing reasons, the finding of the ALJ that the Bureau did not offer any evidence to refute the testimony of Yellow Cab's witness, Mr. Jones, is supported by the record in this case, and Exception No. 1 should be denied.

REPLY TO EXCEPTION NO. 2

THE ALJ PROPERLY CONCLUDED THAT THERE WAS NO EVIDENCE THAT A DRIVER OF YELLOW CAB IMPROPERLY REFUSED TO PROVIDE TAXI SERVICE

In Exception No. 2, the Bureau takes exception to Conclusion of Law No. 2, *to-wit*: “There is no evidence that a driver of Yellow Cab improperly refused to provide taxi service. 52 Pa.Code §29.313(a); 66 Pa.C.S. §1501.” I.D. p. 4. The Bureau argues that the ALJ “ignored” the testimony of university professor, a PUC enforcement officer, and undisputed documentary evidence, and failed to specify why she did so.” Nothing could be further from the truth.

To the contrary, the ALJ listed seven (7) specific Findings of Fact, to which no exceptions were filed by the Bureau. The ALJ listened to the testimony, and in fact asked her own questions at the hearing as well. As noted above, it is the ALJ who is tasked with the job of evaluating the credibility of witnesses and the weight of evidence. And for the reasons stated above in response to the Bureau’s Exception No., 1, there was ample evidence in the record on which the ALJ could find that Mr. Jones was unavailable to provide service to Dr. Hooker, and that there was no improper failure on the part of Yellow Cab to provide service.

III. CONCLUSION

The Initial Decision, including the seven (7) Findings of Fact and Two (2) Conclusions of Law, are based on the substantial evidence of record. For the foregoing reasons, the Exceptions of the Bureau of Investigation and Enforcement should be denied, and the Initial Decision adopted by the Commission.

Respectfully submitted,

Yellow Cab Company of Pittsburgh

By: 

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Vicki Hunt Mortimer, Esquire
Attorneys for Yellow Cab Co. of Pittsburgh

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**Before The
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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|------------------------------------|---|---------------------------|
| PENNSYLVANIA PUBLIC UTILITY | : | |
| COMMISSION BUREAU OF INVESTIGATION | : | |
| AND ENFORCEMENT | : | |
| | : | Docket No. C-2012-2249031 |
| vs. | : | |
| | : | |
| YELLOW CAB CO. OF PITTSBURGH, | : | |

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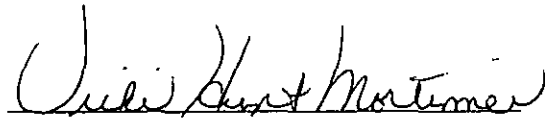
I hereby certify that I have this 25th day of November, 2013, served a true and correct copy of the foregoing Replies of Respondent Yellow Cab Company to the Exceptions of the Bureau of Investigation of Enforcement upon the persons listed below by electronic mail and first class mail, postage prepaid:

Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
400 North Street, 2nd Floor
Harrisburg, PA 17120

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Vicki Hunt Mortimer

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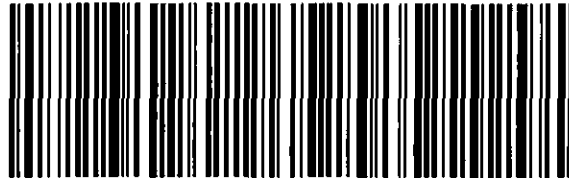
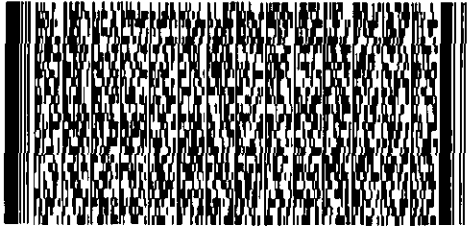
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