

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

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PENNSYLVANIA PUBLIC UTILITY	:	
COMMISSION, BUREAU OF	:	DOCKET NO. C-2012-2318101
INVESTIGATIONS AND ENFORCEMENT:	:	
Complainant	:	
v.	:	
	:	
GERMANTOWN CAB COMPANY	:	
	:	
Respondent	:	

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**RESPONDENT’S BRIEF**

Respondent, Germantown Cab Company, by and through its attorneys, Michael S. Henry, Esquire, hereby submits its brief in the above matter.

**I. STATEMENT OF JURISDICTION**

The Pennsylvania Public Utility Commission (“Commission”) has jurisdiction over this matter pursuant to 66 Pa. C.S. §502 (pertaining to enforcement proceedings by commission).

**II. QUESTIONS INVOLVED**

Whether the Commission has exclusive jurisdiction and regulatory authority over all of the call or demand service Respondent provides in the territory described in its certificate of public convenience, including the call or demand service it provides “within Philadelphia”?

Suggested answer: Yes.

Whether the present enforcement action violates Respondent’s Due Process rights because the Commission has determined that it does not regulate Respondent’s call or demand service “within Philadelphia,” which effectively reduces the service territory described in

Respondent's certificate of public convenience without notice, without a hearing, without findings, and without due cause shown?

Suggested Answer: Yes.

Whether the Complaint in this matter should be dismissed because the Commission has not given Respondent fair notice and warning of the nature and scope of its regulatory obligations based on its determination that it does not regulate the call or demand service Respondent provides "within Philadelphia?"

Suggested Answer: Yes.

Whether the Complaint in this matter should be dismissed based on the Commission's determination that it does not have jurisdiction over taxicab service in Philadelphia and the inspections in the present matter took place in Philadelphia?

Suggested Answer: Yes.

Whether the proposed fines in this matter should be reduced?

Suggested Answer: Yes.

### **III. STATEMENT OF THE CASE**

The Commission is an independent administrative agency empowered by the act of July 1, 1978, P.L. 598, No. 116, to implement, administer and enforce the Public Utility Code, 66 Pa. C.S. §§101 et seq. and regulations the Commission has promulgated pursuant thereto. The regulations that are the subject of the enforcement proceeding below appear in Chapter 29 (pertaining to Motor Carriers of Passengers) of Title 52 (pertaining to Public Utilities) of the Pennsylvania Code. 52 Pa. Code Ch. 29.

On September 5, 1996, the Commission, pursuant to Section 1103 of the Public Utility Code, 66 Pa. C.S. §1103, issued a certificate of public convenience to Germantown that

authorizes it to operate as a common carrier by motor vehicle to provide call or demand service in a territory that includes a portion of northwest Philadelphia and a portion of suburban Montgomery County. Germantown continues to operate under its PUC certificate up to the present date. Germantown does not hold a certificate of public convenience issued by the Philadelphia Parking Authority (“Authority”) and does not have authorization through the Authority to provide call or demand service in any part of Philadelphia. Germantown does not own any medallions.

In August of 2012, the Commission’s Bureau of Investigations and Enforcement (“I&E”) filed a Formal Complaint against Germantown. In the Complaint, I&E alleged that Commission enforcement officers conducted an annual inspection of Germantown’s vehicles on July 30<sup>th</sup> and 31<sup>st</sup>, 2012. The officers inspected 51 of Repondent’s 145 vehicles: thirty-nine at its facility in Philadelphia on July 30, 2012, and twelve at its facility in Norristown on July 31, 2012.

Six vehicles were cited for violations. All six were inspected “within Philadelphia.” The officer alleged that 2 vehicles had meter violations pursuant to 52 Pa. Code §29.314(b). Both were corrected before the conclusion of the inspection. They alleged that 3 vehicles had dome light problems pursuant to 52 Pa. Code §29.314(e), 2 vehicles had other lighting problems pursuant to 52 Pa. Code §29.402-1, 2 vehicles did not have proper consumer decals posted pursuant to 52 Pa. Code §29.318, and 1 vehicle did not have proper rates posted pursuant to 52 Pa. Code §29.316(c). The Officers also inspected records of 50 drivers and found no violations.

For these violations, I&E sought a total civil penalty of \$750.

On September 5, 2012, Germantown filed an Answer admitting that an inspection occurred, but denying the allegations in the Complaint. An initial hearing was held on

November 18, 2013. At the conclusion of the hearing, the ALJ requested briefs and specifically requested the parties to address the issue of the Commission's jurisdiction.

#### **IV. SUMMARY OF LEGAL ARGUMENT**

This case involves a Commission enforcement action against Germantown. The Commission has regulated Germantown since September 5, 1996, the date when it entered an order approving Germantown's application for a certificate of public convenience. This order has never been rescinded, amended or modified and it remains valid and enforceable to the present date.

The Commission's regulatory relationship with Germantown is defined by this order, specifically by the description of the class of authorized service and the territory in which it may be provided. Germantown asserts that the Commission violated this order in the present enforcement action when it determined that it only regulates Germantown's service "outside of Philadelphia." By making this determination, the Commission illegally reduced Germantown's authorized service territory without notice, without a hearing, without due cause shown, and without a written order, all in violation of Germantown's Due Process rights. Secondly, the Commission failed to give Germantown fair notice and warning as to how it should comply with regulations that apply to only a part of its authorized service territory and deprived it of the ability to prepare a proper defense to the charges, again violating Germantown's Due Process rights. Germantown seeks dismissal of the BIE's Complaint based on these Due Process violations.

#### **V. LEGAL ARGUMENT**

##### **A. A CERTIFICATE OF PUBLIC CONVENIENCE IS CENTRAL TO THE COMMISSION'S REGULATION OF A PUBLIC UTILITY AND DEFINES THE NATURE AND THE SCOPE OF THE**

## REGULATORY RELATIONSHIP BETWEEN THE COMMISSION AND A PUBLIC UTILITY

Central to the Commission's regulation of public utilities is a certificate of public convenience, which every utility must acquire before it can operate lawfully. *Ronald Cab, Inc. v. Pennsylvania Public Utility Commission*, 76 A. 3d 74, 75 (Cmnwlth. Ct. 2013) (citing 66 Pa. C.S. §1101 (public utility may supply service where a certificate of public convenience is “first had and obtained”).<sup>1</sup> Regulation of a public utility begins with the issuance of a certificate of public convenience, for which an applicant must demonstrate that there is a need. *Ronald Cab, Inc.*, supra at 75. The Public Utility Code establishes the procedure for obtaining a certificate of public convenience and requires the Commission to issue a written order and make a finding that the granting of the certificate is necessary or proper for the service, accommodation, convenience or safety of the public.” 66 Pa. C.S. §1103.<sup>2</sup>

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<sup>1</sup> Section 1101 states:

Upon the application of any proposed public utility and the approval of such application by the commission evidenced by its certificate of public convenience first had and obtained, it shall be lawful for any such proposed public utility to begin to offer, render, furnish, or supply service within this Commonwealth. The commission's certificate of public convenience granted under the authority of this section shall include a description of the nature of the service and of the territory in which it may be offered, rendered, furnished or supplied.

<sup>2</sup> Section 1103(a) states:

General rule. – Every application for a certificate of public convenience shall be made to the commission in writing, be verified by oath or affirmation, and be in such form, and contain such information, as the commission may require by its regulations. **A certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of the certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.** The commission, in granting such certificate, may impose such conditions as it may deem to be just and reasonable. In every case, the commission shall make such finding or determination in writing, stating whether or not its approval is granted. Any holder of a certificate of public convenience, exercising the authority conferred by

**a. THE DESCRIPTION OF THE CLASS OF SERVICE CONTAINED IN THE CERTIFICATE OF PUBLIC CONVENIENCE DETERMINES THE NATURE AND THE SCOPE OF THE REGULATIONS THAT APPLY TO THE PUBLIC UTILITY'S OPERATIONS**

When the Commission grants a certificate of public convenience it must contain a description of the class of service and the territory in which it may be offered, rendered, furnished or supplied. 66 Pa. C.S. §1101. The certificate of public convenience for a motor carrier must designate one of the classifications adopted by the Commission. 52 Pa. Code §29.13, establishes the following six classes of motor carrier service: scheduled route service, call or demand service, group and party service, limousine service, airport transfer service, and paratransit service.<sup>3</sup> The service classification designated in the certificate of public convenience

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such certificate, shall be deemed to have waived any and all objections to the terms and conditions of such certificate. (emphasis added)

<sup>3</sup> 52 Pa. Code §29.13 states as follows:

The following standard classification of types of service furnished by common carriers of passengers is adopted, and the following is hereby recognized as a standard class of common carrier service. The rights and conditions pertaining to a standard class of service are specified in Subchapter D (relating to supplemental regulations). A certificated service which does not completely correspond to a standard class may be governed, where practicable, by the regulations for the standard class to which it most nearly corresponds:

- (1) *Scheduled route service.* Common carrier service for passengers, rendered on either an exclusive or a nonexclusive basis, wherein the vehicles delivering the service operate according to schedules along designated routes.
- (2) *Call or demand service.* Local common carrier service for passengers, rendered on either an exclusive or a nonexclusive basis, where the service is characterized by the fact that passengers normally hire the vehicle and its driver either by telephone call or by hail, or both.
- (3) *Group and party service.* Common carrier service for passengers, rendered on an exclusive basis as charter service for groups or rendered on a nonexclusive basis for tour or sightseeing service and special excursion service.

determines the regulations that the Commission has a duty to enforce and with which the certificate holder must comply.<sup>4</sup> In this way, the service designation contained in the certificate of public convenience defines the nature and the scope of the regulatory relationship between the Commission and a motor carrier that holds the certificate.

**b. THE DESCRIPTION OF THE AUTHORIZED TERRITORY CONTAINED IN THE CERTIFICATE OF PUBLIC CONVENIENCE DETERMINES THE NATURE AND THE SCOPE OF TERRITORIAL RESTRICTIONS THE PUBLIC UTILITY MUST OBSERVE**

A certificate of public convenience for a motor carrier must also contain a description of the authorized service territory. A motor carrier's service is subject to territorial restrictions and it cannot provide service beyond the territory described in its certificate of public convenience without complying with these restrictions. For example, the Commission has adopted territorial restrictions applicable to call or demand service under 52 Pa. Code §29.312(4), which provides:

*Territorial restrictions, exclusive service.* When engaged in service on an exclusive basis, a call or demand vehicle may transport persons:

- (i) In the area authorized by the certificate.

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- (4) *Limousine service.* Local, nonscheduled common carrier service for passengers rendered in luxury-type vehicles on an exclusive basis which is arranged for in advance.
  - (5) *Airport transfer service.* Common carrier service for passengers rendered on a nonexclusive basis which originates or terminates at an airport.
  - (6) *Other services: paratransit, experimental.* Common carrier service for passengers which differs from service as described in any one of the five classes set forth in paragraphs (1)—(5) and is provided in a manner described in the certificate of public convenience of the carrier and is subject to restrictions and regulations are stated in the certificate of the carrier or in this chapter.

<sup>4</sup> For example, the Commission's regulations applicable to call or demand service are codified at 52 Pa. Code §§29.311-29.318.

(ii) From a point in the area authorized by the certificate to a point in this Commonwealth.

(iii) From a point in this Commonwealth to a point in the area authorized by the certificate, provided that the request for the transportation is received in the area authorized by the certificate.

The Commission has a duty to enforce these territorial restrictions based on the description of service area contained in certificate of public convenience and a public utility has a corresponding duty to obey them on that basis. In this way, the certificate of public convenience further defines the nature and scope of the regulatory relationship between the Commission and a motor carrier with a certificate.

**c. THE DESCRIPTION OF THE AUTHORIZED TERRITORY CONTAINED IN THE CERTIFICATE OF PUBLIC CONVENIENCE IS AN INTEGRAL PART OF THE UTILITY OWNER'S INVESTMENT OF PROPERTY IT EMPLOYS IN PUBLIC SERVICE AND MUST REMAIN STABLE FOR THE PROTECTION OF INVESTORS AND THE PUBLIC GOOD**

Furthermore, as the Commonwealth Court noted in *Western Pennsylvania Water Company v. Pennsylvania Public Utility Commission*, 311 A.2d 370, 375 (Cmnwlth. Ct. 1973), “we should never lose sight of the fact that most public utilities ... are privately owned by investors willing to invest their money in property devoted to public service.” The service territory described in a certificate of public convenience provides a common carrier with entry to a discrete territory or marketplace. *Susquehanna Area Regional Airport Authority v. Pennsylvania Public Utility Commission*, 911 A.2d 612 (Cmnwlth. Ct. 2006) appeal denied by 923 A.2d 412 (Pa. 2007). And maintaining the stability of this discrete territory or marketplace is critical for the protection of not only the investors, but the general public as well. *Western*

*Pennsylvania Water Company*, supra.<sup>5</sup> Thus, the description of the authorized territory contained a motor carrier's certificate of public convenience forms an integral part of the carrier's investment of property utilized for public service and further supports the proposition that the certificate of public convenience is central to the Commission's regulation of a public utility.

**d. THE POWER TO REVOKE A CERTIFICATE OF PUBLIC CONVENIENCE IS THE SOURCE OF THE COMMISSION'S POWER TO ENFORCE ITS REGULATIONS AND ORDERS**

The Commission's power to enforce its regulations is inextricably bound to its power to rescind or modify its order granting a certificate of public convenience. Simply put, no regulation can occur without the power to sanction non-compliance. And no sanction can be effective, unless the ultimate risk of non-compliance is the loss of operating rights.

As a regulatory agency, the Commission has only those powers, duties, responsibilities and jurisdiction given to it by the Legislature. *Western Pennsylvania Water Co.*, supra. Indeed, our Supreme Court has held that, as a legislative creation, the Commission may exercise only those powers found in the express words of the enabling statute or those explicitly found in other legislative enactments. *Fairview Water Co., v. Pennsylvania Public Utility Commission*, 502 A.2d 162 (Pa. 1985).

The Public Utility Code gives the Commission extensive statutory responsibility for ensuring that the adequacy, efficiency, safety and reasonableness of public utility services are

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<sup>5</sup> In explaining this concept, the Court stated: "Whether the investors be stockholders or bond holders, they are interested in stability of the service area of the public utility in which they have invested. To permit the PUC to unilaterally order a public utility to extend its service lines beyond the certificated service area upon which the utility has based its financing would create an unstable corporate venture, which ultimately would work to the disadvantage of the public. We agree that a certificate of public convenience is for the protection of the public, but we disagree with the PUC's observation that a certificate of public convenience has no relevance to the protection of the public utility. *Western Pennsylvania Water Company*, supra.

properly furnished and maintained. 66 Pa. C.S. §1501.<sup>6</sup> The Commission is also responsible for ensuring that service is provided on a reasonably continuous basis and without unreasonable disruption or delay. *Id.* Section 501 of the Public Utility Code also gives the Commission broad authority to enforce the Public Utility Code, through its regulations and orders, and to supervise public utilities doing business in Pennsylvania. 66 Pa. C.S. §501.<sup>7</sup> The Commission also has the power to rescind or modify its regulations and orders as necessary to fulfill its statutory obligations. *Id.*

It is well-established that the Commission has been granted broad authority to effect the legislative intent, and is empowered, not only to amend, but even to cancel certificates previously granted. *Latrobe Bus Service v. Pennsylvania Public Utility Commission*, 103 A.2d 442 (Pa. Super. 1954). While the Commission may not act arbitrarily, it has the same power to revoke a certificate as it has to issue it, upon due cause being shown. *Paradise v. Pennsylvania*

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<sup>6</sup> Section 1501 states, in pertinent part, as follows:

Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities, and shall make all such repairs, changes, alterations, substitutions, extensions, and improvements in or to such service and facilities as shall be necessary or proper for the accommodation, convenience, and safety of its patrons, employees, and the public. Such service also shall be reasonably continuous and without unreasonable interruptions or delay. Such service and facilities shall be in conformity with the regulations and orders of the commission. Subject to the provisions of this part and the regulations or orders of the commission, every public utility may have reasonable rules and regulations governing the conditions under which it shall be required to render service. ...

<sup>7</sup> Section 501(a) states as follows:

*Enforcement of provisions of part.* --In addition to any powers expressly enumerated in this part, the commission shall have full power and authority, and it shall be its duty to enforce, execute and carry out, by its regulations, orders, or otherwise, all and singular, the provisions of this part, and the full intent thereof; and shall have the power to rescind or modify any such regulations or orders. The express enumeration of the powers of the commission in this part shall not exclude any power which the commission would otherwise have under any of the provisions of this part.

*Public Utility Commission*, 132 A.2d 754 (Pa. Super. 1957). Of course, the Commission must afford Due Process to a public utility before it takes any action that may affect the certificate holder's interest in the property it employs for the public good.

No regulation can occur without enforcement and no enforcement can occur without the power to revoke or cancel a certificate of public convenience. The power to revoke or cancel a certificate puts the teeth into the Commission's enforcement. For all of the foregoing reasons, the certificate of public convenience is central to the Commission's regulation and enforcement of the Public Utility Code.

**B. THE COMMISSION VIOLATED GERMANTOWN'S DUE PROCESS RIGHTS WHEN IT FOUND THAT IT ONLY REGULATES GERMANTOWN'S CALL OR DEMAND SERVICE "OUTSIDE OF PHILADELPHIA."**

The Commission has regulated Germantown since September 5, 1996, the date it entered an order, under Docket No. A-00110733, Folder 1, approving Germantown's application to begin transporting, as a common carrier, persons upon call or demand in a territory that includes a portion of northwestern Philadelphia and its adjacent suburbs in Montgomery County.<sup>8</sup> On

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<sup>8</sup> The description of operating rights in Folder 1 of Germantown's certificate of public convenience states:

To transport, as a common carrier, by motor vehicle, persons upon call or demand between points in the city of Philadelphia, bounded by School House Lane, Church Lane, Wister Street, Stenton Avenue, Northwestern Avenue, Ridge Avenue, Manatawanna Avenue, Hagys Mill Road, Port Royal Avenue, Cross Street, Shawmont Avenue, Umbria Street, Parker Avenue, Ridge Avenue, Walnut Lane, Wissahickon Avenue to points of beginning; and that portion of Whitemarsh Township, Montgomery County, bounded as follows: beginning on Ridge Pike, at the Springfield Township line, northwest on Ridge Pike to Butler Pike, northeast on Butler Pike to Whitemarsh Township line, southeast along the Whitemarsh Township line to Bethlehem Pike, south on Bethlehem Pike to Valley Green Road, northeast on Valley Green Road to the Whitemarsh Township line, southwest along the Whitemarsh Township line to Ridge Pike; and that portion of Springfield Township, Montgomery County, bounded as follows: beginning at the Springfield Township line and Mermaid Lane, southwest on Mermaid Lane to

July 13, 2007, the Commission entered a second order under, Docket No. A-00110733, Folder 1, Amendment A, approving Germantown's application to begin transporting, as a common carrier, persons upon call or demand in additional parts of Montgomery County.<sup>9</sup> These orders have never been rescinded, amended or modified and they remain valid and enforceable to the present date.

In the present enforcement action, Germantown objects to the Commission's determination that it does not regulate Respondent within its PUC-approved territory "within Philadelphia" and that it shares regulatory responsibilities with the Philadelphia Parking Authority. As discussed above, the nature and the scope of the regulatory relationship between the Commission and Germantown is determined by Germantown's certificate of public convenience. Germantown had a right to expect that the Commission would abide by well-established principles of public utility law and adhere to the Public Utility Code and its own regulations and orders, including the terms and conditions of the order it issued granting Germantown its certificate of public convenience. By deviating from well-established principles of public utility law, the Commission has deprived Respondent of a portion of its operating territory without Due Process and has further deprived Respondent of its Due Process right to

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Stenton Avenue, northwest on Stenton Avenue to the Springfield Township line, northeast, southeast, southwest and southeast along the Springfield Township line to Mermaid Lane; and from points in said area to points outside the area and vice versa.

<sup>9</sup> The description of operating rights in Folder 1, Amendment A of Germantown's certificate of public convenience states:

To transport, as a common carrier, by motor vehicle, persons upon call or demand, from points in that portion of Montgomery County bounded as follows: beginning at Ridge Pike on the Philadelphia and Montgomery County boundary proceeding west along that boundary to the Schuylkill River, northwest along the Schuylkill River to PA Route 363, northeast on Pa. Route 363 to Skippack Pike, southeast on Skippack Pike to Butler Pike, southeast to Ridge Pike to point of beginning.

fair notice and warning regarding the nature and scope of its regulatory obligations in light of its determination regarding its own jurisdiction and regulatory authority.

Of course, Germantown knows from prior litigation that the Commission, like the Philadelphia Parking Authority (“Authority”), believes that the act of July of July 16, 2004, P.L. 758, No. 94 (“Act 94”) transferred subject matter jurisdiction and regulatory authority over Germantown’s call or demand service “within Philadelphia” from the Commission to the Authority, while the Commission retained subject matter jurisdiction and regulatory authority over Germantown’s call or demand service “outside of Philadelphia.”<sup>10</sup> But Germantown believes that this interpretation of Act 94 violated its due process rights in the present enforcement action for two reasons.

**a. THE PRESENT ENFORCEMENT ACTION VIOLATES GERMANTOWN’S DUE PROCESS RIGHTS BECAUSE IT IS BASED ON THE PREMISE THAT THE COMMISSION DOES NOT REGULATE GERMANTOWN “WITHIN PHILADELPHIA” WHICH IS TANTAMOUNT TO A REDUCTION IN GERMANTOWN’S OPERATING TERRITORY WITHOUT NOTICE, WITHOUT HEARING, WITHOUT FINDINGS SUPPORTED BY SUBSTANTIAL EVIDENCE, AND WITHOUT DUE CAUSE SHOWN**

First, the Commission’s belief that that it does not regulate Germantown’s call or demand service “within Philadelphia” fundamentally changes its operating rights by reducing the service territory described in its certificate of public convenience so that it only encompasses the area “outside of Philadelphia.” Germantown’s certificate of public convenience contains a

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<sup>10</sup> The Commission relies on Section 5714(d)(2) of Act 94, 53 Pa. C.S. §5714(d)(2) to support its claim that it does not regulate Germantown’s call or demand authority “within Philadelphia.” Section 5714(d)(2), as originally enacted, stated, in pertinent part, as follows:

Carriers currently authorized to provide service to designated areas within cities of the first class on a non-citywide basis shall retain their authorization through the authority.

description of its operating territory, which includes a designated area “within Philadelphia.” The Commission’s claims that it does not regulate the portion of Germantown’s call or demand authority “within Philadelphia” effectively eliminates it from the service territory the Commission approved when it granted Germantown’s certificate of public convenience. For, where there is no regulation, there is no authorization.

As discussed above, the Commission has a duty, pursuant to well-established principles of public utility law, to enforce territorial restrictions on Germantown’s operations based on the description of its territory contained in its certificate of public convenience. And Germantown has a corresponding duty to obey such restrictions. The Commission cannot shirk its responsibility to enforce these restrictions without violating its duty under the Public Utility Code and its own regulations and orders, including the order granting Germantown’s certificate of public convenience.

In a previous enforcement proceeding, the Commission acknowledged the following:

The Commission’s records and the record in this proceeding reflect that [Germantown] was issued a Certificate by the Commission on September 5, 1996, at Docket No. A-00110733, for call or demand authority. [Germantown] has authority from the Commission to operate in Montgomery County, including Norristown, Conshohocken, Plymouth Meeting, and parts of Blue Bell, and a portion of Philadelphia in the northwest section of the City that includes Germantown, Chestnut Hill and Roxborough.

The Commission’s records reflect that the Commission’s orders granting call or demand authority to Germantown in the aforementioned territory have not been rescinded, amended, or otherwise modified. Accordingly, they remain valid and enforceable. Furthermore, the records

of the Philadelphia Parking Authority reflect that the Authority never issued a certificate of public convenience to Germantown granting call or demand authority within Philadelphia.<sup>11</sup>

The BIE's prosecution in the present enforcement action violates Germantown's Due Process rights because it is premised on the determination that the Commission does not regulate Germantown "within Philadelphia" Clearly, the Commission's order granting Germantown's certificate authorizes call or demand service "within Philadelphia" and has not been rescinded, amended, or otherwise modified by order of the Commission. And, without an Authority order granting Germantown authorization to provide call or demand service "within Philadelphia," it would not be lawful for Germantown to provide such service. Furthermore, there would be no way for the Authority to enforce its regulations against Germantown because the Authority cannot revoke something it never issued in the first place.

If, as the Commonwealth Court found in *Ronald Cab*, supra, Germantown's certificate is central to the Commission's regulation of Germantown's call or demand authority, then Act 94 would not, and could not, have affected the rights the Commission granted to Germantown in its order of September 5, 1996. In fact, Act 94 itself provides that the enactment or reenactment of Section 5714(d)(2) did not affect "any right accrued or vested" as a result of the repeal of the

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<sup>11</sup> On December 13, 2012, Germantown, through its attorney, submitted a request to the Authority under the Open Records Law requesting: "Any order issued by the Authority approving, granting, or issuing a certificate of public convenience to any partial rights taxicab company." (RR 400) On January 22, 2013, the Authority responded stating:

On December 13, 2012, you requested documents pertaining to orders issued by the Philadelphia Parking Authority approving, granting or issuing a certificate of Public Convenience to any partial rights taxicab company. The Authority is not in possession of any orders responsive to your request; therefore your request is denied.

(RR 402)

Medallion Act, 66 Pa. C.S., Ch. 24 (now repealed and substantially reenacted as 53 Pa. C.S. Ch. 57).<sup>12</sup> Germantown was grandfathered from regulation under the Medallion Act. See *Pennsylvania Public Utility Commission v. Genco Services, Inc., t/a Cheldon Radio Cab Co., Inc.*, 1992 Pa.PUC LEXIS 40 (PUC Docket No. A-00106517C912); See also *Dee Dee Cab, Inc. v. Pennsylvania Public Utility Commission*, 817 A.2d 593 (Cmnwlth. Ct. 2003) appeal denied by 836 A.2d 123 (Pa. 2003). Germantown’s right to claim an exemption from regulation under the Medallion Act accrued with the Commission’s decision in *Genco*, supra, and the enactment or reenactment of Section 5714(d)(2) did not affect that right. Germantown’s PUC-issued right to provide call or demand service “within Philadelphia” continues to be exempt from regulation under Act 94, as amended.

In any event, the Commission could not have acted unilaterally to eliminate the operating territory the Commission granted to Germantown “within Philadelphia.” The extent of a utility’s service may be altered only by order of the Commission. See *Western Pennsylvania Water Company*, supra. The Commission may not unilaterally extend a service territory beyond the territory described in a certificate of public convenience. *Id.* Likewise, it follows that the Commission may not unilaterally reduce the service territory described in a certificate of public convenience.

While it is true that the Commission has broad powers to rescind or modify an order granting a certificate of public convenience and to impose “such conditions as it may deem to be

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<sup>12</sup> Section 21 of Act 94 states, in pertinent part, as follows:

The following provisions do not affect any act done, liability incurred or right accrued or vested or affect any civil or criminal proceeding pending or to be commenced to enforce any right or penalty or punish any offense under any provision of law repealed by section 4 of this act:

....

(4) The reenactment, amendment or addition of 53 Pa. C.S. ....§5714

just and reasonable,” its power is not absolute and it may not act without hearings, sufficient evidence, or without due cause shown. Id; see also, 66 Pa. C.S. §1103(a). The BIE’s determination in the present enforcement action that it does not regulate Germantown’s call or demand service “within Philadelphia” amounts to a unilateral amendment of its certificate of public convenience and, therefore, violates Germantown’s Due Process rights.

It should be noted that the Commission’s view that it does not regulate Germantown’s call or demand service “within Philadelphia,” despite the fact that it issued an order granting a certificate to Germantown that authorizes such service, which has not been rescinded, amended or otherwise modified, is also not compatible with the Commonwealth Court’s recent decision in *Rosemont Taxicab Co., Inc. v. Philadelphia Parking Authority*, 68 A.3d 29 (Cmnwlth. Ct. 2013) appeal denied by 2014 Pa. LEXIS 77 (Pa. January 8, 2014). Rosemont purchased the operating rights of Concord Coach USA, t/a Bennett Taxicab (“Bennett”), which, like Germantown held a certificate of public convenience issued by the Commission to provide call or demand service in a portion of Philadelphia and its suburbs. In describing Bennett, the Commonwealth Court noted that Bennett continued to hold a PUC-issued certificate of public convenience after Act 94 was enacted and was not subject to regulation by the Authority under Act 94:

**Bennett Taxicab has operated for many years under a certificate of public convenience issued by the Public Utility Commission. This certificate authorizes it to operate in Delaware and Montgomery counties as well as a small part of the City of Philadelphia.** Because of its small service area in Philadelphia, Bennett Taxicab is known as a partial rights taxicab company. This means that Bennett Taxicab can provide point-to-point service in Philadelphia to persons hailing one of its taxis so long as [at least one of the] (sic) points lie within the bounds of its small service area in Philadelphia. This distinguishes it from the 1,600 medallion taxicabs in Philadelphia that since 2004 have held certificates of public convenience issued exclusively by the Parking Authority. These certificates give medallion taxicabs the right to provide point-to-point service anywhere in the City of Philadelphia. **The 2004 transfer of taxicab regulation did not impact Bennett Taxicab's ability to continue to operate in**

**the service area listed in its pre-2004 certificate of public convenience issued by the Public Utility Commission.** (emphasis added)

*Rosemont*, supra at 31.

Furthermore, in describing Rosemont, the Commonwealth Court noted that Rosemont was not regulated by the Authority because it does not hold a certificate of public convenience issued by the Authority and that the Authority does not obtain subject matter jurisdiction and regulatory control over a carrier simply by virtue of its operation “within Philadelphia.” The Court stated:

**Rosemont does not hold a certificate of public convenience from the Parking Authority and, thus, the Parking Authority does not regulate it.** Rosemont operates solely under a certificate of public convenience issued by the Public Utility Commission, and it does not require shields in taxicabs. The Parking Authority has no more authority, at present, over Rosemont than it does over any taxicab that happens to deliver a passenger to Philadelphia. **Taxicabs that are licensed by the Commission do not become the business of the Parking Authority simply by crossing the border of Philadelphia.** (emphasis added)

*Rosemont*, supra at 38.

For all of the foregoing reasons, the present enforcement action violates Germantown’s Due Process rights because it is based on the premise that the Commission does not regulate Germantown’s call or demand service “within Philadelphia.” To sustain a complaint based on such a premise constitutes a partial revocation of Germantown’s operating rights. Accordingly, the Complaint should be dismissed.

**b. THE COMMISSION’S INTERPRETATION OF ACT 94 VIOLATED GERMANTOWN’S DUE PROCESS RIGHTS IN THE PRESENT PROCEEDING BECAUSE IT FAILS TO GIVE GERMANTOWN FAIR NOTICE AND WARNING OF THE NATURE OF ITS REGULATORY OBLIGATIONS AND DEPRIVED IT OF THE OPPORTUNITY TO PREPARE A PROPER DEFENSE TO THE CHARGES LODGED AGAINST IT**

In the present enforcement action, the Commission charged Germantown with violations of several of its regulations pertaining to meters, vehicle equipment and safety standards and

other standards pertaining to vehicle markings and postings. Germantown asserts that the prosecution is invalid because the Commission failed to give fair notice and warning of the nature and scope of its regulatory obligations prior to proceeding with its complaint.

Vague statutes or regulations deny due process of law when they do not give fair notice to persons of ordinary intelligence that their contemplated conduct might be unlawful and do not set reasonably clear guidelines for law enforcement officials and courts, thus inviting arbitrary and discriminatory enforcement. *Park Home v. City of Williamsport*, 680 A.2d 835 (Pa. 1996). To not be unconstitutionally vague, the terms of a statute or regulation must be sufficiently specific to inform those who are subject to it what conduct on their part will render them liable to its penalties. *Oppenheim v. State Dental Council and Examining Board*, 459 A.2d 1308 (Cmnwlth. Ct. 1983).

A statute that forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process. *Id.* Only if the statute contains reasonable standards to guide prospective conduct does it satisfy the requirements of due process. *Id.* In reviewing challenges based upon vagueness the courts must consider “both the essential fairness of the law and the impracticality of drafting legislation with greater specificity.” *Fabio v. Civil Service Commission of the City of Philadelphia*, 414 A.2d 82, 85 (Pa. 1980).

In the present case, Section 5714(d)(2), as interpreted by the Commission and applied to its regulations, is unconstitutionally vague because it does not give fair notice and warning as to how a partial rights carrier, such as Germantown, can comply with Commission regulations that establish different regulatory standards than those adopted by the Authority. It should be noted that both the Commission and the Authority have adopted vehicle safety standards, which mirror,

for the most part, the vehicle safety standards adopted under the Vehicle Code, Title 75 of the Pennsylvania Consolidated Statutes. Germantown does not contest the Commission's interpretation of Section 5714(d)(2) with regard to the alleged violations of the Commission's vehicle safety standards as there is no conflict between it and the Authority. Rather, Germantown challenges the Commission with regard to its regulations pertaining to meters, vehicle markings and postings, which make up the bulk of the regulatory violations alleged in the present enforcement proceeding.

Under the Commission's interpretation of Section 5714(d)(2), the Commission shares subject matter jurisdiction and regulatory authority over Germantown with the Authority. The Commission asserts that it regulates Germantown's call or demand service "outside of Philadelphia," while the Authority regulates Germantown's call or demand service "within Philadelphia." But the Commission's regulations and the Authority's regulations that pertain to call or demand service provided by partial rights taxicabs are not identical. Yet, the call or demand service Germantown provides "within Philadelphia" and "outside of Philadelphia" is provided in the same vehicles by the same drivers, who and cross the border between Philadelphia and Montgomery County several thousand times per day.

So a person of reasonable intelligence would find it difficult, if not impossible, to figure out how one vehicle can be equipped with meters that comply with two conflicting regulatory standards. For example, the Commission cited Germantown for violating 52 Pa. Code §29.314(b)(6), which states:

(b) *Meters.* Meters must conform with the following requirements:

- (6) It is the responsibility of the certificate holder to cause the meters to be so regulated that the fare is be calculated and registered in accordance with the current tariff rates on file with and approved by the Commission.

But the Authority's regulations require taxicab meters to be calibrated in accordance with the certificate holder's approved tariff or standard rates set by the Authority, which are different than Germantown's tariff on file with the Commission. 52 Pa. Code §1017.22.

Under the Commission's interpretation of Section 5714(d)(2), a meter regulated so that the fare is calculated and registered in accordance with the Authority's rates would violate 52 Pa. Code §29.314(b)(6) because these rates are not part of Germantown's Commission approved tariff. There simply is no way for Germantown to comply with the Commission's standard without violating the Authority's standard and *vice versa*. And the Commission has not established reasonably clear guidelines and has offered no guidance about how to overcome this conflict in order to comply with the regulatory standard. Furthermore, it is difficult, if not impossible for a driver, let alone a member of the taxicab riding public, to determine when, and under what circumstance the Commission's rates should be utilized. The Commission's regulation is not sufficiently specific to inform those who are subject to it what conduct on their part will render them liable to its penalties.

Similar problems exist with regard to the Commission's regulations pertaining to vehicle markings and complaint decals. Each agency requires different markings and posting, thereby creating an irreconcilable conflict without sufficient guidance as to how to comply or avoid being cited for a violation. For these reasons, Section 5714(d)(2), as interpreted by the Commission and applied to its regulations, is unconstitutionally vague and its prosecution on this basis violated Germantown's Due Process right to fair notice and warning as to the nature of its regulatory obligations. It also deprived Germantown of a fair opportunity to prepare a proper defense to the charges lodged against it. Accordingly, the adjudication in the present enforcement proceeding should be reversed on this basis.

And since the Commission's interpretation of the statute leads to an absurd and unconstitutional construction of the statute, which is impossible of execution and unreasonable, results which are presumed to be contrary to legislative intent under 1 Pa. C.S. §1922, Germantown respectfully request the Court to declare that the Commission regulates Germantown's call or demand exclusively under the terms and conditions described in its PUC-issued certificate of public convenience.

**C. IF THE COURT UPHOLDS THE COMMISSION'S INTERPRETATION OF ITS JURISDICTION, THEN THE COMPLAINT SHOULD BE DISMISSED BECAUSE ALL OF THE INSPECTIONS THAT REVEALED VIOLATIONS OCCURRED "WITHIN PHILADELPHIA" AND THERE OUTSIDE OF THE COMMISSION'S JURISDICTION**

If the Court finds that the Commission does not regulate Germantown "within Philadelphia", the Complaint in this matter must be dismissed because the record reflects that the Commission was operating outside of its territorial jurisdiction by conducting inspections "within Philadelphia." The Commission cannot have it both ways, if it does not have jurisdiction or regulatory authority over Germantown "within Philadelphia", then it cannot inspect and enforce its regulations "within Philadelphia."

**D. THE FINES IN THIS MATTER SHOULD BE REDUCED UNDER ANY CIRCUMSTANCES BECAUSE GERMANTOWN'S HISTORY OF COMPLIANCE OVER PRIOR YEARS IS DRAMATICALLY IMPROVED, THE VIOLATIONS IN THIS MATTER WERE SMALL IN NUMBER AND MINOR AND WERE CORRECTED IMMEDIATELY**

If the Court finds that the Complaint can proceed and that a fine is warranted, the fine proposed fine should be reduced. In prior years, Germantown had numerous violations and the Commission imposed large fines, primarily during the time when Germantown had the financial and regulatory burden of complying with PPA regulations in addition to PUC regulations. In response to the Commission enforcement actions, Germantown has dramatically improved its

compliance record, such that only a handful of violations were detected during the inspection, which is the subject of these proceedings. Germantown should be commended for its response to its regulatory obligations. Assessment of any fine in this matter should take this improvement into consideration.

## **VI. CONCLUSION**

Based on all of the foregoing, Petitioner, Germantown Cab Company, respectfully requests that the Complaint in this matter be dismissed and that the Court declare that the Commission has exclusive subject matter jurisdiction and regulatory authority over Germantown in accordance with the terms and conditions of its PUC-issued certificate of public convenience.

Respectfully,

*Michael S. Henry*

Michael S. Henry  
Attorney for Respondent  
Germantown Cab Company

Date: 2/6/2014

IN THE COMMONWEALTH  
COURT OF PENNSYLVANIA

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Germantown Cab Co. :  
Petitioner :  
 : NO. 1850 CD 2013  
v. :  
 :  
PA Public Utility Commission :  
Respondent :

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**CERTIFICATE OF SERVICE**

I, Michael S. Henry, Esquire, hereby certify that I have served a true and correct copy of the foregoing Respondent's Brief by electronic and US mail, postage prepaid, upon:

Heidi Wushinske  
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