

COMMONWEALTH OF PENNSYLVANIA

PUBLIC UTILITY COMMISSION

**IN RE: APPLICATION OF DOMINICANA TAXI EXPRESS, LLC,
A LIMITED LIABILITY COMPANY OF THE COMMONWEALTH OF
PENNSYLVANIA FOR CERTIFICATE OF PUBLIC CONVENIENCE**

Docket No. A-2015-2471494

Assigned to: Elizabeth H. Barnes, ALJ

**REPLY BRIEF OF PROTESTANTS
READING METRO TAXI CAB, INC., READING CHECKER CAB, INC. and
READING YELLOW CAB, INC.**

**LAW OFFICES OF STEPHEN G. WELZ, P.C.
Stephen G. Welz, Esquire
I.D. # 23280
Counsel for Protestants, Reading Metro Taxi
Cab, Inc., Reading Checker Cab, Inc., and
Reading Yellow Cab, Inc.
999 Berkshire Blvd., Suite 290
Wyomissing, PA 19610-1254
(610) 378-5272 – telephone
(610) 378-1804 – facsimile
sgwelz@welzlaw.com**

REPLY BRIEF OF PROTESTANTS
READING METRO TAXI CAB, INC., READING CHECKER CAB, INC. and
READING YELLOW CAB, INC.

The Brief of the Applicant raises 3 points that the Protestants wish to address in reply. First, Applicant correctly states that even though proof of need is traditionally established through proof of requests for the proposed service, it is not the only means of proof. Dutchland Tours, Inc. v. Commonwealth Public Utility Com., 19 Pa. Commw. 1; 337 A.2d 922 (1975) LEXIS 960. (Applicant’s Brief, page 5). Nevertheless, it remains an accepted, if not the preferred means of proof, and when such evidence is not offered the court must determine if the evidence as a whole is legally sufficient to support a conclusion of public need. Dutchland, Id., citing Pittsburgh & Lake Erie Railroad Co. v. Pennsylvania Public Utility Commission, supra, 170 Pa. Superior Ct. 411, 420, 85 A.2d 646 (1952).

The Applicant claims that it “established by substantial evidence a compelling need for an additional service provider that is capable of providing service to the growing Hispanic community, and that the current service providers are not adequately meeting the needs of this population.” (Appellant’s Brief, page 6). An examination of the record belies that claim. Specifically, the Applicant presented virtually no direct evidence of need or requests for the proposed service from independent witnesses but instead offered general observations and opinions that unnamed third parties might take advantage of it. Neither the individual members of the Applicant nor the expert business planner produced any evidence that the need for bilingual taxi drivers was not being met or largely satisfied by the existing certificated operators, including the Protestants. Frankly, one would think that in a city where the majority of the population was Hispanic there would be an abundance

of witnesses testifying with regard to need and the inadequacy of existing service if indeed such conditions existed. That was simply not so in this case. Instead, the Applicant produced 2 English-speaking witnesses (Ms. Alvelo and Ms. Polanco) who admitted to having no personal problem with communication and 1 Spanish-speaking witness, the prospective employee, Pedro A. Ramirez, who testified that he owns his own vehicle but would like to be able to get a taxi in a snow storm. Such evidence is hardly of the kind and quality that would be considered substantial evidence as cited in Dutchland Tours, Inc. v. Commonwealth Public Utility Com., 19 Pa. Commw. 1; 337 A.2d 922 (1975) LEXIS 960:

Substantial evidence is such relevant and competent evidence having a rational probative force which a reasonable mind might accept as adequate to support a conclusion. *York v. Public Utility Commission*, 3 Pa. Commonwealth Ct. 270, 281 A.2d 261 (1971), *aff'd* 449 Pa. 136, [**926] 295 A.2d 825 (1972). Although need and the inadequacy of existing service has been traditionally established by proof of requests for the proposed service, *see Trantor v. P.U.C.*, 4 Pa. Commonwealth Ct. 585, 288 A.2d 837 (1972), "[n]o particular type of evidence is required; the only requirement is that the evidence as a whole be legally sufficient to support the order of the [PUC]. *Pittsburgh & Lake Erie Railroad Co. v. Pennsylvania Public Utility Commission*, *supra*, 170 Pa. Superior Ct. 411, 420, 85 A.2d 646." *D.F. Bast, Inc. v. Pennsylvania Public Utility Commission*, 397 Pa. 246, 250, 154 A.2d 505, 507-508 (1959).

Second, the applicant has cited two cases in support of the general rule that it is the applicant's burden of proof of need, inadequacy of existing service and capacity of the applicant to satisfactorily meet such need. Protestants of course have no argument with the same but are compelled to note that in one of the cases cited, Seiferd v. Commonwealth, Public Utility Com., 12 Pa. Commw. 85, 315 A.2d 320 (1974) LEXIS 1019, the court found that appellee's (protesting party's) service was less than sufficient by "all standards"

because “The record reveals that protestant has only one mini-bus available for tours and is unable to employ his two school buses which are used elsewhere on a daily basis for scheduled route service. Likewise, protestant's existing operations evidence an absence of the essential back-up equipment necessary to serve its patrons if the mini-bus should again break down.” 315 A.2d. at 322. Viewing the established, objective evidence in the instant case in a light most favorable to the Applicant, the most that can safely be concluded is that the applicant may have contracts to purchase 2 cars to operate in consecutive 12-hour shifts in order to provide 24-hour call and demand taxi service. Consequently, the Applicant proposes that each car serve as a back-up to the other. Clearly if either car is unavailable for *any* reason there is only car remaining in what then would be 24-hour service and no back-up available. The irony of similarity between the Applicant in the instant case and the unsuccessful protestant in Seiferd, Id. is inescapable.

Third, although the Protestants have not challenged the application on the grounds that it endangers or impairs the existing carriers’ operations the Applicant’s brief repeats an allegation made by Applicant’s counsel during closing argument at the conclusion of the hearing on November 23, 2015 that can no longer go unaddressed. Specifically, counsel characterized the Protestants as a “monopoly” and labeled the protest as an attempt to “ensure that he can maintain his monopoly.” (N.T. 230). While such characterization and imputation may have been dismissible as ambitious and overzealous argument at the time, the Applicant repeats the legally inaccurate and desperate argument on page 8 of its brief.

The U.S. District Court in Pennsylvania addressed the question of how a monopoly is determined in the decision of Yeager's Fuel v. Pennsylvania Power & Light Co., 953 F. Supp. 617; 1997 U.S. Dist. LEXIS 1134; 1997-1 Trade Cas. (CCH) P71,739, and stated that in the absence of a formula for reaching such a decision, several factors emerge: "[1] the strength of the competition, [2] probable development of the industry, [3] the barriers to entry, [4] the nature of the anticompetitive conduct, and [5] the elasticity of consumer demand." 953 F. Supp. at 646. The district court went on to state that it "considers PP&L's 31% market share alone inadequate to demonstrate, as a matter of law, that PP&L possessed sufficient market presence to come dangerously close to achieving monopoly power. A market share of 31% is not significant enough, without more, to create a conclusive presumption of attempted monopoly. See Barr, 978 F.2d at 112 (remarking "market share of 47-50% alone [is] not enough to establish dangerous probability of success") (citation omitted)" 953 F. Supp at 647.

The uncontradicted evidence in this case is that the Protestants collectively have 35 cars on the street and the other certificated operators have 12 cars (Grab-A-Cab) and close to 20 cars (Berks Taxi) with 7 or 8 of those cars 7 or 8 passenger minivans. (N.T. 213 & 214). In addition, there are at least 3 other car services with 1 of them (Uptown Car Service) having approximately 20 cars in service. (N.T. 215). Therefore, even if one disregards 2 of the 3 car services, the Protestants' collective share of the market, based solely on the number of cars on the road, is at best 40%, hardly a monopoly. In addition, the Protestants' witness, Curtis Stricker, testified without challenge that the Protestants suffered more than a 20% reduction in business in the past 12 months following the entry

of the certificated operator, Berks Taxi, into the local Berks County market. (N.T. 217-218). Considering such testimony and evidence in light of the 5 factors enumerated by the District Court in Yeager's, *supra*, the characterization of the Protestants as a “monopoly” is inaccurate and unjustified.

The Applicant may be a very small business when compared to the existing operators but that fact alone, contrary to what Ms. Rodriguez asserted as the small business exception from the PUC, (N.T. 67 & 68) does not excuse it from being judged by the same standard applicable to every other certificated operator or potentially certificated operator in the Commonwealth of Pennsylvania.

Respectfully submitted,

LAW OFFICES OF STEPHEN G. WELZ, P.C.



Date: February 12, 2016

Stephen G. Welz, Esquire
I.D. # 23280
Counsel for Protestants, Reading Metro Taxi Cab, Inc., Reading Checker Cab, Inc., and Reading Yellow Cab, Inc.
999 Berkshire Blvd., Suite 290
Wyomissing, PA 19610-1254
(610) 378-5272 – telephone
(610) 378-1804 – facsimile
sgwelz@welzlaw.com