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April 27, 2016

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

RE: Hiester Lotz v. Carl R. Bieber, Inc.  
Docket Number: C-2016-2538634

Dear Secretary Chiavetta,

Enclosed for filing please find the Preliminary Objections in the above referenced matter on behalf of Carl R. Bieber, Inc.. Copies have been served on the parties of record in accordance with the attached Certificate of Service.

Yours truly,

Jeffrey A. Franklin  
Attorney for: Carl R. Bieber, Inc.  
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Telephone: 1-610-845-3803  
Supreme Court ID No. 59560

jaf/web  
Matter No. 37007  
Enclosure  
cc: w/o enc: Mr. Hiester H. Lotz by mail

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Hiester Lotz	:	
Complainant	:	
v.	:	Docket No. C-2016-258634
	:	
Carl R. Bieber, Inc.	:	
Respondent	:	

**Notice to Plead**

The attached Preliminary Objections have been filed by Carl R. Bieber, Inc. with the Pennsylvania Public Utility Commission in the above-captioned proceeding. If you wish to respond to the Preliminary Objections, you must, pursuant to the provisions of 52 Pa. Code § 5.101(f), take action within ten (10) days after these Preliminary Objections are served by filing a response with the Secretary of the Pennsylvania Public Utility Commission and serving a copy of that response upon all parties of record. You are warned that if you fail to do so, the case may proceed without you and an order or a judgment may be entered against you by the Commission without further notice.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Hiester Lotz	:	
Complainant	:	
v.	:	Docket No. C-2016-258634
	:	
Carl R. Bieber, Inc.	:	
Respondent	:	

**CARL R. BIEBER, INC.’s PRELIMINARY OBJECTIONS TO  
AND MOTION TO DISMISS  
THE COMPLAINT OF HIESTER LOTZ**

TO THE PENNSYLVANIA PUBLIC UTILITY COMMISSION:

AND NOW, Carl R. Bieber, Inc. t/a Bieber Tourways ("Respondent" or the "Company"), by and through its counsel, Jeffrey A. Franklin, Prince Law Offices, P.C., and pursuant to 52 Pa. Code§ 5.10l(a)(l), respectfully submits these Preliminary Objections asking for dismissal of the Complaint filed by Hiester Lotz at the above-captioned docket pursuant to 52 Pa. Code§ 5.10l(a)(l), (3)-(4), avers as follows:

**52 Pa. Code § 5.10l(a)(l), (3)-(4)**

1. In disposing of Preliminary Objections, the Commission must accept as true all well-pled, material facts of the nonmoving party, as well as every reasonable inference from those facts. *County of Allegheny v. Commonwealth of Pennsylvania*, 490 A.2d 402 (Pa. 1985); *Commonwealth of Pennsylvania v. Bell Telephone Co. of Pa.*, 551 A.2d 602 (Pa. Cmwlt. 1988). The Commission must review the Complaint in the light most favorable to the Complainant and should dismiss the Complaint only if it appears that the Complainant would not be entitled to relief under any circumstances as a matter of law. *Interstate Traveler Services, Inc. v. Commonwealth, Department of Environmental Resources*, 406 A.2d 1020 (Pa. 1979).

2. The Commission should dismiss the instant Complaint because (i) the Commission lacks jurisdiction to grant the requested relief and (ii) the Complaint fails to state a claim on which relief could be granted. See 52 Pa. Code § 5.101(a)(1), (3)-(4).

3. The Complainant requests in this most recent Complaint to this Commission that this Commission direct the Company to file some type of amended letter to the Office of Attorney General Bureau of Consumer Protection at its File No. BCP-14-05-028479 from two years ago in 2014.

4. This Commission lacks jurisdiction to do so and there is no basis under the Pennsylvania Public Utility Code or this Commission's regulations for this Commission to do so. The Complainant's proper redress is to the Office of Attorney General Bureau of Consumer Protection, not this Commission.

#### **Settlement Discussions**

5. In addition, the Complaint attaches a document labeled as "Exhibit #5" which consists of "efforts to resolve this issue" (Complaint at Narrative sentence No. 7) and are confidential settlement discussions conducted by e-mail between the Complainant and counsel for the Respondent in the prior Commission Complaint by the same Complainant of the same underlying issue with the same Respondent at PaPUC Docket No. C-2014-2443703. The attachment contains confidential settlement discussions including an unaccepted offer of settlement. It is the policy of this Commission to encourage settlements. 52 Pa. Code § 5.231(a). This settlement offer is inappropriately provided by Complainant and is not admissible in evidence against counsel or the Respondent in PaPUC Docket Nos. C-2014-2443703 (concluded) or C-2016-2538634 (present incarnation). 52 Pa. Code § 5.231(d).

#### **Res Judicata and Collateral Estoppel**

6. Further, the Complainant filed a formal complaint against Respondent with this Commission at Docket No. C-2014-2443703 in 2014 based on the same event in which the issues were fully litigated and a final Order was entered by this Commission.

7. Any attempt to re-litigate this issue that already has been decided is barred by the doctrine of collateral estoppel. Collateral estoppel, or issue preclusion, prevents re-litigation of an issue of fact or law between the same parties upon a different claim or demand. *Fiore v. Commonwealth of Pennsylvania (Department of Environmental Resources)*, 508 A.2d 371, 374 (Pa. Cmwlth. 1986). Collateral estoppel bars the re-litigation of an issue where: (1) an issue decided in a prior action is identical to one presented in a later action; (2) the prior action resulted in a final judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to the prior action, or is in privity with a party to the prior action; and (4), the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the prior action. *Stilp v. Commonwealth*, 910 A.2d 775 (Pa. Cmwlth. 2006). Each of these elements is satisfied in the instant matter as more fully discussed herein.

8. When a final decision has been rendered in a proceeding, it is binding, under the doctrine of claim preclusion, on any case brought subsequent to that time which involves the same parties and issues as raised previously. *Cannon v. Verizon Pennsylvania Inc.*, Docket No. C-20043729, Opinion and Order entered June 29, 2005.

9. Claim preclusion, or res judicata, provides that matters which were actually litigated in a prior action, as well as those which should have been litigated in that prior action, will not be litigated in a subsequent action.

10. For the doctrine to prevail, four conditions must be met: (1) identity of issues; (2) identity of causes of action; (3) identity of persons and parties to the action;

and (4) identity of the quality and capacity of the parties suing or sued. *Safeguard Mutual Insurance Co. v. Williams*, 345 A.2d 664 (1975) and *Day v. Volkswagenwerk Aktiengesellschaft*, 464 A.2d 1313 (1983); *Northwestern Lehigh School District v. Commonwealth of Pennsylvania, Agricultural Lands Condemnation Approval Board*, 578 A. 2d 614 (1990). The Commonwealth Court stated that, "for the purposes of res judicata, there is identity of causes of action when in both the old and new proceedings, the subject matter and the ultimate issues are the same." *Howard v. Department of Public Welfare*, 529 A.2d 1231 (1987).

11. Although the Commission's procedural rules do not specifically address the issue, the Commission has adopted this well-settled legal principle. *Simms v. Philadelphia Electric Company*, Docket No. F-889246 (1988). The Commission has recognized the applicability of the doctrine of res judicata in proceedings before it. *O'Toole v. Bell Telephone Company of Pennsylvania*, 77 Pa. PUC 98 (1992). The Pennsylvania courts have affirmed the Commission's application of the doctrine in the context of utility rate proceedings. *Philadelphia Electric Company v. Pennsylvania Public Utility Commission*, 433 A.2d 620 (Pa. Cmwlth. 1981); see also, *Kentucky West Virginia Gas Co. v. Pennsylvania Public Utility Commission*, 721 F. Supp. 710 (M.D. Pa. 1989) (acknowledging the role of res judicata and collateral estoppel in administrative proceedings), aff'd., 899 F.2d 1217.

12. A final valid judgment on the merits by a court of competent jurisdiction bars any future suit between the same parties on the same cause of action. *McCarthy, et al. v. Township of McCandless*, 300 A.2d 815 (1973); *Martin v. Poole*, 177 A.2d 339 (1975).

13. All four conditions required for a finding of res judicata have been met in this case: (1) the issues are identical (the 2016 Complaint even attached the Commission's Order from the 2014 Complaint proceeding); (2) the causes of action are identical (It is not clear to the Respondent that the instant Complaint alleges any violation of the Pennsylvania Public Utility Code or Commission regulations, but in the event the Commission determines that it does, then the Respondent avers that the Complainant argues in both Complaints that Respondent has failed to provide him with adequate, safe, and reasonable service in violation of Section 1501 of the Public Utility Code, 66 Pa. C.S. § 1501); (3) the persons and parties to the action are identical (both Complaints involve the Complainant and the Respondent); and 4) the quality and capacity of the parties suing or sued are also identical.

14. Application of the claim preclusion helps to prevent vexatious litigation, to conserve the parties' and the tribunal resources by eliminating redundant lawsuits and to establish certainty by bringing finality to the resolution of a controversy. *McArdle v. Tronetti*, 627 A.2d 1219 (Pa. Super. 1993), appeal denied, 537 Pa. 622, 641 A.2d 587 (1004); *Pa. Public Util. Comm'n v Katrina Waddington t/b/a Waddington Tours*, Docket No. A-00108279, Opinion and Order entered May 20, 2002.

15. The Complainant fully participated in the 2014 Complaint proceeding. He now seeks to re-litigate the same issues in the instant complaint proceeding. The doctrine of res judicata bars the same allegations and issues that he presented, or had a full and fair opportunity to present, in the previous proceeding. The Commission should as a matter of law dismiss this Complaint.

**ICC Route Preemption**

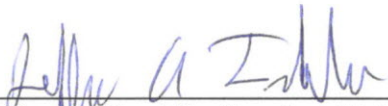
16. Respondent provides transportation service on this route pursuant to Certificates of Public Convenience and Necessity from the Interstate Commerce Commission (“ICC”) attached hereto and incorporated herein as Attachment No. 1 and Attachment No. 2. *See Petition for Declaratory Relief by Fullington Trailways, LLC*, Docket No. FMCSA-2009-0106, 75 FR 4443 (2010) (“*Fullington*”) (addressing federal preemption). The Federal Motor Carrier Safety Administration (“FMCSA”) has primary jurisdiction to interpret the scope of operations that may lawfully be conducted under Federal authority. *See, Funbus Systems, Inc. v. C.P.U.C.*, 801 F2d 1120, 1129 (9<sup>th</sup> Cir. 1986) (“*Funbus*”). 49 U.S.C. 14501(a)(1) preempts State or local government entities from regulating rates or scheduling of carriers that provide intrastate or intrastate transportation subject to Federal jurisdiction. *Fullington* at \*4445.

17. In addition to the ICC authority for the route, Respondent avers it satisfies the *Funbus* factors because its service of the instant route is substantially similar to that addressed in *Fullington*. Like Fullington’s service in *Fullington*, Respondent in the instant matter provides active, regularly scheduled interstate service on this route to through-ticketed passengers in interstate origins or destinations to or from other states than just Pennsylvania including connections to other carriers such as Greyhound and Amtrak for out of state passenger service, like that of the Complainant.

WHEREFORE, Carl R. Bieber, Inc. hereby requests that the Complaint of Hiester Lotz be dismissed with prejudice.

Respectfully submitted,

Dated: April 27, 2016

  
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Jeffrey A. Franklin, Esquire, ID 59560  
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Attorneys for  
Carl R. Bieber, Inc.

**VERIFICATION**

I, STEVEY HADAMS, PRESIDENT of Carl R. Bieber, Inc., hereby state that the facts set forth above are true and correct to the best of my knowledge, information, and belief and that I expect the Company will be able to prove the same at any hearing held in this matter. I understand that the statements herein are made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: April 27, 2016

Stevey Hadams Pres.

BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION

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**Certificate of Service**

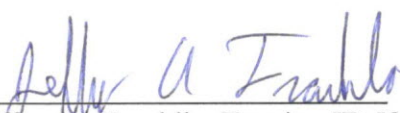
I hereby certify that I have this day served a true copy of the foregoing documents upon the parties, listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Via First Class Mail:

Hiester H. Lotz  
7 Jeanette Dr.  
Hamburg, PA 19526

Respectfully submitted,

Dated: April 27, 2016

  
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