

**BEFORE THE  
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Metro Transportation,	:	
LLC for Approval to Begin to Provide	:	
Service to Persons, Upon Call or Demand,	:	A-2015-2520130
in the City of Erie, Erie County, in the	:	
City of Reading, Berks County, and in	:	
the City of Allentown, Lehigh County	:	

**INITIAL DECISION GRANTING APPLICANT'S  
MOTIONS TO DISMISS PROTESTS AND REASSIGNING CASE TO THE  
BUREAU OF TECHNICAL UTILITY SERVICES**

Before  
Elizabeth H. Barnes  
Administrative Law Judge

**INTRODUCTION**

This Decision grants an Applicant's Motions to Dismiss two Protests for lack of standing and untimeliness, and reassigns this case to the Bureau of Technical Utility Services for further consideration because all other protests will be withdrawn upon Commission approval of a restrictive amendment.

**HISTORY OF THE PROCEEDING**

On or about January 15, 2016, Applicant completed its filing of an Application at the Commission seeking the right to begin to transport persons upon call or demand in the City of Erie, Erie County, in the City of Reading, Berks County, and in the City of Allentown, Lehigh County. Notice of the Application was published in the *Pennsylvania Bulletin* on January 30, 2016 at 46 Pa.B. 632. Formal protests were due on February 16, 2016.

On February 11, 2016, Reading City Cab, LLC; Amigo Cab, LLC and Express Taxi, LLC filed a Joint Protest. On February 12, 2016, Reading Yellow Cab, Inc., Reading Metro Cab, Inc. and Reading Checker Cab, Inc. filed Protests. On February 15, 2016, Erie Transportation Services, Inc. d/b/a Erie Yellow Cab filed a Protest. On February 16, 2016, a Protest to the Application was filed by Capital City Cab Service, Inc. (Capital City). Forty-six days after the deadline for protests, on March 23, 2016, a Protest on behalf of Yourway Transport, Inc. was filed. On March 25, 2016, a Notice was issued assigning the above-captioned matter to me and scheduling a hearing for May 25, 2016. On March 25, 2016, a prehearing order was issued.

On May 9, 2016, Reading City Cab, LLC, Amigo Cab, LLC; and Express Taxi, LLC filed a Motion to Compel Discovery Responses of Metro Transportation, LLC. To date, there has been no answer to the motion to compel filed. On May 10, 2016, counsel for Applicant entered a notice of appearance. On May 17, 2016, Applicant filed a Motion to Dismiss the Protest of Capital City Cab Service, Inc. for Lack of Standing and a Motion to Dismiss the Protest of Yourway Transport. Additionally, Applicant requested a 60-day continuance of the initial hearing in order to resolve the protests. A continuance was granted by Order dated May 18, 2016, and the hearing was rescheduled to August 8, 2016.

On May 27, 2016, a Restrictive Amendment was filed amending the application such that the authority sought shall read as follows.

To transport, as a common carrier, by motor vehicle, persons in upon call or demand in the City of Allentown, Lehigh County.

Based upon this Restrictive Amendment, and conditioned upon its acceptance by the Commission, Protestants Erie Transportation Services, Inc. t/d/b/a Erie Yellow Cab, Inc., Reading City Cab, LLC, Amigo Cab, LLC, Express Taxi, LLC, Reading Yellow Cab, Inc., Reading Checker Cab, Inc., and Reading Metro Taxi Cab, Inc. agreed to withdraw their Protests. To date, there have been no responses filed by either Yourway Transport, Inc. or Capital City to the Motions to Dismiss, which are now ripe for a decision.

## FINDINGS OF FACT

1. Applicant is Metro Transportation, LLC.
2. Protestants willing to withdraw their protests if the restrictive amendment is approved include the following: Erie Transportation Services, Inc. t/d/b/a Erie Yellow Cab, Inc., Reading City Cab, LLC, Amigo Cab, LLC, Express Taxi, LLC, Reading Yellow Cab, Inc., Reading Checker Cab, Inc., and Reading Metro Taxi Cab, Inc.
3. The restrictive amendment filed on May 27, 2016 amends the initially requested authority such that Applicant will transport, as a common carrier, by motor vehicle, persons in upon call or demand in the City of Allentown, Lehigh County.
4. Protestant Capital City Cab, Inc. has no authority to operate in Lehigh County or the City of Allentown.
5. Protestant Yourway Transport, Inc. filed its protest approximately 43 days after the deadline for protests, offering no reason for the late filing.
6. Neither Capital City Cab, Inc. nor Yourway Transport, Inc. filed any opposition response to two Motions to Dismiss their Protests filed by Applicant on May 17, 2016.
7. More than 20 days have lapsed since the Motions to Dismiss Protests were filed.

## DISCUSSION

The matters before the Commission are two motions to dismiss. The first motion to dismiss is regarding the protest of Capital City for lack of standing and the second motion to dismiss is regarding Yourway Transport for filing its protest late. Commission regulations provide:

(c) A protest shall be treated as a pleading and the applicant may, within 20 days after the closing date for the filing of protests, file motions to strike, to dismiss, or for amplification as provided in § 5.101 (relating to preliminary objections).

(ii) *Time of filing.* A protest shall be filed within the time specified in the notice appearing in the *Pennsylvania Bulletin*, which shall be no less than 15 days from the date of publication. Failure to file a protest in accordance with this subsection shall bar subsequent participation in the proceeding, except when permitted by the Commission for good cause shown.

\* \* \*

52 Pa.Code §§ 3.381(C), (C)(ii).

The regulation directs the reader to another regulation regarding preliminary objections generally:

**§ 5.101. Preliminary objections.**

(a) *Grounds.* Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

- (1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.
- (2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.
- (3) Insufficient specificity of a pleading.
- (4) Legal insufficiency of a pleading.
- (5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

(7) Standing of a party to participate in the proceeding.

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(f) *Answer to a preliminary objection.*

(1) *Time for filing.* An answer to a preliminary objection may be filed within 10 days of date of service.

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52 Pa.Code §§ 5.101(a), (f).

In reviewing preliminary objections, only the facts in the pleadings filed by the nonmoving party can be presumed to be true in order to determine whether recovery is possible. *Pennsylvania State Lodge, Fraternal Order of Police v. Dept. of Conservation & Natural Resources*, 909 A.2d 413 (Pa.Cmwlt. 2006) *aff'd*, 492 Pa. 304, 924 A.2d 1203 (2007). The reviewing authority will accept as true the well-pled averments set forth in the complaint, and all inferences reasonably deducible therefrom. Conclusions of law, unwarranted inferences from facts, argumentative allegations, or expressions of opinion will not be accepted as true for purposes of evaluating preliminary objections. "In order to sustain preliminary objections, it must appear with certainty that the law will not permit recovery, and, where any doubt exists as to whether the preliminary objections should be sustained, the doubt must be resolved in favor of overruling the preliminary objections. *Corman, et al. v. The National Collegiate Athletic Association*, 74 A.2d 1149 (Pa.Cmwlt. 2013).

The Motion is filed by the Applicant who is seeking motor carrier authority. According to the Motion, Protestant Capital City holds authority at Docket No. A-00113875 to provide transportation service upon call or demand in the counties of Dauphin, Cumberland, Perry and York, Pennsylvania. Its authority does not extend to the counties of Berks, Lehigh or Erie, which are the counties for which authority is sought in the original Application.

Applicant moves for dismissal of the protest of Capital City for lack of standing due to this lack of authority overlap. While noting that the motion to dismiss was filed approximately 60 days after the deadline set by the above regulation, 52 Pa.Code § 3.381(C), the lack of authority overlap and failure of the Protestant to file an answer to the motion provides clear indicators that there is no prejudice to the Protestant in consideration of the motion.

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co., 75 Pa. P.U.C. 598, 603 (1991). Generally, the Commission has held that a person or entity has standing when the person or entity has a direct, immediate and substantial interest in the subject matter of a proceeding. Joint Application of Pennsylvania-American Water Co. and Evansburg Water Co. for Approval of the transfer, by sale, of the water works property and rights of Evansburg Water Co. to Pennsylvania-American Water Co., A-212285F0046/47 and A-210870F01 (July 9, 1998); William Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 346 A.2d 269 (1975); Landlord Service Bureau, Inc. v. Equitable Gas Co., 79 Pa. P.U.C. 342 (1993); Re Equitable Gas Co., 76 Pa. P.U.C. 23 (1992); Manufacturers' Association of Erie v. City of Erie - Bureau of Water, 50 Pa. P.U.C. 43 (1976); Waddington v. Pennsylvania Public Utility Commission, 670 A.2d 199 (Pa. Cmwlth. 1995), alloc. denied, 678 A.2d 368 (Pa. 1996). Requiring a person or entity to have a direct, immediate and substantial interest in the subject matter of a proceeding helps avoid frivolous, harassing lawsuits whose costs are ultimately borne, at least in part, by utility ratepayers. See Pennsylvania Public Utility Commission v. National Fuel Gas Distribution Corp., 73 Pa. P.U.C. 552 (1990).

A protestant's interest in the subject matter of a proceeding is direct if the protestant's interest is adversely affected by the actions challenged in the protest, is immediate if there is a close causal nexus between the protestant's asserted injury and the actions challenged in the protest, and is substantial if the protestant has a discernible interest other than the general interest of all citizens in seeking compliance with the law. Ken R. ex rel. C.R. v. Arthur Z., 682 A.2d 1267 (Pa. 1996); In re El Rancho Grande, Inc.,

437 A.2d 1150 (Pa. 1981); William Penn Parking Garage, Inc.; Empire Coal Mining & Development, Inc. v. Department of Environmental Resources, 623 A.2d 897 (Pa. Cmwlth. 1993); Landlord Service Bureau, Inc. Mere conjecture about possible future harm does not confer a direct interest in the subject matter of a proceeding. Official Court Reporters of the Court of Common Pleas of Philadelphia County v. Pennsylvania Labor Relations Board, 467 A.2d 311 (Pa. 1983).

Only a certificate of public convenience authorizes a public utility to serve a particular territory. 66 Pa. C.S. §1101; Lukens Steel Co. v. Pennsylvania Pub. Util. Comm'n, 499 A.2d 1134 (Pa. Cmwlth. 1985) The certificate of public convenience imposes the obligation on the public utility to provide service in that territory. Bland v. Tipton Water Co., 71 A. 101 (Pa. 1908) A public utility must have a certificate of public convenience before rendering service. The Public Utility Code has no provision allowing a public utility to charge for its services while an application for a certificate of public convenience is pending. Popowsky v. Pennsylvania Pub. Util. Comm'n, 647 A.2d 302 (Pa. Cmwlth. 1994) A public utility may not serve any territory beyond that stated in its certificate of public convenience. Western Pennsylvania Water Co. v. Pennsylvania Pub. Util. Comm'n, 311 A.2d 370 (Pa. Cmwlth. 1973)

The Commission's Rules of Practice and Procedure at 52 Pa. Code §5.52 require that a protestant set forth facts sufficient to establish the protestant's standing to protest. This includes establishing that the protestant has a direct interest in the proceeding. To evaluate the preliminary objections, the analysis must consider only those facts which are pleaded by the protestant.

A review of Commission records at Docket No. A-00113875 reveals an Order dated February 28, 2002, granting Capital City authority to transport, as a common carrier, persons upon call or demand, in the counties of Cumberland, Perry and York,<sup>1</sup> a copy of which is attached to the Protest. The Protest indicates only that authority granted under the above docket and states that "A restrictive amendment removing York

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<sup>1</sup> A search of Commission records reveals the following additional dockets: A-2014-2434294, Commission Order of July 28, 2014 denying authority to offer contract carrier services throughout Pennsylvania; R-2012-2290704, rate increase; several petitions which did not affect authority.

County from the service area would protect Protestant's business interests to the point where it would be willing to withdraw its protests." Protest of Capital City ¶ 10.<sup>2</sup> Accordingly, Protestant Capital City admittedly possesses authority which does not overlap with the requested authority of the instant Application. Therefore, the motion to dismiss Capital City's Protest will be granted.

Applicant also seeks dismissal of the Protest of Yourway Transport for failure to file the protest timely. As appears above, a protest is to be filed within the time allowed and failure to file the protest timely will bar subsequent participation in the proceeding unless the Commission grants an exception based upon good cause shown. 52 Pa.Code § 3.381(C)(ii).

Good cause must be shown by the Protestant, as the party seeking affirmative relief from the Commission bears the burden of proof. 66 Pa.C.S. § 332(a). This must be shown by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (1990), *alloc, denied*, 602 A.2d 863 (1992). A preponderance of evidence is that which is more convincing, by even the smallest amount, than that presented by the other party. *Se-Ling Hosiery v. Margulies*, 364 Pa. 45, 70 A.2d 854, 1950 Pa. LEXIS 316 (1950). Here, the Protestant has not filed a response to the Motion to Dismiss nor provided any reason whatsoever for the late filing. Accordingly, Yourway Transport, Inc. has failed to carry its burden of showing good cause why its protest was filed approximately 40 days past the deadline for the filing of protests as shown in the *Pennsylvania Bulletin's* publication of notice of the Application. 46 Pa.B. 632. *See Application of Lifestar Response of NJ-Lifestar Response Corp.*, Docket No. A-2013-2352953 (Final Order entered May 20, 2014). Accordingly, the motion to dismiss the Protest of Yourway Transport shall be granted.

Finally, the Commission's regulation at 52 Pa.Code §3.381(c)(iii) provides that if all protests to an application for passenger authority are withdrawn at or prior to the hearing, the Commission may consider the application without holding an

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<sup>2</sup> The protest itself lists the application of Empty Pockets Whitetail Preserve, LLC, instead of Metro Transportation.

oral hearing, based on verified statements filed by the applicant. Further, 52 Pa.Code § 5.235 provides that parties to an application for passenger authority may stipulate as to modifications to proposed motor carrier rights. The stipulation, in the form of a restrictive amendment, must be in writing, explaining why the stipulation is in the public interest, be signed by each party to the stipulation, and be submitted to the Commission's Secretary. The Restrictive Amendment is not binding on the Commission if it determines that the restrictive amendment is contrary to the public interest.

In order to find that a restrictive amendment is in the public interest, the Commission must find that adopting the restrictive amendment would serve to protect a legitimate public purpose. The public need for the proposed service is the relevant factor in determining the public interest, while protection of private economic interests and competitive positions is not. *Crown America Corp. v. Pa. Pub. Util. Comm'n.*, 463 A.2d 1257 (Pa.Cmwlt. 1983); *Glenside Suburban Radio Cab, Inc. v. Pa. Pub. Util. Comm'n.*, 411 A.2d 798 (Pa.Super. 1961).

There is no public policy or factual reason to reject the restrictive amendment. Therefore, since the remaining parties have agreed to the restrictive amendment, and the remaining protests are withdrawn as long as the Commission approves the restrictive amendment, the Application is unopposed. Accordingly, the hearing on August 8, 2016, shall be cancelled and the case reassigned to the Commission's Bureau of Technical Utility Services for further review and disposition as an unopposed application under the procedure set forth at 52 Pa.Code § 3.381(c)(1)(iii).

#### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter in this proceeding. 66 Pa. C.S. §§102, 1101, 1103.
2. Capital City has no direct, immediate or substantial interest in the subject matter of this application proceeding and has no standing to protest. *Application of Select Ambulance, Inc.*, A-2014-2441095, Final Order entered April 3, 2015.

3. Yourway Transport had no good cause for a 43 days late-filed protest. 52 Pa.Code §§ 3.381(c)(1)(ii) and 5.53. *See Application of Lifestar Response of NJ-Lifestar Response Corp.*, A-2013-2352953 (Final Order entered May 20, 2014).

4. If all protests to an application for passenger authority are withdrawn at or prior to the hearing, the Commission may consider the application without holding an oral hearing, based on verified statements filed by the applicant. 52 Pa.Code §3.381(c)(iii).

5. Further, parties to an application for passenger authority may stipulate as to modifications to proposed motor carrier rights, which is not binding on the Commission if it determines that the restrictive amendment is contrary to the public interest. 52 Pa.Code § 5.235.

6. In order to find that a restrictive amendment is in the public interest, the Commission must find that adopting the restrictive amendment would serve to protect a legitimate public purpose. The public need for the proposed service is the relevant factor in determining the public interest, while protection of private economic interests and competitive positions is not. 52 Pa.Code § 5.235. *Crown America Corp. v. Pa. Pub. Util. Comm'n.*, 463 A.2d 1257 (Pa.Cmwlt. 1983); *Glenside Suburban Radio Cab, Inc. v. Pa. Pub. Util. Comm'n.*, 411 A.2d 798 (Pa.Super. 1961).

7. The remaining Protestants are willing to withdraw their protests if the Commission approves the restrictive amendment as described above; therefore, there is no need for a hearing and this matter is referred to the Commission's Bureau of Technical Utility Services for further review. 52 Pa.Code § 3.381(c)(1)(iii).

ORDER

THEREFORE,

IT IS ORDERED:

1. That Metro Transportation, LLC's Motion to Dismiss the Protest of Capital City Cab Service, Inc. and Motion to Dismiss the Protest of Yourway Transport, Inc. are hereby granted.
2. That the Protest of Capital City Cab Service, Inc. is hereby dismissed for lack of standing.
3. That the Protest of Yourway Transport, Inc. is dismissed for untimely filing with no good cause shown.
4. That the hearing scheduled in this matter for August 8, 2016, is cancelled.
5. That the caption of the Application of Metro Transportation, LLC for Approval to Begin to Provide Service to Persons, Upon Call or Demand, in the City of Erie, Erie County, in the City of Reading, Berks County, and in the City of Allentown, Lehigh County, at Docket No. A-2015-2520130, is amended as follows:

Application of Metro Transportation, LLC for Approval to Begin to transport, as a common carrier, by motor vehicle, persons upon call or demand in the City of Allentown, Lehigh County.
6. That the Application of Metro Transportation, LLC at A-2015-2520130 is referred to the Pennsylvania Public Utility Commission's Bureau of Technical Utility Services for further review as an uncontested proceeding.

7. That Joint Protestants' (Reading City Cab, LLC' Amigo Cab, LLC; and Express Taxi, LLC) Motion to Compel Discovery Responses is hereby denied as moot.

Date: July 1, 2016

/s/  
Elizabeth H. Barnes  
Administrative Law Judge