



COMMONWEALTH OF PENNSYLVANIA
 PENNSYLVANIA PUBLIC UTILITY COMMISSION
 P.O. BOX 3265, HARRISBURG, PA 17105-3265

ISSUED: JANUARY 20, 2000

IN REPLY PLEASE
 REFER TO OUR FILE
 A-00116172

THOMAS M KEENAN ESQUIRE
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DOCUMENT
 FOLDER

APPLICATION of MAIN LINE TRANSIT SERVICE, INC.

TO WHOM IT MAY CONCERN:

Enclosed is a copy of the Initial Decision of Administrative Law Judge Wayne L. Weismandel. This decision is being issued and mailed to all parties on the above specified date.

If you do not agree with any part of this decision, you may send written comments (called Exceptions) to the Commission. Specifically, an original and nine (9) copies of your signed exceptions MUST BE FILED WITH THE SECRETARY OF THE COMMISSION IN ROOM B-20, NORTH OFFICE BUILDING, NORTH STREET AND COMMONWEALTH AVENUE, HARRISBURG, PA OR MAILED TO P.O. BOX 3265, HARRISBURG, PA 17105-3265, within twenty (20) days of the issuance date of this letter. The signed exceptions will be deemed filed on the date actually received by the Secretary of the Commission or on the date deposited in the mail as shown on U.S. Postal Service Form 3817 certificate of mailing attached to the cover of the original document (52 Pa. Code §1.11(a)) or on the date deposited with an overnight express package delivery service (52 Pa. Code 1.11(a)(2), (b)). If your exceptions are sent by mail, please use the address shown at the top of this letter. A copy of your exceptions must also be served on each party of record. 52 Pa. Code §1.56(b) cannot be used to extend the prescribed period for the filing of exceptions/reply exceptions. A certificate of service shall be attached to the filed exceptions.

If you receive exceptions from other parties, you may submit written replies to those exceptions in the manner described above within ten (10) days of the date that the exceptions are due.

Exceptions and reply exceptions shall obey 52 Pa. Code 5.533 and 5.535 particularly the 40-page limit for exceptions and the 25-page limit for replies to exceptions. Exceptions should clearly be labeled as "EXCEPTIONS OF (name of party) - (protestant, complainant, staff, etc.)".

If no exceptions are received within twenty (20) days, the decision of the Administrative Law Judge may become final without further Commission action. You will receive written notification if this occurs.

CC:ALJ WEISMANDEL/OFFICE OF ALJ/LAW/PIO/OSA/CHAIRMAN/COMMISSIONERS/TRANS & SAFETY/TRANS & SAFETY-KEEZEL/C & A/ OUR FILE

Very truly yours,

James J. McNulty
 Secretary

smk
 Encls.
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SRB

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Main Line	:	Docket No.
Transit Service, Inc.	:	A-00116172

Initial Decision Granting Motion To Dismiss Protest

Before
Wayne L. Weismandel
Administrative Law Judge

History of the Proceeding

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DOCKETED
JAN 21 2000

On August 5, 1999, Main Line Transit Service, Inc. (applicant) filed an Application for Approval of Transfer and Exercise of Common Carrier or Contract Rights (Application) with the Pennsylvania Public Utility Commission (Commission), Docket Number A-00116172.¹ The Application sought the approval of the transfer and to exercise the right as a common carrier described at Docket Number A-00089018, Folder No. 2, Amendment D, issued to Bennett Taxi Service, Inc., for transportation of persons in paratransit service between points in the Townships of Upper Merion, Lower Merion and the Borough of Narberth, Montgomery County, and the Townships of Radnor, Haverford, Marple and Newtown, Delaware County, subject to certain restrictions. The Application listed Thomas M. Keenan, Esq., 376 East Main Street, P.O. Box 26460, Collegeville, PA 19426, telephone number (610) 489-6170, as "Applicant's attorney (for this application)".

Notice of the Application was published in the Pennsylvania Bulletin on September 25, 1999, with protests due on or before October 18, 1999.

On October 18, 1999, Norristown Transportation Company (protestant) filed a Protest (Protest) against the granting of the Application. The Certificate of Service attached to the Protest certified that a copy was served upon the applicant only on October 14, 1999, by first class mail.

By Memorandum dated November 8, 1999, the Commission's Bureau of Transportation and Safety (T&S) advised the Office of Administrative Law Judge (OALJ) that the case should be set for hearing.

By Interim Order Setting Settlement Conference (Interim Order) dated November 16, 1999, Chief Administrative Law Judge Robert A. Christianson directed the applicant and protestant to "attempt to settle this matter, considering, in particular, the issues relating to transfer-of-authority proceedings." The Interim Order further directed the participants to confer on or before December 13, 1999, and directed the applicant to file a report with the OALJ Mediation Coordinator within ten days following the conference. The Interim Order was served on the applicant, its attorney of record Thomas M. Keenan, Esq., and protestant's attorney of record Larisa Tenberg, Esq.

On December 8, 1999, Barnett Satinsky, Esq. and Marci A. Love, Esq., Fox, Rothschild, O'Brien & Frankel, LLP, filed and served a Notice Of Appearance "as co-counsel on behalf of the Applicant." Also on December 8, 1999, applicant filed and served a Motion To Dismiss The Protest Or, In The Alternative, Motion In

¹ Though filed on August 5, 1999, the Application was not docketed

Limine (Motion), accompanied by a Brief In Support, requesting that the Protest be dismissed as insufficient as to substance, or in the alternative, that the protestant should be precluded from introducing evidence of adverse impact in support of its Protest at any hearing in the case.²

On December 20, 1999, protestant filed and served a Reply (Reply), accompanied by a Brief In Support, to applicant's Motion. Protestant's Reply was served on both Barnett Satinsky, Esq. and Thomas M. Keenan, Esq., on behalf of the applicant. The Reply avers that "the issues of lack of fitness and abandonment are always relevant in a transfer proceeding regardless of whether a protestant raised them in its protest or not." Additionally, in its Brief In Support, protestant argues that applicant's Motion should be denied because it was untimely filed.

On December 28, 1999, applicant's Motion was assigned to me for ruling. By letter dated December 28, 1999, the participants were notified by Chief Administrative Law Judge Christianson of my assignment.

Applicant's Motion is procedurally ready to be ruled upon.

Findings Of Fact

1. On August 5, 1999, applicant filed an Application for transfer of common carrier rights with the Commission, Docket Number A-00116172.

until August 31, 1999.

² The filing and serving of applicant's Motion was accepted as the report to be filed with the OALJ Mediation Coordinator in accordance with the Interim Order.

2. The Application listed Thomas M. Keenan, Esq., 376 East Main Street, P.O. Box 26460, Collegeville, PA 19426, telephone number (610) 489-6170, as "Applicant's attorney (for this application)".

3. On October 18, 1999, protestant filed a Protest against the granting of the Application.

4. The Certificate Of Service attached to the Protest certified that a copy was served upon the applicant only on October 14, 1999, by first class mail.

5. The Protest raises only one ground: that the granting of the Application "will have an adverse impact on [protestant] in that [protestant] and applicant will be in direct competition with one another for the transportation of passengers."

6. On December 8, 1999, Barnett Satinsky, Esq. and Marci A. Love, Esq., Fox, Rothschild, O'Brien & Frankel, LLP, filed and served a Notice Of Appearance "as co-counsel on behalf of the Applicant."

7. Also on December 8, 1999, applicant filed and served a Motion requesting that the Protest be dismissed as insufficient as to substance, or in the alternative, that the protestant be precluded from introducing evidence of adverse impact in support of its Protest at any hearing in the case.

8. On December 20, 1999, protestant filed and served a Reply to applicant's Motion.

9. Protestant's Reply was served on both Barnett Satinsky, Esq. and Thomas M. Keenan, Esq., on behalf of the applicant.

Discussion

Commission preliminary motion practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections. Equitable Small Transportation Intervenors v. Equitable Gas Company, 1994 Pa PUC LEXIS 69, Docket No. C-00935435 (July 18, 1994). A motion to dismiss a protest, as provided in 52 Pa.Code §5.101, is available to an applicant in motor transportation proceedings. 52 Pa.Code §3.381(c)(1)(i)(C).

52 Pa.Code §5.101(a)(3) provides:

A preliminary motion is available to participants. The preliminary motion shall state specifically the grounds relied upon, the standing of the party and shall be limited to the following:

A motion to dismiss a pleading that is insufficient as to substance, that does not indicate on its face the standing of the party to participate in the proceeding or that fails to join an indispensable party.

What 52 Pa.Code §5.101(a)(3) refers to as "a motion to dismiss a pleading that is insufficient as to substance" is comparable to Pa.R.C.P. 1028(a)(4), "legal insufficiency of a pleading (demurrer)."

It is well established that for purposes of determining preliminary objections in the form of a demurrer, the Court must accept as true all well pleaded facts and reasonable inferences which may be deduced

therefrom, but not conclusions of law. *Moyer v. Davis*, 67 Pa. Commonwealth Ct. 251, 446 A.2d 1355 (1982), aff'd, 501 Pa. 192, 460 A.2d 754 (1983). It is also true that a demurrer may not be sustained unless the face of the complaint shows that the law will not permit recovery, and that any doubt should be resolved in favor of overruling the demurrer. *Association of Pennsylvania State Colleges and University Faculties v. Commonwealth*, 44 Pa. Commonwealth Ct. 193, 403 A.2d 1031 (1979). And, of course, in ruling on a demurrer a court may not consider facts not disclosed in the record. *Wells v. Pittsburgh Board of Public Education*, 31 Pa. Commonwealth Ct. 1, 374 A.2d 1009 (1977).

Insurance Adjustment Bureau v. Insurance Commissioner, 86 Pa. Commw. 491; _____, 485 A.2d 858; 859-860 (1984).

Applying these principles to the case at hand, respondent's Motion will be granted.

The Protest filed in this case raises only one ground; that the granting of the Application "will have an adverse impact on [protestant] in that [protestant] and applicant will be in direct competition with one another for the transportation of passengers."

Accepting that this averment is true, as one must for purposes of ruling on applicant's Motion, the law will not permit this to serve as the basis for a valid protest in this transfer of motor common carrier authority case.

In *Re L. Joseph Williams t/d/b/a Executive Limousine Service*, 78 PA PUC 41(1993), Administrative Law Judge Larry Gesoff stated the law as follows:

Although an acquiring applicant is technically a "new carrier", the operating authority sought to be transferred here is not new authority. The Commission has

previously determined the issue of public necessity for the rights to be transferred.

In *App. of H. E. Shoup*, 45 PA PUC 371, 373 (1971), the commission examined the issue of competition in the context of a transfer proceeding, and stated:

The initial contention of Womeldorf, Inc., is that the protestant will be injured by competition if the application is approved. The Commission has considered the matter of competition to be irrelevant in a transfer proceeding.

The Commission has also held that adverse economic impact resulting from increased competition is not a sufficient basis to deny a transfer application. *Edward R. Simpson, supra.*; and *App. of McNaughton Bros., Inc., supra.*

78 PA PUC @ 53.³

See, also, Re Erie Transportation Services, Inc., 72 PA PUC 113(1990).

Protestant's sole basis raised in the Protest for denying the instant Application being "irrelevant", applicant's Motion must be granted and the Protest dismissed.

The Commission is granted discretion to determine if a hearing is required. 66 Pa.C.S. §703(b). A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law only the Commission need not hold a hearing. Lehigh Valley Power Comm. v. PA Public Utility Comm'n, 128 Pa.Commw. 259, 563 A.2d 548(1989), Edan Transportation Corp. v. PA Public Utility Comm'n, 154 Pa.Commw. 21, 623 A.2d 6(1993). This case does not involve disputed questions of fact. The question presented is one of law only. A hearing in this case is not necessary and would be a fruitless exercise.

³ Administrative Law Judge Gesoff's Initial Decision became a final Commission decision by operation of law, 66 Pa.C.S. §332(h).

The sole Protest filed in this case being dismissed herein, the Application will be referred for disposition in accordance with the provisions of 52 Pa.Code §3.381(c)(1)(iii)(A).

Given the procedural history of this case, a few additional points should be covered.

A protest is a pleading. 52 Pa.Code §§3.381(c)(1)(i)(C), 5.1(a)(1), 5.51 - 5.54. It is hornbook law that the issues in a case are raised by the pleadings alone. *Cf.* 52 Pa.Code §§3.381(c)(1)(i)(A)(IV), 5.52(a). The only issue raised in the instant Protest is that of the potentially adverse impact of competition on protestant. Statements such as “the issues of lack of fitness and abandonment are always relevant in a transfer proceeding regardless of whether a protestant raised them in its protest or not”, confuse the evidence concept of relevance with proper procedural requirements to raise issues in a particular case. Relevant issues that are not properly pled are waived.

The Commission’s Regulations provide that a protest is to be served by the protestant on “the applicant and the applicant’s attorney, if any”. 52 Pa.Code §§3.381(c)(1)(i)(A), 5.52(b). Thomas M. Keenan, Esq., is shown as “Applicant’s attorney (for this application)” on the Application. This constitutes Mr. Keenan’s entry of appearance on behalf of applicant in this case. 52 Pa.Code §§1.24(b), 1.55(a). However, the Certificate Of Service attached to the Protest certified that a copy was served upon the applicant only. While timely filed, the service of the Protest in this case was clearly deficient.

The lack of service of the Protest on applicant’s attorney is of some importance here in light of protestant’s averment that applicant’s Motion was not timely filed. This averment is contained in protestant’s Brief In Support filed with its

Reply. It should be remembered that issues are not properly raised in a Brief, but rather, in a pleading.

Applicant's Motion should have been filed on or before the twenty-third day after service of the Protest. 52 Pa. Code §§5.101(b), 5.61(a), 3.381(c)(1)(i)(C), 1.56(a)(1), 1.56(b). That is, on or before November 8, 1999.⁴ In fact, applicant's Motion was filed and served on December 8, 1999, apparently a month late. As set forth above, however, protestant's service of its Protest was defective, and it does not stretch credulity to conclude that the lack of service on applicant's counsel contributed to the delay in preparing and filing applicant's Motion. Computations of time periods from the "date of service" presume that service was properly made. Protestant should not be heard to complain about a delay that it, at least in part, caused. Further, protestant filed and served a Reply⁵ that was received and considered before any action was taken on applicant's Motion. In the vernacular, "no harm, no foul."

Conclusions of Law

1. The Commission has jurisdiction over the subject matter and the participants in this case.

⁴ This computation uses the mailing date of October 14, 1999 set forth in the Certificate Of Service attached to the Protest, and also takes into account that the twenty-third day would have been Saturday, November 6, 1999. See, 52 Pa.Code §1.12(a).

⁵ It is noted that the Certificate Of Service attached to protestant's Reply certifies that service was made on both Barnett Satinsky, Esq. and Thomas M. Keenan, Esq..

2. Commission preliminary motion practice is comparable to Pennsylvania civil practice respecting the filing of preliminary objections.

3. A motion to dismiss a protest, as provided in 52 Pa.Code §5.101, is available to an applicant in motor transportation proceedings.

4. A protest is a pleading.

5. The issues in a case are raised by the pleadings alone.

6. Relevant issues that are not properly pled are waived.

7. The only issue raised in the instant Protest is that of the potentially adverse impact of competition on protestant.

8. A protest is to be served by the protestant on the applicant and the applicant's attorney, if any.

9. An attorney whose name and address appear in a representative capacity on an Application filed with the Commission shall be considered to have entered an appearance.

10. While timely filed, the service of the Protest in this case was clearly deficient.

11. What 52 Pa.Code §5.101(a)(3) refers to as "a motion to dismiss a pleading that is insufficient as to substance" is comparable to Pa.R.C.P. 1028(a)(4), "legal insufficiency of a pleading (demurrer)."

12. In determining preliminary objections in the form of a demurrer, the Court must accept as true all well pleaded facts and reasonable inferences which may be deduced therefrom, but not conclusions of law. It is also true that a demurrer may not be sustained unless the face of the complaint shows that the law will not permit recovery, and that any doubt should be resolved in favor of overruling the demurrer. And, in ruling on a demurrer, a court may not consider facts not disclosed in the record.

13. In a transfer of motor common carrier authority case, although an acquiring applicant is technically a “new carrier”, the operating authority sought to be transferred is not new authority. The Commission has previously determined the issue of public necessity for the rights to be transferred.

14. The Commission has considered the matter of competition to be irrelevant in a transfer proceeding.

15. The Commission has also held that adverse economic impact resulting from increased competition is not a sufficient basis to deny a transfer application.

16. The Commission is granted discretion to determine if a hearing is required.

17. A hearing is necessary only to resolve disputed questions of fact, and when the question presented is one of law only the Commission need not hold a hearing.

18. This case does not involve disputed questions of fact. The question presented is one of law only. A hearing in this case is not necessary and would be a fruitless exercise.

19. Protestant's Protest raises no claims for which relief can be granted.

20. The face of the Protest shows that the law will not permit recovery.

21. When the sole Protest filed in a case is dismissed, the Application will be referred for disposition in accordance with the provisions of 52 Pa.Code §3.381(c)(1)(iii)(A).

Order

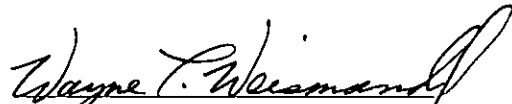
THEREFORE,

IT IS ORDERED:

1. That the Motion To Dismiss the Protest of Norristown Transportation Company, filed in the above-captioned case by Main Line Transit Service, Inc., is granted and the Protest is dismissed.

2. That the Application for Approval of Transfer and Exercise of Common Carrier or Contract Rights filed on August 5, 1999, by Main Line Transit Service, Inc., Docket Number A-00116172, now being unopposed, is referred for disposition in accordance with the provisions of 52 Pa.Code §3.381(c)(1)(iii)(A).

Date: JANUARY 4, 2000


Wayne L. Weismandel
Administrative Law Judge