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July 25, 2020

Secretary Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA.17105-3265

**Re: Application of Metro Transportation, LLC
Docket No. A-2019-3011470**

**Yourway Taxi & Limo, Inc. v. Metro Transportation, LLC
Docket No. C-2019-3013829**

In Brief of Metro Transportation, LLC

Dear Secretary Chiavetta:

Appended hereto is the Main Brief of Metro Transportation, LLC ("Metro") E-filed in the above-captioned matter. If you have any questions, please feel free to call.

Very truly yours,

REGER RIZZO & DARNALL LLP



Craig A. Doll, Esquire
Debra L. Roscioli, Esquire

CAD/dim
Enclosures

cc: Honorable Joel Cheskis
Metro Transportation, LLC
Per certificate of service

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Metro Transportation LLC	:	
For Approval to Expand Its Territory As	:	
A Small Passenger Carrier In The	:	A-2019-3011470
Commonwealth of Pennsylvania	:	
Yourway Taxi and Limo, Inc.	:	
	:	C-2019-3013829
	:	
v.	:	
	:	
	:	
Metro Transportation, LLC	:	

**MAIN BRIEF OF
METRO TRANSPORTATION LLC**

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Dated: July 25, 2020

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I. Procedural History

On July 8, 2019, Metro Transportation LLC (“Metro” or “Applicant”) filed an application with the Pennsylvania Public Utility Commission (“Commission”) seeking an amendment and expansion of its currently certificated authority so as to provide service to include Lehigh County, Northampton County, Bucks County, Schuylkill County, Carbon County and Monroe County (“application”)(Tolla Exhibit 1 – T-1). The application was docketed at A-2019-3011470. Notice of the application was published in the Pennsylvania Bulletin on July 27, 2019. 49 Pa.B. 3989.

In response to the publication of the application, a protest was filed by Yourway Taxi and Limo, Inc. (“Yourway”) on August 12, 2019.

On September 6, 2019, a hearing notice was issued establishing an initial in-person hearing for this matter for Tuesday, November 5, 2019 at 10:00 a.m. in hearing room 4 of the Commonwealth Keystone Building in Harrisburg and assigning Your Honor as the presiding officer. In anticipation of that hearing, a prehearing order was issued on September 13, 2019.

On October 11, 2019, counsel for Yourway requested that the initial hearing be converted to a telephonic prehearing conference because he had just been retained by Yourway for this proceeding and there were other issues that warranted the request. As there was no objection to Yourway’s request, it was granted via order dated October 18, 2019. A hearing change notice dated October 18, 2019 was issued formally changing the hearing date.

On October 18, 2019, Yourway filed a formal complaint against Metro, docketed at C-2019-3013829, as well as a motion to consolidate the formal complaint with the application proceeding. In its complaint, Yourway averred that Metro has been rendering unlawful transportation to the public, for compensation, between points in the Commonwealth of Pennsylvania.

A prehearing conference was held on November 5, 2019 as scheduled. Kusa Tolla appeared on behalf of Metro. Richard Mulcahey, Esquire appeared on behalf of Yourway. A prehearing order was entered setting forth various undertakings to be made on behalf of the various parties. At that hearing, Metro was reminded that Metro, as an LLC, was required to be

represented by an Attorney in all Commission proceedings. By Prehearing Order No. 2, Your Honor informed Metro that counsel was to be retained and an appearance entered no later than January 6, 2020.

On December 3, 2019, the undersigned entered their appearance on behalf of Metro. Subsequently, both parties requested a postponement of the scheduled hearings and conducted discovery. On February 6, 2020, Metro filed a Motion for Waiver of the Provisions of 52 Pa. Code §§ 5.61 and 5.101, seeking an opportunity to file an Answer and Preliminary Objections. An Answer to this Motion was filed by Yourway on or about February 20, 2020. On March 6, 2020, pursuant to a Proclamation of Disaster Emergency by Governor Tom Wolf, the Commonwealth was shut down due to the Corona Virus.

A telephonic evidentiary hearing was held June 9, 2020, resulting in the transcription of 111 pages of on the record materials, the presentation of one (1) witness for Metro; six (6) witnesses for Yourway; and the introduction of five (5) exhibits for Yourway. Outstanding are the receipt into evidence of Exhibit T-1 for Metro and a late filed exhibit P-3 for Yourway.

At the conclusion of the hearing, Your Honor established a briefing schedule with simultaneous Main Briefs being filed by the parties on or before July 30, 2020, and simultaneous Reply Briefs due on or before August 20, 2020.

II. Statement of Issues

- 1. Does Yourway possess standing to file the instant complaint?**

Suggested Answer: No.

- 2. Does Metro possess a presumption of fitness as an existing carrier?**

Suggested Answer: Yes.

- 3. Has Yourway rebutted that presumption?**

Suggested Answer: No.

- 4. Has Metro met all of the requirements of 52 Pa. Code §41.14 so as to grant the application?**

Suggested Answer: Yes

III. Argument

A. Preliminary Matters

Prior to the presentation of argument on the merits of the application, there exist two preliminary matters which Your Honor directed to be addressed in this Brief:

1. The Answer and New Matter to the complaint of Yourway requesting that the complaint be dismissed; (Tr.7-10) and
2. The admission of Tolla Exhibit T-1 into the record. (Tr.30-31).

These two items will be addressed in the body of this Brief.

B. General Legal Requirements

Before Your Honor are two consolidated proceedings: (1) the application of an existing certificated common carrier; and (2) a complaint filed by Yourway. Although consolidated for hearing, these two cases must be treated separately for decisional purposes. The application (Exhibit T-1) is a traditional application for a certificate of public convenience filed where an entity seeks permission to provide motor carrier service within a specific portion of the Commonwealth of Pennsylvania. As such Your Honor must be guided by Section 1103(a) of the Public Utility Code¹ and the Commission's policy statement regarding the evidentiary criteria used to decide motor common carrier applications,² as well as 66 Pa. C.S. §332, which places the burden of proof upon the party seeking an action of the Commission. As Metro is an existing certificated carrier, Your Honor must also be guided by the numerous Commission and Appellate Court cases that create a rebuttable presumption of technical and financial fitness on the part of such carrier.³ Similarly, this Commission has found that the presumption applies to its propensity to operate safely and legally. *Application of Three Rivers Limousine Service, Inc.* A-2014-2412182 (February 12, 2015). Unless those presumptions are rebutted by a protestant, the application must be granted.⁴

¹ 66 Pa. C.S. §1103(a).

² 52 Pa. Code §41.14.

³ *South Hills Movers, Inc. v. Pa. PUC*, 144 Pa. Commw 505, 601 A.2d 1308 (1992); *Re Friedman's Express, Inc.* 70 Pa. PUC 402 (1989).

⁴ *Application of Black Diamond Cab Company, Inc.* A-2008-2065150 (April 24, 2009).

With respect to the complaint filed by Yourway, there exists a threshold question regarding the right of Yourway to file the complaint in the first instance – i.e. has Yourway established its legal standing to initiate the complaint. Only after a complaining party has satisfied this requirement it may be entitled to participate with the burden of proof resting with the complaining party.⁵

C. Yourway Does Not Possess Standing to File The Complaint

On or about February 4, 2020, the undersigned counsel for Metro filed a Motion for Waiver of the time limitations contained in the Commission’s regulations at 52 Pa. Code §§ 5.61 and 5.101. Pursuant to this Motion, Counsel was seeking, due to its late entry into this proceeding on behalf of Metro, an opportunity to address the allegations contained in Yourway’s complaint and to file Preliminary Objections to the complaint. On or about February 20, 2020, Counsel for Yourway filed an Answer, not objecting to the filing of an Answer by Metro (Yourway Answer ¶ 14) but requesting that Your Honor deny Metro the right to file Preliminary Objections. (Yourway - Prayer for Relief). Due to the pandemic and Governor Wolf’s Emergency Orders, this issue was left for discussion in this brief.

Since there was no objection to the filing of an Answer by Metro, Your Honor via email dated June 2, permitted Metro to file an answer to the complaint but did not address the issue of preliminary objections. Due to the timing of the upcoming hearing, and in compliance with that email and the provisions of 52 Pa. Code §5.62, on June 4, 2020, Metro filed its Answer and New Matter to Yourway’s complaint presenting the affirmative defense that Yourway lacked standing to bring the complaint. Yourway’s Answer to the New Matter has never been filed. Within this New Matter, Metro discussed the issue of Yourway’s standing. As Yourway has filed no response, Metro submits that Yourway has not contested the facts, law, and allegations contained in this New Matter.

Pursuant to numerous Commission, Commonwealth, and Pennsylvania Supreme Court decisions as well as this Commission’s regulations, in order to file a complaint with this

⁵ 66 Pa. C.S. § 332.

Commission one must possess standing. Within the context of its answer and *New Matter*, Metro specifically raised the issue of Yourway's lack of standing to file the complaint.

"Standing" means that a party has a sufficient stake in an otherwise judicial resolution of a matter. The Commission has adopted the criteria used in Pennsylvania civil law practice to determine whether a party has standing. *Courier Express, Inc. v. F. L. Shaffer Company, Inc.*, C-892462 (1990).

While standing to participate in a proceeding before the Commission is primarily within its discretion,⁶ the Commission has held that a person or entity has standing only when that person has a direct, immediate and substantial interest in the subject matter of a proceeding. *Joint Application of Pennsylvania American Water Co and Evansburg Water Com.*, A-212285F0046/47 and A-210870F001 (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.*, 79 Pa. P.U.C. 23(1992); *Waddington v. Pennsylvania Public Utility Commission*, 670 A.2d 199 (Pa. Cmwlth 1995), alloc. Denied 678 A.2d 368 (Pa. 1996).

In determining whether party has standing, the Commission has explained its three pronged test:

A complainant's interest in the subject matter of a proceeding is direct if the complainant's interest is adversely affected by the actions challenged in the complaint, is immediate if there is a close causal nexus between the complainant's asserted injury and the actions challenged in the complaint and is substantial if the complainant has a discernible interest other than the general interest of all citizens in seeking compliance with the law.⁷

⁶ *Pennsylvania Natural Gas Association v. T.W. Phillips Gas and Oil Company.*, 75 Pa. P.U.C. 598, 603 (1991)

⁷ *KenR. 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. v. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975); *Empire Coal Mining & Development, Inc. v. Department of Environmental Resources*, 623 A. 2d 897 (Pa. Cmowlth 1993)

In order to meet this standard, pursuant to the Commission's regulations at 52 Pa. Code §5.52, a party is required to set forth facts sufficient to establish his standing to protest or complain. Yourway's complaint, even viewed in a light most favorable to it does not set forth any facts that establish its standing.

Yourway's interest is not direct. Yourway has not alleged a direct interest so as to confer standing upon it. In order to have such a direct interest an aggrieved party must show a causation of the harm to his interest by the matter of which it complains. Nowhere within the complaint does Yourway even allege that its interest has been harmed. Yourway does not allege that the unidentified individuals chose to be transported by Metro rather than Yourway⁸ nor that it had sufficient available capacity to perform such service especially in light of the numerous additional carriers in the Lehigh Valley area. Similarly, Yourway did not allege in its complaint or introduce any evidence at the hearing that it suffered any monetary or other harm or damage to its interest.

To have an "immediate" interest means that the nature of the causal connection between the action complained of and the injury to the person challenging the activity is sufficiently close so as to present a justiciable controversy. See generally, *In re Francis Edward McGillick Foundation*, 642 A.2d 467 (Pa. 1994).; *Application of Bucks Cab Company, LLC*, A-2008-2025262 [Decision of ALJ Smith (2008)]. In its complaint, Yourway does not allege any injury or any causal connection between the alleged illegal activity and any harm or financial loss suffered by it, nor did it present any such evidence at the time of trial. Yourway has not alleged any recognizable immediate interest.

Yourway's interest is not substantial. In order for a complainant's interest to meet the "substantial" test, the interest must be some discernible adverse affect to some interest other than the abstract interest of all citizens in having others comply with the law. See, *William Penn Parking Garage, Inc.*, *supra*. Neither the complaint nor evidence adduced at the hearing indicate any discernible adverse affect upon Yourway. Yourway neither alleges or seeks any

⁸ As stated ante, the witnesses presented at the hearing in this matter did not independently choose to utilize the services of Metro but were told to do so by Yourway managers who reimbursed these individuals for the trip.

damages as a result of the alleged violations of the Commission's regulations, but requests, inter alia that the Commission impose fines, refund fares to the "public"⁹, and order PennDOT to suspend the vehicle registrations of all of Metro's vehicles.

Yourway's own witness confirmed the exact reason for the filing of the complaint. When questioned on direct examination about the alleged violations of Metro, Mr. Jaffer, Operations Manager of Yourway stated:

I tried contacting the PUC first. I phoned them as well as an electronic complaint. And they basically, I feel like they just don't want bothered. I hate to say it but just a handful of complaints go through, nothing is ever done about it. So I feel like they're not following the rules, you're following everything by the book. Its not fair.

Q. Yeah. And is that why your company filed the protest in this matter, and the complaint in this matter?

A. Correct

(Tr. 37-38). The evidence in this proceeding is clear. The only reason for the filing of both the protest and the complaint is Mr. Jaffer's displeasure that the Commission Investigation and Enforcement Bureau did not respond to his protestations in a manner desired by Mr. Jaffer. Clearly, Yourway has not, either through the four corners of the complaint or the testimony of its own witness, shown a substantial interest sufficient to grant it standing to file the complaint.

This Commission has repeatedly held that a customer has a direct, immediate, and substantial interest and has standing to file a complaint. *Maiello, Brungo Maiello, LLP v. Verizon Pennsylvania, Inc.* 2009 Pa. PUC LEXIS 60 (2009); *Re Pennsylvania American Water Company*, 85 Pa. PUC 548 (1995); *Pa. P.U.C., et al v. Marietta Gravity Water Company*, 87 Pa. PUC 864 (1997). Yourway has not alleged that it was a customer of Metro. Thus, Yourway does not possess standing as a customer of Metro.

Finally, Yourway is attempting to act as a private attorney general to vindicate the "public interest" – an authority vested in the Commission itself and to put Metro out of

⁹ As the entity Yourway was not a passenger, there is nothing to be refunded to Yourway. Yourway has never explained who the "public" may be.

business. The Commission has found that: “individual litigants cannot act as private attorneys general to vindicate the public interest despite their lack of a direct, immediate and substantial interest in the controversy.” *Jetway Transport, Inc.* A-2008-2053623, 2009 Pa. PUC LEXIS 204 (2009). The remedy is clear, the complaint must be dismissed. To find otherwise would permit any entity who lacks standing to file a complaint against any utility or a protest to a filing or action of the Commission.

D. Exhibit Tolla 1 (T-1) Should Be Admitted Into The Record

During the course of the hearing, Metro attempted to introduce the application as filed with this Commission into the record as Tolla Exhibit 1 (“T-1”). (Tr. 29-31). Characterizing T-1 as two documents, Counsel for Yourway objected to the admission of the Verified Statement portion of the Application, claiming that the Verified Statement was hearsay; denied Yourway’s constitutional right to confront a witness; and Yourway’s right to cross examination. Initially, Counsel has mischaracterized the document as being two separate and distinct submissions when it is one document.

T-1 is an electronic copy of the officially filed document entitled Application which was obtained from the Commission’s data base at this docket number. It was filed as one document in compliance with the Commission’s regulations at 52 Pa. Code §3,381(a)(3) which provide in pertinent part:

(3) Filing and verification. An original application shall be filed by the applicant . . . The application by a common carrier for a certificate of public convenience authorizing the transportation of passengers or household goods in use shall be accompanied by verified statements of the applicant as set forth in subsection (c)(1)(iii)(A)(II).

Emphasis added. Yourway’s characterization may have been correct several years ago, when the filing of the Verified Statement generally came after the protest period for an application had passed. Specifically, §3.381(a)(3) previously provided that the Verified Statement may be filed simultaneously with the Application itself. The current language of the regulation is no longer permissive, but is mandatory.

Yourway was well aware of the existence of the contents of the document and cannot now express surprise and argue that its constitutional rights have been violated. During the hearing, Counsel for Yourway specifically questioned Mr. Tolla quoting from the document. (Tr. 20-21). Additionally, in response to an interrogatory propounded By Yourway, requesting a copy of the application, Metro referred Yourway to the “public document found on the Commission’s website at A-2019-3011470.” A click on the application in the document section of the Commission’s database would have returned the entire document currently marked as Exhibit T-1.

The document is not hearsay, but a sworn statement of Mr. Tolla, subject to the penalties of 18 Pa.C.S. §4904. As such it may be considered a form of affidavit which is readily admissible.

Finally, had Yourway desired to do so, Your Honor provided ample opportunity for Yourway to cross-examine Mr. Tolla on any statement made in the document. Instead Yourway chose to limit cross-examination to only a portion of the document. (Tr. 21). Yourway was never precluded by Your Honor from exercising its constitutional right to confront Mr. Tolla or cross-examine him, and did exercise those rights. Exhibit T-1 should be admitted into the record.

E. Argument on the Application Merits

1. Yourway has Standing Only to Protest a Portion of the Application

Before Your Honor is the Application of Metro Transportation LLC, an existing certificated call and demand carrier, which seeks to expand its existing service territory to and from points in the City of Allentown so as to include points in the counties of Lehigh, Northampton, Bucks, Schuylkill, Carbon and Monroe. (T-1, ¶10). Protestant Yourway possesses a certificate from this Commission to provide passengers call and demand service from points in Lehigh and Northampton counties to points in Pennsylvania. (Complaint ¶4).

On the question of standing to protest an application, it has been long established that a protestant must have some operating authority in actual or potential conflict with the authority sought by an applicant. *See, Application of Glen Alsace Water Company*, 45 PA PUC 472 (1971).

In the present application, a comparison of the existing authority of Yourway and that sought by Metro clearly indicates that in the case of Bucks, Schuylkill, Carbon and Monroe Counties, the service territories do not overlap. At a minimum, Yourway lacks the standing to protest that portion of the application for those counties.

2. Metro as an Existing Carrier Possesses a Rebuttable Presumption of Fitness Which has Not Been Rebutted by Yourway.

In order to obtain a certificate of public convenience from this Commission, an Applicant must meet the requirements of Section 1103(a) of the Public Utility Code, *66 Pa. C.S. §1103(a)* and Section 41.14 of the Commissions regulations, *52 Pa. Code §41.14*. Pursuant to § 1103 of the Code, the Commission may grant an application if it finds “that the granting of such certificate is necessary or proper for the service, accommodation, convenience or safety of the public.” In order to make this determination, the Commission, in a policy statement, setting forth the criteria to be taken into consideration in the granting of a motor carrier application. Section 41.14 provides:

§ 41.14. Evidentiary criteria used to decide motor common carrier applications – statement of policy

An applicant seeking motor carrier authority has the burden of demonstrating that it possesses the technical and financial ability to provide the proposed service. In addition, authority may be withheld if the record demonstrates that the applicant lack the propensity to operate safely and legally. In evaluating whether a motor carrier applicant can satisfy these fitness standards, the Commission will ordinarily examine the following factors, when applicable:

- (1) Whether an applicant has sufficient capital, equipment, facilities and other resources necessary to serve the territory requested.
- (2) Whether an applicant and its employees have sufficient technical expertise and experience to serve the territory requested.
- (3) Whether an applicant has or is able to secure sufficient and continuous insurance coverage for all vehicles to be used or useful in the provision of service to the public.

(4) Whether the applicant has an appropriate plan to comply with the Commission's driver and vehicle safety regulations and service standards in Chapter 29 (relating to motor carriers of passengers).

(5) An applicant's record, if any, of compliance with 66 Pa. C.S. (relating to Public Utility Code), this title and the Commission's orders.

(6) Whether an applicant or its drivers have been convicted of a felony or crime of moral turpitude and remains subject to supervision by a court or correctional institution.

Within its Protest, Yourway challenges Metro's fitness merely stating various conclusions as follows:

The applicant is unfit in that it does not possess the technical and financial ability to provide the proposed service and because the applicant lacks a propensity to operate safely and legally.

Protest ¶10. Protestant goes on to parrot the requirements of §41.14, claiming that Metro has failed to satisfy any one of the outlined factors.¹⁰

As a corollary to this policy statement, numerous Commission and court cases have held that companies possessing Commission authority that are seeking additional authority enjoy a presumption of financial and technical fitness. *Application of Cranberry Taxi, Inc. t/d/b/a Veteran's Taxi*, A-2010-2168756 (June 21, 2012); *Application of First Class Transportation*, A-2015-2466538 (August 31, 2017); *South Hills Movers, Inc. v. Pa. PUC*, 144 Pa. Commw. 505, 601 A.2d 1308 (1992); *Re Friedman's Express, Inc.* 70 Pa. P.U.C. 402 (1989); *Re V.I.P. Travel Service, Inc.* 56 PUC 625 (1982). Further, the Commission has found that a certificated utility is entitled to not only a presumption of financial and technical fitness, but that it also possesses a propensity to operate safely and legally. *Application of Three Rivers Limousine Service, Inc.*, A-2014-2412182 (February 12, 2015). Since Metro is presumed to be fit, it is Yourway's burden to present evidence to rebut Metro's prim facie case. With this presumption in mind, it becomes incumbent upon Yourway to, through a preponderance of the evidence, rebut that

¹⁰ Despite the removal of the requirement to prove need in §41.14, Protestant argues that there is no need for the proposed service.

presumption. The burden is a particularly heavy one. *Lehigh Valley Transportation Service, Inc. v. Pa. P.U.C.*, 56 A. 3d 49, (Pa. Cmwlth. 2012)

Although saying the correct words in its Protest to withstand preliminary objections, it was incumbent upon Yourway to present evidence to rebut the presumption. No evidence was introduced by Yourway regarding the sufficiency of capital, equipment, etc. of Metro to provide the proposed service. Only one question was asked on cross-examination regarding §41.14(a)(1). Upon cross-examination by Yourway's counsel, Mr. Tolla was questioned whether his current fleet would be sufficient to provide service in such an expansive service territory. (Tr.18). The record clearly shows that should the need arise Metro would purchase additional vehicles. (Tr. 13). As further noted on Exhibit T-1, Verified Statement ¶15, Mr. Tolla states that he would "purchase more vehicles once PA PUC approved the request to extend the service areas in the listed counties". Further, ¶ 3 (describing Metro's facilities, record keeping, dispatching, etc.) and ¶9 (Financial Statement) indicates Metro's evidence of §41.14(a)(1). Despite the complete opportunity to question Mr. Tolla regarding the Verified Statement, Yourway chose not to do so. Yourway has presented no evidence to dispute Metro's evidence regarding the first factor of §41.14.

As was the case with the first factor of §41.14, Yourway has not presented any evidence or conducted cross-examination on factors 2, 3, 4, or 6. Rather, Mr. Tolla stated that he has been in operation for three years; has insurance on all of his vehicles, has not committed a felony; performs background checks on all of his drivers, and has sufficient funds to provide service in the proposed service territory. (Tr. 13-15 and Verified Statement ¶¶ 4,5,6,7, and 8). Metro submits that Yourway has presented no competent evidence to begin to rebut the presumption of fitness with respect to §41.14 (1), (2), (3), (4), and (6).

Finally, despite having the opportunity to question Mr. Tolla regarding Metro's financial fitness, Yourway chose not to do so. As shown on Exhibit T-1, Metro has over \$142,000 in assets and only \$4,000 in liabilities. Clearly Metro is both technically and financially fit to provide the proposed service.

3. Yourway has not Met its Burden of Proving that Metro has failed to Comply with the Public Utility Code, this Commission’s Regulations or Orders.

Yourway has based its entire case on §41.14(5) – the propensity to operate safely and legally. Yourway introduced the testimony of six witnesses all of whom either work for Yourway, are acquainted with Yourway personnel; or were recruited to perform a private sting operation. The presumption of technical and financial fitness extends to the provisions of §41.14 (a)(5). *See, Three Rivers Limousine, supra.*

The lack of a propensity on the part of an Applicant safely and legally must be based upon the totality of the record that conclusively shows that an applicant will not operate safely or legally. As stated by the Commission “... the rebuttable presumption of existing carrier fitness is equally applicable to the issue of propensity to operate safely and legally.” *Application of Black Diamond Cab Company, Inc. A-2008-2065150 (April 29, 2009).* Thus, an applicant does not have an affirmative duty to prove that it will operate safely and legally, rather the protestant has the affirmative duty to prove that an existing carrier is not operating safely and legally. *Application of Mahmoud Awad, A-00119891 (January 3, 2005).*

In its decision in *Application of Michael Stover t/a Michael Stover Trucking, A-2017-2615590 (October 5, 2017)*, the Commission had the opportunity to address the issue of numerous alleged incidents of providing service without a certificate from the Commission.¹¹ As stated by the Commission:

It is well established that an applicant’s prior unlawful operation does not preclude the Commission from granting authority in a subsequent proceeding. *See Brinks, Inc. v. Pa. P.U.C., 500 Pa. 387, 456 A.2d 1342 (1983).*

* * *

In order for the Commission to conclude that an applicant lacks the propensity to operate legally in accordance with 52 Pa. Code §41.14(b)(5), the evidence of record, taken as a whole, must demonstrate that an applicant has shown a “persistent disregard for, flouting, or defiant attitude toward the Public Utility Code, or the orders and regulations of the Commission.” *Application of ATM Corporation of America t/d/b/a Classic Limousine Transportation, Docket No. A-00112166 (Order entered September 24, 1996).*

¹¹ As Stover was not an existing carrier, there was no presumption of fitness.

As explained by Mr. Tolla with reference to contacts by PUC Enforcement personnel:

Q. Now Mr. Tolla, Metro has been subject to at least two complaints, filed by the Pennsylvania Public Commission regarding your operations.

Correct?

A. Yeah, there's a second one, but I believe the second one was dropped.

Q. ... complaint filed on or about May 28, 2019?

A. Well I really don't remember this particular date, but I do remember that it's a complaint filed.

Q. And was that complaint because you provided transportation from Bethlehem outside your current authorized area, to a location in Pennsylvania?

A. Yes. That was a – that was a complaint.

(Tr. 21-22). The complaint in question¹² was filed May 28, 2019 and alleged that on February 26, 2019, Metro's log sheets indicated that extraterritorial service was rendered. Mr. Tolla testified that the driver performed the transportation without his knowledge. (Tr. 22). Metro, rather than contest the complaint paid the suggested fine and the matter was closed.

The complaint stated that an investigation which ultimately gave rise to the complaint occurred on March 1, 2019. Complaint ¶4. Mr. Tolla explained that:

Q. As a result of contact by the PUC, was your response to file the application, seeking the additional territory?

A. Yeah. They suggested that I do that.

(Tr. 27). The current application is dated July 8 and was filed with the Commission July 11, 2019, a mere 34 days after the filing of the complaint. Clearly Mr. Tolla heeded the recommendation of the Enforcement Officer and filed the instant application to expand Metro's territory.

¹² *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Metro Transportation LLC, C-2019-3007820*

Upon cross-examination, Mr. Tolla was questioned about a second alleged extraterritorial complaint. (Tr. 23-24). He explained that Commission personnel investigated an alleged second instance of providing extraterritorial service which was unfounded. (Tr. 23). "All I know is that the – the investigation agent called me up, came over, to look to see what was going on, and they got all the information they needed, and they didn't find anything" (Tr. 24). Contrary to Yourway's assertion that the PUC ignored its complaints, it is clear that the Bureau of Investigation and Enforcement followed up with subsequent investigations of Metro's operations and found nothing.¹³

Yourway presented six witnesses in support of its contention that Metro consistently violated the Public Utility Code, the orders of the Commission, and the Commission's regulations. The common thread running through Yourway's witnesses' testimony was that all were either employees of Yourway and relatives or acquaintances of Yourway employees. They were also instructed to take the pictures subsequently presented as Exhibits.¹⁴ Perhaps most damaging was the admission by the witnesses was that of all the trips they recorded, they were told to set up the trips and were, with the exception of one witness actually reimbursed by Yourway for entrapping Metro's drivers into providing extraterritorial service.

In viewing the testimony of record, four (4) Yourway witnesses testified that they had received extraterritorial service from Metro: Michael McCleave (2/29/19); Dionicio Perez (2/27/19); Melissa Lipsky (3/1/19); and Katie Miller (1/25/20). All of these allegations were presented to the Commission and apparently factually insufficient and unworthy of initiating a Commission complaint. As testified to earlier and as is evidenced by the Commission complaint at C- 2019-3007820, PUC Motor Carrier Inspection and Enforcement Officer Scharl met with Mr. Tolla on March 1, 2019, wherein Mr. Tolla was cited for extraterritorial service and was advised to file the instant application. (Tr. 26-27). This conversation occurred before the filing of the formal PUC complaint. No further extraterritorial service accusations appear in this record until that of Ms. Miller, (Yourway's dispatcher) after Mr. Tolla having spoken to Officer

¹³ Yourway provided no record evidence of this alleged complaint.

¹⁴ Although Mr. McCleave authenticated the pictures in P-1 as having been taken by him, since he appears in the first picture outside the cab, he testified that he did not take that picture. (Tr. 50). This casts doubt upon the authenticity of his entire exhibit.

Scharl. Having been informed and cited by Officer Scharl, Mr. Tolla, rather than showing a flagrant disregard for Commission Orders immediately ceased providing extraterritorial service.¹⁵

The second common thread running throughout the testimony of the above Yourway witnesses is that they were all either employees or otherwise tied to Yourway¹⁶. Mr. McCleave, Mr. Perez, and Ms. Lipsky were instructed by Yourway to secure the services of Metro; and were also reimbursed the fare amount by either Mr. Jaffer or a Mr. Sharmeil. (Tr. 51, 62, 69). It would be logical to conclude that Yourway, through Mr. Jaffer, hatched a poorly executed concerted plan to entice Metro to violate his service territory. The testimony of these witnesses are fraught with additional errors and misstatements. For example the receipt presented by Mr. Perez is identical to that of Mr. McCleave including origin and destination points even though Mr. Perez's testified to a different origin and destination point. Secondly, both receipts carry the date February 26, 2019 whereas Mr. Perez testified that he was transported on February 27, 2019. The pictures could have been taken anywhere – there are no identifiable markings for someone to conclude that they were taken where they say they were. Metro submits that the credibility of these witnesses is highly suspect.

Yourway's Operations Manager, Mr. Jeffer, testified that he became aware of Metro when Metro first applied to provide service in the City of Allentown but did not object to that application. (Tr. 35). Such is simply not true. Metro's original application for the City of Allentown was docketed at A-2015-2520120. On March 25, 2016, Yourway, through its President Gulam Jaffer filed a Protest. By Order dated July 1, 2016, Administrative Law Judge

¹⁵ Subsequent to the filing of the application, Mr. Tolla testified that an Investigation and Enforcement Officer contacted him again, performed an investigation and found nothing was amiss. (Tr. 23-24).

¹⁶ Mr. McCleave (former employee – Tr. 47); Mr. Perez (has friends at Yourway Tr. 53); Ms. Lipsky (boyfriend who performs IT services for Yourway, Tr. 64); and Ms. Miller (employee of Yourway, Tr. 74).

Barnes dismissed Yourway's protest.¹⁷ Not only was Yourway aware of the filing but sought to be an active participant in that proceeding.

Mr. Jaffer acknowledged on cross examination that the Commission's regulations permit the transportation of passengers from outside a carrier's certificated territory to a point within its service territory.¹⁸ Having stated that he saw Metro picking up passengers outside Metro's service territory he testified on cross-examination that he was unaware of whether those customers were being transported for compensation, the dates of the alleged transportation, or whether they were dropped off within Metro's service territory. (Tr. 39-40). Thus, the transportation may have been perfectly legal.

Yourway's final witness, Mr. Joseph Santee, made wild accusations that documents were systematically falsified at the direction of Mr. Tolla (Tr. 86) by reversing origin and destination points, a fact vehemently denied by Mr. Tolla. (Tr. 102.) In support of this accusation, Mr. Santee provided examples of telephone screen shots as part of his exhibit, purportedly showing addresses of various points either inside or outside Metro's service territory. (Exhibit P-7). After acknowledging that he was familiar with the Commission's regulation that only either the point of origin or destination need be in the service territory (Tr. 92), Mr. Santee testified that the exhibit showed pick-up and drop-off points (Tr. 88-89). He later contradicted himself when he testified on cross-examination that the exhibit only showed pick up points. (Tr. 90,). Amazingly, he could not recall where any drop off point was.¹⁹ (Tr. 94-95). This contradiction alone is a cause of concern regarding the credibility of Mr. Santee. If either one of the points was within Metro's service territory, such transportation was and is entirely legal. Mr. Santee's motives may not have been altruistic. Although testifying that he left the employ of Metro because of Metro's practices, Mr. Tolla testified that Mr. Santee at least twice took Metro's vehicle home for extended period of time during which Metro could

¹⁷ ALJ Barnes Initial Decision was approved by Final Order of the Commission entered August 9, 2016.

¹⁸ Tr. 39. 52 Pa. Code §29.312(4)

¹⁹ Mr. Santee also acknowledged that some of the pick-up points were indeed in the City of Allentown and within Metro's service territory. (Tr.93-95)

not reach him. Mr. Santee finally showed up when Mr. Tolla threatened to file a police report. (Tr. 102-104).

The Commission's records are clear. Two Commission complaints against Metro were filed. Metro did not contest those complaints instead paying the suggested fine. This is despite Yourway alleging that it reported alleged violation to PUC personnel. (Tr. 37). Mr. Tolla testified that he is not aware of any outstanding complaints lodged against him by the Commission. (Tr. 24). As stated previously, the true reason for the filing of the protest and complaint in this proceeding was Yourway's frustration at the Commission not filing formal complaints against Metro based upon its allegations.²⁰ (Tr. 37-38)

One PUC complaint is far from the persistent disregard for, flouting, or defiant attitude toward the Public Utility Code, or the orders and regulations of the Commission which would require denying of the application. When taken as a whole, the record consists of testimony by Yourway witnesses which lacks credibility; was part of a concerted effort financed by Yourway to entrap Metro over a false perception that the PUC Investigation and Enforcement Bureau was not performing as Yourway would have liked; was, with one exception, conducted before Metro was indeed visited by Enforcement personnel, of which Yourway was aware²¹; and in no way rises to the level of rebutting the presumption of Metro's propensity to operate safely and legally.

IV. Conclusion


The record before Your Honor is clear: Yourway lacks the standing to bring the complaint; Exhibit T-1 should be admitted into the record; Metro, as an existing carrier possesses a legal presumption that it is fit – both technically and financially and is presumed to

²⁰ Mr. Tolla testified that Commission personnel have been in contact with him, and made no mention of any additional complaints against Metro. Although speculative, it is possible the enforcement personnel performed their duty, investigated the allegations by Yourway and found no evidence to file a complaint.

²¹ Tr. 40-41.

be operating safely and legally; Yourway has not proven that Metro has exhibited a persistent disregard for, flouting, or defiant attitude toward the Public Utility Code, or the orders and regulations of the Commission, thereby overcoming the fitness presumption. Therefore, Yourway's complaint should be dismissed and the application be granted as filed.

Respectfully Submitted,



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Dated: July 25, 2020

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Metro Transportation, LLC	:	
	:	Docket No. A-2019-3011470
Yourway Taxi and Limo, Inc.	:	
v.	:	Docket No. C-2019-3013829
Metro Transportation, LLC	:	

CERTIFICATE OF SERVICE

I hereby certify that I have this date served a copy of the Main Brief of Metro Transportation, LLC upon the persons listed below via E-filing and/or email in accordance with the provisions of 52 Pa. Code §1.54.

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