

August 17, 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**

Reply Brief of Metro Transportation, LLC

Dear Secretary Chiavetta:

Appended hereto is the ReplyBrief 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	:	

**REPLY BRIEF OF
METRO TRANSPORTATION LLC**

Craig A. Doll, Esquire
Debra L. Roscioli, Esquire
REGER RIZZO & DARNALL LLP

(717) 580-7748 (direct dial)
Cdoll76342@aol.com

Attorney I.D. # 22814

Attorney for Metro Transportation, LLC

Dated: August 17, 2020

TABLE OF CONTENTS

I. Additional Procedural History.....	2
II. Counter Argument	2
A. Metro Has Established Its Prima Facie Case.....	2
B. Yourway Has Not Rebutted The Presumption Of Fitness.....	2
C. Yourway Has Failed To Rebut The Presumption Of Safe And Legal Operation By Metro.....	5
D. Yourway Does Not Have Standing To File The Complaint And No Fine Should Be Imposed.	8
III. Conclusion	10

I. Additional Procedural History

Metro Transportation, LLC (“Metro” or “Applicant”) has set forth the procedural history of this proceeding in its Main Brief at pages 1-2. In accordance with Your Honor’s order on the date of the hearing, on July 27, 2020, Metro’s Main Brief was recorded as filed with the Commission. On July 29, 2020, the Main Brief of Yourway Taxi and Limo, Inc. (“Yourway”) was filed. This Reply Brief is filed in response to the arguments raised by Yourway in its Main Brief and in compliance with your Order.

II, Counter Argument

A. Metro Has Established Its Prima Facie Case.

Within the introduction of its Main Brief, Yourway states that notwithstanding the presumption of fitness in favor of Metro, Metro must establish a prima facie case. As set forth below, Metro states that the mere existence of the presumption and Yourway’s duty to rebut that presumption is sufficient to establish a prima facie case. Yourway would ignore the legal effect of a presumption, have Metro present an entire case as if the presumption had not existed – in effect nullifying the legal effect of the presumption. In addition, Metro has further established its fitness through oral testimony and written testimony which is part of the record before the Commission.

B. Yourway Has Not Rebutted The Presumption Of Fitness.

Initially Metro agrees with Yourway that Your Honor must be guided by the legal requirements of the Commission’s policy statement found in 52 Pa. Code §41.14. However, as stated above, Yourway argues that in addition to being a certificated carrier with the presumption of fitness, an existing carrier must prove all of the elements contained in §41.14. To so find renders the presumption a legal nullity. If an existing carrier must prove every element of §41.14 then why did the Commission create the presumption in the first place? The reason for the presumption is obvious. Having already

found that an existing carrier is fit, and also assuming the Commission is performing its statutory enforcement duty, the Commission appropriately established the presumption and has required that a Protestant prove a negative – that an applicant is unfit. There exists a plethora of cases outlined in Metro’s Main Brief pp. 11-14, involving the presumption of fitness; technical, financial, and the propensity to operate safely and legally. In support of its position, Yourway does not appear to appreciate the significance of the presumption and the necessity of it to prove that the presumption is no longer valid. Once the continuing presumption attaches, the burden to rebut the continuing presumption is clearly upon Yourway. There is no necessity for Metro to present evidence in support of a presumption, but it is incumbent upon Yourway to prove that the presumption is no longer valid.

Yourway cites *Lehigh Valley Transportation Services v. Pa. P.U.C.*, 56 A.3d 49 (Pa. Cmwlth Ct. 2012) for the proposition that an existing carrier must prove all elements of §41.14 in addition to taking advantage of the presumption. A reading of the case simply does not support this proposition. As stated by the Court:

J&J is an existing certificate holder; therefore **we begin** by noting as such, J&J is entitled to a continuing presumption regarding its fitness to operate. *South Hills Movers, Inc. v. Pennsylvania Public Utility Commission*, 144 Pa. Commw. 505, 601 A.2d 1308, 1310 (Pa. Cmwlth. 1992). It is therefore Lehigh and Quick Service, as the parties challenging J&J’s Application, who bear the burden of rebutting this presumption.

Emphasis added. *Lehigh Valley*, 56 A.3d 49, 58. Thus the Court began its analysis with the presumption and appropriately concluded that a prima facie case had been established and that it was incumbent upon the protestants to prove the negative. The sole issue before the Court was whether alleged violations of the Code and Commission regulations was sufficient to deny the application. The Court deferred to the Commission’s ability to interpret its own regulations regarding the phrase “lacks a propensity to operate safely and legally” to mean a persistent disregard for, flouting, or defiant attitude towards the Code or the orders and regulations of the Commission. Significantly, the Commission found that despite violations, J & J’s application should be granted.

Not only does the presumption establish a prima facie case, Metro has presented credible oral and written evidence of its fitness. As stated in its Main Brief, pp. 11-13,

Yourway has presented no counter evidence regarding Metro's technical or financial fitness ignoring both the oral testimony of Mr. Tolla and his sworn written testimony in the form of the Verified Statement which, pursuant to Commission regulations, is a part of the application.¹ Within its own Main Brief, Yourway acknowledges oral testimony by Mr. Tolla on each and every element of §41.14. Apparently, this was not enough for Yourway. For example, Yourway criticizes Metro's position that it will utilize its existing vehicles to provide service throughout the proposed territory, and will purchase additional vehicles as necessary as totally inadequate to serve the proposed service territory. (Yourway M.B. 6-7). As a basis for this conclusion, Yourway relies on statistics not of record to speculate that Metro cannot provide service in the proposed territory. Rather than being a fault, Metro submits that such a plan makes tremendous business sense – why expend funds for vehicles that will not be used until the application is granted. Yourway appears to have forgotten its own testimony in its original application. When asked about the number of vehicles to be used, Mr. Gulam Ali Jaffer testified on behalf of Yourway that it has a few vehicles to start but would go out and buy additional vehicles after the application is approved. *Application of Yourway Transport, Inc.*, Docket No. A-2012-2300845. (Tr. 209). Mr. Tolla provided the same testimony in this proceeding. (Tr. 13).

Yourway speculates that Metro could not have sufficient technical expertise or experience to operate without any evidence to counter that of Metro. This is the precise reason why the Commission created the continuing presumption in the first instance. Having already found that Metro has sufficient technical expertise or experience, the Commission can continue to rely upon its earlier finding unless and until it is proven otherwise. Yourway has not produced a shred of evidence otherwise.

With respect to insurance, Yourway claims that Metro does not possess "sufficient and continuous insurance coverage for all vehicles to be used in the vast six (6) county geographic areas requested." Yourway did not even attempt to speculate as to how many vehicles it believed would be necessary to serve the area or show that Metro could not obtain or afford such insurance. Metro already possesses insurance on all of its existing vehicles as evidenced by

¹ See Metro M.B. pp. 9-10.

its Form E on file with the Commission. Yourway's argument also defies logic. Not only will the vehicles not be purchased for the expanded territory until the application is approved, but since those vehicles have not been purchased there is no need for additional insurance to be procured. The mere fact that it possesses insurance on all of its vehicles at the present indicates that it has a carrier that will provide insurance on additional vehicles in the fleet if necessary. Yourway has provided no evidence to the contrary.

Yourway also complains that Metro has not produced any evidence "...regarding Applicant's/Respondent's plan to comply with the necessary driver and vehicle safety regulations. Clearly, Yourway does not understand the presumption and the necessity of it to prove that the presumption is no longer valid. Once the continuing presumption attaches, the burden to rebut the continuing presumption is upon Yourway. There is no necessity for Metro to present evidence in support of a presumption, but it is incumbent upon Yourway to prove that the presumption is no longer valid. In addition, in response to Question 4 of its Application (Exhibit T-1), Metro sets forth a detailed explanation of its driver hiring and training programs. Similarly, Question 6 details its vehicle safety program.

In addition to this oral testimony, Exhibit T-1 provides additional evidence on all of the §41.14 criteria, a portion of which has been objected to by Yourway. Once more, Yourway need only look to its own application which included its Verified Statement, and which was made a part of the record in that proceeding.

Combining the presumption and the lack of any evidence to rebut that presumption except through innuendo and speculation, Yourway has utterly failed to rebut the presumption.

C. Yourway Has Failed To Rebut The Presumption Of Safe And Legal Operation By Metro.

As was the case with technical and financial fitness, Metro will not repeat its arguments set forth in its Main Brief with respect to each of Yourway's individual witness or that witness's credibility. The continuing fitness presumption extends to the propensity to operate safely and legally. In contrast, Yourway would have Your Honor sanction a competitor hatching a scheme to lure a company into providing unlawful service merely because the appropriate Commission

authorities did not believe the evidence presented to it and presumably decided that the activities complained of by Yourway should not result in any official Commission action. Not only does Yourway request that Your Honor ignore the vast number of cases that prohibit private attorney general actions, but find that the Commission's Enforcement Division is derelict in performing its duties. Yourway refuses to believe in the possibility that the Commission's Enforcement personnel reviewed the information provided to it by Yourway and found it unbelievable or lacking in substance.

In support of its proposition that due to alleged violations of the Public Utility Code, the application must be denied, Yourway cites *DF Bast v. PUC*, 397 PA 246 (1959) and *Bunting Bristol v. PUC*, 41 PA 286 (1965). At the same time, Yourway acknowledges that "operating without Commission authority alone does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission." *Capital City Cab v. Pa. P.U.C.*, 138 A.3d 119, 130 Cmwlth Ct. 2016; *Brinks, Inc. v. Pennsylvania Public Utility Commission*, 500 PA 387, 456 A.2d 1342 (1983). Yourway proceeds to argue that these two cases, as well as many additional court and Commission cases cited by Metro in its Main Brief cannot apply due to alleged fraud.

Both *Bast* and *Bunting* involve questions of 'need' for the proposed service. In *Bast* the Court specifically found:

The mere fact of prior operation without commission approval is not per se equivalent to an offense which will prohibit absolutely the acquisition of proper authority when the application is subsequently made.

397 Pa. 246, 251. A similar finding was made in *Bunting*. Further, in *Lehigh Valley Transportation, supra.*, the court endorsed the Commission's definition of the phrase "lack a propensity to operate safely and legally" as follows:

The PUC interprets the phrase "lacks a propensity to operate safely and legally," to mean a "persistent disregard for, flouting, or defiant attitude toward the [Code], or the orders and regulations of the [PUC]," (PUC Op. at 11-12 quoting Application of Central Transport, Inc. Docket No. A-00108155 (Order entered June 26, 1992)).

56 A.3d 49, 58.

In *Bast*, the illegal transportation was utilized as evidence of the need for the proposed service. Early Court and Commission cases found that showing inadequacy of existing service was a method of proving need. See, *Re Investigation of Taxicab Service*, I.D. 171 (1977); *Re Red Star Express Lines of Auburn, Inc.* A-00103375 (December 16, 1983). In *Red Star*, the Commission stated:

With respect to the traditional standards, it is well settled that a carrier which seeks operating authority has the burden of proving by substantial evidence that there is: (1) a public need for the proposed service; (2) inadequacy of the existing service to satisfy the need; and (3) capacity of the applicant to provide the proposed service. See, e.g. *Byerly v. Pennsylvania Pub. Utility Commission* (1970) 440 Pa. 521, 270 A.2d 186.

Red Star, 56 Pa. PUC 282, 286. Requests for service whether fulfilled or unfulfilled were accepted evidence of inadequacy.

Significantly in *Bast*, the applicant had provided illegal service for a period of 5 years and testified that he would continue to do so until that application was granted. Similarly, in *Bunting*, the presentation of evidence of illegal service was by customers for whom the illegal service was rendered and was used to support a finding of need. The Applicant in *Bunting* continued to operate illegally after the filing of the application and continued to do so for several years.

Yourway goes on to argue that the cases cited by Metro are inapplicable due to fraud. The entire basis of this accusation is based upon the testimony of one witness – Mr. Joseph Santee, a current employee of Yourway. Tr. 85. As stated in Metro’s Main Brief pp. 18-19, Mr. Santee’s testimony is based on conversations he overheard and his exhibit P-7 for the proposition that Mr. Tolla directed drivers to falsify records regarding trips that did not begin or end in Allentown.

It is clear, as acknowledged by not only Mr. Santee, but also Mr. Jaffer that the Commission’s regulations at 52 Pa. Code §29.312(4) provide that a certificate holder may transport an individual from a point in its service territory to any point in Pennsylvania, or from any point in Pennsylvania to a point within its service territory. Consequently, when either the

point of origin or destination is within its authorized service territory, that transportation is legal. In his testimony, Mr. Santee provided an example of the alleged fraud:

Like in other words if we picked up in Bethlehem and they were going to Allentown, we showed that we picked up in Allentown and took them to Bethlehem.

Tr. 86. Since the trip either originated or ended in Allentown and was perfectly legal under Metro's existing rights, it made no difference in what column the origination or destination point was placed by the driver. Further, and despite Mr. Santee claiming that other drivers were told the same thing, no additional witness was presented to corroborate this testimony; verify that this was a general instruction to all drivers; or that other drivers switched origination or destination points. As for Mr. Santee's exhibit P-7 which purports to show the reversal of origin and destination points, nothing could be further from the truth.² Not only does this exhibit not show the alleged falsified manifests but merely consists of screen shots from a cell phone of various locations. No evidence was presented as to whom these text messages were from or to whom they were sent. Of the eight addresses on the screen shots five were in Allentown and three were in Bethlehem. Mr. Santee was unable to recall if any of the destination points were within Metro's service territory. Tr. 88-89. Far from proving that manifests were altered, since none were submitted, Exhibit P-7 proves nothing; does not show that any illegal transportation took place; and casts doubt upon Mr. Santee's credibility. Finally, Mr. Santee's motives may not have been purely altruistic. As testified by Mr. Tolla, Mr. Santee took Metro's vehicle home for extended periods of time and only returned the vehicle when Metro threatened to file a police report. Tr. 102-104. In short, the testimony of a discredited and disgruntled former employee of Metro and current employee of Yourway defies credibility.

² On cross-examination, Mr. Santee admitted that the addresses were only points of origin. Tr. 90.

D. Yourway Does Not Have Standing To File The Complaint And No Fine Shold Be Imposed.

Yourway cites the Commission's regulation at 52 Pa. Code §5.22(a)(4) for the proposition that the mere fact that it is a competitor of Metro, it automatically is granting standing to bring a complaint. Yourway misunderstands the purpose of §5.22. 52 Pa. Code §5.22 sets forth the content of a formal complaint – i.e. the items that a document must contain before the Commission will even consider its filing. §5.22(a)(4) merely provides that the document must set forth the interest of the complainant in the subject matter. This regulation is followed by examples, not part of the regulation itself, nor does it automatically permit an individual to file a formal complaint. It merely provides that within the four corners of the document there must be a statement of what that interest may be. To find that a mere allegation in the complaint itself would automatically establish standing would render meaningless 52 Pa. Code §5.101(a)(7) which permits a challenge to the standing of a party as well as *William Penn Parking Garagev. City of Pittsburgh*, 464 Pa. 168, 346 A.2d 269 (1975) and numerous other Commission decisions. Significantly, Yourway cites no Commission or Court cases in support of its position.

The remainder of Yourway's Main Brief is devoted to seeking to have Your Honor impose unspecified monetary penalties upon Metro primarily based upon its unsubstantiated allegations of fraud. This effort is a barely disguised effort to eliminate Metro as a competitor. In essence, Yourway is attempting to act as a private attorney general to prosecute alleged crimes and seek the imposition of penalties rather than let Commission personnel do their job. For the reasons set forth in its Main Brief pages 8-9, such action is impermissible. Further, as testified to be Mr. Jaffer, all of these allegations were forward to the Commission's Bureau of Investigation and Enforcement who apparently determined that there was no validity to these allegations. Great deference must be given to those tasked to enforce the Commission's regulations.

In support of an extreme penalty, Yourway cites *Donald Fix, t/d/b/a/ Don Far Moving Company*, C-2009-2127784 which involved a complaint not be a private individual but by the

Commission's Bureau of Transportation and Safety. Such is not the case here. Yourway goes on the city *Application of Joel Sicherman*, A-2016-2532992 wherein counsel made the same argument as here citing *Bast* and *Bunting, supra*. In *Sicherman*, the applicant for original authority for household goods in transit, had performed that service for a period of ten years prior to seeking household goods authority even after it had obtained property authority. In contrast, the Puc filed a complaint for one instance of unauthorized service on May 28, 2019, which complaint was not contested, and the application currently before Your Honor was filed July 11, 2019, a little over a month later. Notably, the *Sicherman* application was granted.

III. CONCLUSION

For the reasons set forth in its Main Brief and this Reply Brief, Metro Transportation, LLC respectfully requests that Your Honor grant its Applicant to expand its existing service territory and deny the complaint of Yourway Taxi and Limo, Inc

Respectfully Submitted,



Craig A. Doll, Esquire
Debra L. Roscioli, Esquire
REGER RIZZO & DARNALL LLP

(717) 580-7748 (direct dial)
Cdoll76342@aol.com

Attorney I.D. # 22814

Attorney for Metro Transportation, LLC

Dated: August 17, 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 Reply 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.

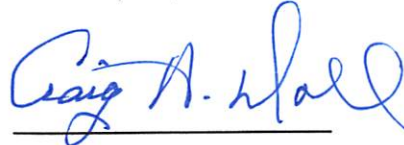
Via E-filing

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

Via e-mail

Honorable Joel H. Cheskis
Deputy Chief Administrative Law Judge
Pennsylvania Public Utility Commission
P.O. Box 3265
Harrisburg, PA 17105-3265

Richard T. Mulcahey, Esquire
Schubert, Gallagher, Tyler, Mulcahey
121 South Broad Street, 20th Floor
Philadelphia, PA 19107-4533



Craig A. Doll, Esquire
Debra L. Roscioli, Esquire
REGER RIZZO & DARNALL LLP

(717) 580-7748 (direct dial)
Cdoll76342@aol.com
Attorney I.D. # 22814

Attorney for Metro Transportation, LLC

Dated: August 17, 2020