

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Metro Transportation LLC	:	
For Approval to Expand Its Territory As A	:	A-2019-3011470
Small Passenger Carrier In The	:	
Commonwealth of Pennsylvania	:	

Yourway Taxi and Limo, Inc.	:	
	:	
v.	:	C-2019-3013829
	:	
Metro Transportation LLC	:	

INITIAL DECISION

Before
Joel H. Cheskis
Deputy Chief Administrative Law Judge

INTRODUCTION

This decision grants an application seeking an amendment and expansion of a motor carrier's operating authority because the applicant has sufficient capital, equipment, facilities and other resources necessary to serve the territory requested and has otherwise satisfied the requirements of the Commission necessary to have the application approved.

This decision also sustains a complaint that was filed by a competing motor carrier and consolidated with the application because the complainant has satisfied its burden to demonstrate that the applicant violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the applicant. Therefore, a civil penalty of \$2,000 will be imposed.

HISTORY OF THE PROCEEDING

On July 8, 2019, Metro Transportation LLC (Metro) filed an application with the Pennsylvania Public Utility Commission (Commission) seeking an amendment and expansion of its authority to provide service to include Lehigh County, Northampton County, Bucks County, Schuylkill County, Carbon County and Monroe County. The application was docketed at A-2019-3011470. Notice of the application was published in the *Pennsylvania Bulletin* on July 27, 2019, with a protest deadline of August 12, 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 me as the presiding officer. On September 13, 2019, a prehearing order was issued setting forth various procedural rules that would govern the hearing.

On October 11, 2019, counsel for Yourway submitted a letter requesting that the initial hearing scheduled for November 5, 2019 be converted to a telephonic pre-hearing conference. As there was no objection to Yourway's request, the request was granted by order dated October 18, 2019.

Also on October 18, 2019, Yourway filed a formal complaint against Metro, docket number C-2019-3013829, as well as a motion to consolidate the formal complaint with the application proceeding. In its complaint, Yourway averred that it believes that Metro has been rendering unlawful transportation to the public, for compensation, between points in the Commonwealth, and detailed three examples of such unlawful service which it averred were "representative of Respondent's wide spread unlawful transportation for compensation in Pennsylvania." Yourway also averred that Metro's "unlawful transportation and failure to comply with regulation in its business operations, recordkeeping and hiring of drivers have violated consumer protection policies" of the Commission.

The prehearing conference convened on November 5, 2019 as scheduled. Prehearing order number 2 was issued on November 6, 2019 memorializing the various matters that were discussed during the prehearing conference. This included formally consolidating the application and the complaint, reminding Metro of the need to obtain legal representation and to respond to discovery and scheduling an evidentiary hearing for January, 2020. The parties were also reminded that Commission policy promotes settlement.

A hearing notice dated November 5, 2019 was issued scheduling an evidentiary hearing for Tuesday, January 21, 2020. By email dated January 14, 2020, Craig Doll, Esquire, advised of his entry of appearance on behalf of Metro. Furthermore, Mr. Doll indicated, among other things, that there were several outstanding procedural matters and requested that the hearing be continued. The request for a continuance was granted by email on January 14, 2020 and a cancellation/reschedule notice was issued on January 17, 2020 continuing the hearing until Tuesday, April 21, 2020.

On February 6, 2020, Metro filed a motion for waiver of the time limitations in sections 5.61 and 5.101 of the Commission's regulations. 52 Pa.Code §§ 5.61, 5.101. In its motion, Metro averred that its counsel was retained one month after the deadline to file an answer and/or preliminary objections in response to Yourway's complaint. On February 20, 2020, Yourway filed an answer to Metro's motion for waiver of the time limitations in sections 5.61 and 5.101 of the Commission's regulations. Yourway admitted or denied the various averments in Metro's motion and argued that Metro had ample notice and opportunity to comply with the Commission's regulations. Metro's motion was granted by order dated February 25, 2020. As a result, Metro filed an answer and new matter to Yourway's complaint on June 4, 2020 generally admitting or denying the averments made by Yourway. In its new matter, Metro averred that Yourway lacks standing to bring the complaint.

Due to the Covid-19 pandemic, the hearing scheduled for April 21, 2020, was cancelled and rescheduled to June 9, 2020.

The hearing was held as scheduled on June 9, 2020. Craig Doll, Esquire, appeared on behalf of Metro and presented one witness. Richard Mulcahey, Esquire, appeared on behalf of Yourway and presented multiple witnesses who sponsored multiple exhibits that were admitted into the record. At the conclusion of the hearing, a discussion was held regarding the opportunity to submit a brief on the disputed issues. The parties agreed that main briefs would be filed on July 30, 2020 and reply briefs would be filed on August 21, 2020. A briefing order was issued on June 10, 2020 memorializing the briefing schedule and addressing additional procedural issues regarding briefs.

Pursuant to the briefing order, Metro filed its main brief on July 25, 2020 and Yourway filed its main brief on July 30, 2020. Subsequently, Metro filed its reply brief on August 17, 2020 and Yourway filed its reply brief on August 20, 2020.

The record in this proceeding closed on August 20, 2020, when the parties filed their reply briefs. The application and the complaint are now ready for disposition. For the reasons discussed below, the application will be granted and the complaint will be sustained.

FINDINGS OF FACT

1. The Applicant in this case is Metro Transportation LLC.
2. The Protestant/complainant in this case is Yourway Taxi and Limo, Inc.
3. Mr. Kusa Tolla is the operator of Metro. Tr. 12.
4. Metro operates eight vehicles from a central location that are dispatched by telephone. Tr. 12-13.
5. Metro is willing to add additional vehicles to cover the expanded territory. Tr. 13.
6. Mr. Tolla has been operating Metro for three years. Tr. 14.

7. Metro has insurance on all its vehicles. Tr. 14.
8. Mr. Tolla has never been convicted of a felony. Tr. 14.
9. Metro performs a background check of its drivers. Tr. 14.
10. Metro has sufficient funds to add additional vehicles if it is necessary to do so. Tr. 15.
11. Metro has authority to operate in Allentown and Lancaster. Tr. 16-17.
12. Metro's central location will be in Allentown. Tr. 18-19.
13. Metro has been subject to two complaints filed by the Commission regarding its operations. Tr. 21.
14. One complaint filed by the Commission against Metro pertained to Metro providing transportation from Bethlehem outside of the authorized area. Tr. 22.
15. One complaint filed by the Commission against Metro involved a driver who did not have a valid license. Tr. 22.
16. As a result of the complaint filed by the Commission regarding providing transportation outside of the authorized area, Metro filed the instant application seeking the additional service territory. Tr. 27.
17. Tolla Exhibit 1 is Metro's application to expand its service territory dated July 8, 2019. Tr. 30; Tolla Exh. 1.
18. Shiraz Jaffer is the operations manager for Yourway Transportation. Tr. 33.

19. Yourway is a 22-year-old transportation company based in Allentown with 100 employees that started as a courier service and added other services and operates as many as 13 vehicles. Tr. 34.

20. Mr. Jaffer witnessed Metro staged at a bus stop, picking up at hotels and operating outside of Allentown. Tr. 36.

21. After seeing Metro operating at the airport, Mr. Jaffer contacted the Airport Authority and the Commission. Tr. 37.

22. Yourway does not do street hails. Tr. 38.

23. Yourway does not provide service out of its territory. Tr. 39.

24. Michael McCleave is a former Yourway employee. Tr. 44.

25. Exhibit P-1 is a letter written by Mr. McCleave, dated March 1, 2019, regarding a ride he received from Metro on February 26, 2019 from the Walmart in Whitehall, Pa to the Sands Casino in Bethlehem, Pa. Tr. 45; Exhibit P-1.

26. Exhibit P-1 includes a picture of a Metro taxi outside the Sands Casino and a copy of the fare showing a charge of \$31.05. Tr. 45-46; Exhibit P-1.

27. The operations manager of Yourway asked Mr. McCleave to call Metro for the ride and take the picture. Tr. 47-49

28. Dion Perez has friends who work at Yourway. Tr. 54.

29. Exhibit P-2 is a letter written by Mr. Perez dated March 1, 2019 indicating that he was picked up by Metro on February 27, 2019 at the Sands Casino in Bethlehem and taken to the Walmart in Whitehall. Tr. 54-55; Exhibit P-2.

30. Exhibit P-2 includes three pictures: 1) a picture of the car that picked up Mr. Perez at the Sands Casino, 2) a picture of the fare at Walmart for \$30.35 and 3) a picture of the receipt from the owner showing a charge of \$31.05. Tr. 55- 57, Exh. P-2.

31. Mr. Jaffer asked Mr. Perez to call Metro for the ride and to take pictures. Tr. 58.

32. Melissa Lipsky is familiar with Yourway because her boyfriend provides IT service for them. Tr. 64.

33. Exhibit P-3 is a letter Ms. Lipsky wrote dated March 4, 2019 indicating that she received a ride from Metro on March 1, 2019 from Barnes and Nobles at the Lehigh Valley Mall in Whitehall to Target on North Cedar Crest Boulevard outside of Allentown. Tr. 64-65; Exhibit P-3.

34. Exhibit P-3 includes four pictures: 1) a picture of the car that picked up Ms. Lipsky at Barnes and Nobles, 2) a picture of the fare meter taken in route to Target, 3) a picture of the car as it dropped her off at Target, and 4) a picture of the fare receipt. Tr. 65-66; Exhibit P-3.

35. Ms. Lipsky was instructed by the operations manager at Yourway to request the ride on March 1, 2019 from Metro and to take pictures. Tr. 67-69.

36. Katie Miller has been employed by Yourway for four years as a dispatcher. Tr. 74.

37. Exhibit P-6 is a letter Ms. Miller wrote dated January 27, 2020 regarding a ride Ms. Miller took from Metro Taxi on January 25, 2020 at King Kone on MacArthur Rd. in Whitehall to the Lehigh Valley Mall in Whitehall with a stop in between at Wawa on MacArthur Rd. in Whitehall. Tr. 74-75; Exhibit P-6.

38. During Ms. Miller's ride, the driver took three incoming calls and made one outgoing call. Exhibit P-6.

39. Exhibit P-6 includes three pictures: 1) a picture of the driver who drove into the parking lot at King Kone, 2) a picture of Ms. Miller sitting behind the driver, and 3) a picture of the trip receipt. Tr. 76-78.

40. Ms. Miller asked Metro for the ride even though she works for Yourway because she believed Metro was giving rides they were not permitted to give and she wanted to see if they would do that for her too. Tr. 79.

41. Joseph Santee was a driver for Yourway off and on for two years. Tr. 85.

42. Prior to being employed by Yourway, Mr. Santee was employed by Metro for a few months. Tr. 86.

43. Exhibit P-7 is screen shots of text messages between Mr. Santee and Metro about pick-up and drop-off locations in Bethlehem, Allentown and Fogelsville. Tr. 88-89; Exh. P-7.

DISCUSSION

A. Legal standard

This consolidated proceeding involves both an application and a complaint. As such, both will be addressed in this decision.

Section 332(a) of the Public Utility Code, 66 Pa.C.S. § 332(a), provides that the party seeking affirmative relief from the Commission has the burden of proof. In this proceeding, Metro has applied to the Commission for an expansion of its operating authority. Thus, Metro is the party seeking affirmative relief from the Commission with regard to the

application and, therefore, it is the party with the burden of proof with regard to its application. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950) (Se-Ling Hosiery).

In Se-Ling Hosiery, the Pennsylvania Supreme Court held that the term, “burden of proof” means a duty to establish a fact by a preponderance of the evidence. Id. The term, “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the opposing party. Upon Metro’s submission of evidence sufficient to establish a *prima facie* case, the burden of going forward with the evidence, sometimes called the burden of persuasion, shifts to Yourway. If Yourway fails to rebut such evidence, then Metro prevails. If, however, Yourway has placed into the record evidence to rebut that of Metro, the burden of going forward with the evidence shifts back to Metro. In order to then satisfy the burden of proof, Metro must rebut Yourway’s evidence by a preponderance of the evidence. Although the burden of going forward with the evidence shifts from one party to the other, the burden of proof never shifts. The burden of proof with regard to the application remains with Metro. *Cf.*, Replogle v. Pa. Elec. Co., 54 Pa. PUC 528 (1980); Waldron v. Philadelphia Elec. Co., 54 Pa. PUC 90 (1980) (Replogle).

On appeal, decisions of the Commission must be supported by substantial evidence in the record. The Pennsylvania appellate courts have defined substantial evidence to mean such relevant evidence that a reasonable mind may accept as adequate to support a conclusion. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 413 A.2d 1037 (1980); Murphy v. Pa. Dept. of Pub. Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961).

These same legal standards of burden of proof and substantial record evidence also apply to the burden placed on Yourway in order for its complaint against Metro to be sustained. That is, in order for Yourway, as the party seeking affirmative relief from the Commission with regard to its complaint, to have its complaint sustained, Yourway must prove by a preponderance of the evidence that it has presented evidence which is more convincing, by

even the slightest degree, than Metro. If it does, Metro then has the burden to rebut Yourway's evidence or the complaint will be sustained.

With regard to the application, however, in order to provide motor carrier service in Pennsylvania, a person or entity must first obtain a certificate of public convenience from the Commission. 66 Pa.C.S. § 1101. A certificate of public convenience is required for any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized. 66 Pa. C.S. § 1102(a)(1). A certificate of public convenience shall only be granted if it is necessary or proper for the service, accommodation, convenience or safety of the public. 66 Pa.C.S. § 1103(a).

The specific criteria the Commission uses in determining whether to approve a motor carrier application is set forth in the policy statement codified at Section 41.14 of the Commission's regulations. Section 41.14 provides:

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

An applicant seeking motor common 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 lacks a 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 contained 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 the 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.

52 Pa. Code § 41.14. The Commission has held that the determination of financial fitness is within the Commission’s discretion, on a case-by-case basis, with the primary concern being the adequacy of the service to the public. Application of Raymond P. Sutherland, Docket No. A-00122346 (Order entered June 5, 2007).¹

B. Position of the Parties

1. Metro Main Brief

In its Main Brief, Metro began its argument by noting that the issues to be briefed are: 1) the answer and new matter to the complaint of Yourway requesting that the complaint be dismissed and 2) the admission of Tolla Exhibit 1 into the record. Metro M.B. at 4. Metro recognized that although this case involves two proceedings consolidated for hearing, they must be treated separately for decisional purposes. Id. Metro argued that, with regard to the application, “Metro is an existing certificated carrier, Your Honor must also be guided by the numerous Commission and appellate cases that create a rebuttable presumption of technical and financial fitness on the part of such carrier” and that, unless those presumptions are rebutted, the

¹ Of note, the Commission recently amended its regulations at 52 Pa.Code §§ 3.381-385 to eliminate the requirement that an applicant for common carrier authority must establish that approval of the application would serve a useful public purpose, responsive to a public demand or need. Final Rulemaking Amending 52 Pa.Code Chs. 1, 3, 4, 23, and 29, Docket No. L-2015-2507592 (Order entered Oct. 27, 2016). Consistent with this regulatory change, the Commission also revised the Policy Statement regarding the evidentiary criteria used to evaluate motor carrier applications to reflect the elimination of the public need component. 52 Pa.Code § 41.14.

application must be granted. Id. (citation omitted). Metro further argued that, with regard to Yourway’s complaint, Yourway does not possess standing to file the complaint. Id. at 5.

Metro then provided specific legal argument regarding its position that Yourway does not have standing to file the complaint. Metro argued that “standing” means that a party has a sufficient stake in an otherwise judicial resolution of a matter and 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.” Id. at 6-7 (citations omitted). Metro then argued that Yourway did not allege in its complaint that it has a direct interest and did not introduce any evidence at hearing that it suffered any monetary or other harm or damage to its interest. Id. at 7. Metro further argued that Yourway did not allege any injury or causal connection between any alleged illegal activity and any harm or financial loss suffered by it. Id. Finally, Metro also argued that Yourway’s interest is not substantial. Id. at 7-8. Metro added that the Commission has repeatedly held that a customer has standing to file a complaint but Yourway is not a customer of Metro and that Yourway is acting as a private attorney general to vindicate the “public interest.” Id. at 8. Metro concluded that Yourway’s complaint must be dismissed.

With regard to the admission of Tolla Exhibit 1, Metro argued that the document should be admitted because counsel for Yourway has mischaracterized it as being two separate and distinct submissions when it is one document – the officially filed application filed with the Commission. Id. at 9. Metro noted that the Commission’s regulations have changed so that the current language of Section 3.381(a)(3) is no longer permissive but requires the filing of a verified statement with the application. Id. Metro added that Yourway was aware of the existence of the document and the document is not hearsay but a sworn statement. Id. at 10. Finally, Metro added that Yourway had an opportunity to conduct cross-examination on the exhibit but did not do so.

Lastly, Metro argued in its brief the merits of the application. Metro argued that Yourway only has standing to protest a portion of the application because Yourway only possesses a certificate to operate call and demand service from points in Lehigh and Northampton counties to points in Pennsylvania and that, therefore, Yourway lacks standing to

protest the application as it pertains to Bucks, Schuylkill, Carbon and Monroe Counties. Id. at 10-11. Metro then argues that Yourway has failed to demonstrate that Metro does not meet the Commission’s fitness requirements to have its application approved. Id. at 12. In particular, Metro argued that “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.” Id. (citations omitted). Metro argued that Yourway has failed to rebut these presumptions. Id. at 12-13. Metro rebutted the evidence presented by Yourway in support of its position that Yourway has failed to rebut Metro’s presumption. Id. at 14-19.

2. Yourway Main Brief

In its main brief, Yourway argued that Metro’s presumption of fitness has been rebutted because Metro has consistently operated outside its geographic area without authority and directed drivers to falsify manifests showing that Metro lacks the propensity to act lawfully and has a deliberate disregard for the Commission’s rules and regulations. Yourway M.B. at 5. Yourway then addressed each of the six factors that the Commission examines under Section 41.14 of its regulations to determine whether a motor carrier applicant satisfies the fitness standards. *See*, 52 Pa.Code § 41.14.

With regard to whether Metro has sufficient capital, equipment, facilities and other resources necessary to serve the territory requested, Yourway argued that it is “inconceivable to [Yourway] that Metro with eight (8) vehicles could properly service the public, as is required by the Commission, in the vast geographic area requested.” Id. at 6. Yourway added that Metro already “is not properly servicing the public in the city of Lancaster.” Id. at 6-7. With regard to whether Metro has sufficient technical expertise and experience to serve the territory requested, Yourway argued that “the record is completely devoid of any evidence of whether the principal of Metro or its employees have any technical expertise and experience to serve the vast geographic area requested,” noting also that Metro was subject to a complaint sustained for a driver not possessing a valid driver’s license. Id. at 7, *citing*, Tr. 22. With regard to whether Metro has sufficient insurance coverage for all vehicles, Yourway noted that the testimony provided on this issue does not show sufficient and continuous insurance coverage for

all vehicles to be used. Id., *quoting*, Tr. 14. Similarly, Yourway argued that the record is completely devoid of any evidence regarding Metro’s plan to comply with the necessary driver and vehicle safety regulations. Id.

With regard to Metro’s record of compliance with the Public Utility Code and Commission Orders, Yourway argued that Metro has been the subject of two complaints issued by this Commission. Id. at 7-8, *citing*, Tr. 22. Yourway added that the principal of Yourway observed Metro on numerous occasions picking up and dropping off passengers outside of its authority and that the persistent unlawful activities of Metro caused Yourway to file the instant protest and complaint and produce five witnesses that provided evidence of unlawful activity. Id. at 8, *citing*, Tr. 36-37, 86-91. Yourway then described the details of the persistent unlawful activities it alleged Metro engaged in. Id. at 8-9, *citing*, Tr. 45, 57, 65, 77, 85-91; *see also*, Exhibits P-1, P-2, P-3, P-6 and P-7. In particular, Yourway argued that “all Metro drivers were instructed by Mr. Tolla to doctor manifests to avoid fines and other penalties by the Commission.” Id. at 9, *citing*, Tr. 90-91. Yourway argued that this evidence demonstrates that Metro has a propensity to operate outside of the confines of the law and should not be granted additional authority. Id.

Next, Yourway argued that Tolla Exhibit 1 should not be admitted into the record as a late filed exhibit because it has been objected to, was not identified by Mr. Tolla and could not have been subject to meaningful cross examination since Mr. Tolla did not have the document with him at the hearing. Id. at 10. Yourway also argued that Tolla Exhibit 1 should have been identified as an exhibit prior to the hearing and that the statement is stale since it is dated July 8, 2019. Id.

Yourway concluded its brief by arguing that its complaint should be sustained since Yourway has satisfied its burden under Section 701 of the Public Utility Code. Yourway first argued that it has standing to bring the complaint since it is a competitor of Metro. Id. at 10-11, *quoting*, 52 Pa. Code § 5.22(a)(4). Yourway next addressed each of the ten factors in Section 69.1201 of the Commission’s regulations used to determine penalties. Id. at 11-13, *citing*, 52 Pa.Code § 69.1201. Yourway did not argue for a specific civil penalty amount.

3. Metro Reply Brief

In its reply brief, Metro first reiterated that it has established its *prima facie* case that its application should be approved, noting that Yourway has failed to rebut its presumption of fitness. Metro R.B. at 2.

Second, Metro rebuts Yourway's argument that an existing carrier must prove all elements of Section 41.14 by arguing that the presumption is supported by a plethora of cases identified in Metro's main brief. Id. at 2-3, *citing*, Metro M.B. at 11-14. Metro argued that this presumption places the burden on Yourway. Id. at 3. Metro then discussed case law cited by Yourway in its main brief and argued that Yourway presented no counter evidence regarding Metro's technical or financial fitness, referencing the testimony of Mr. Tolla and the sworn testimony attached to the application that was admitted into the record. Id. at 3-4. Metro argued that "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 proves otherwise. Yourway has not produced a shred of evidence otherwise." Id. at 4. Metro further argued that Yourway's argument regarding Metro's level of insurance on its existing vehicles is evidenced by its Form E on file with the Commission. Id. at 4-5. Metro argued that the same logic applies to Yourway's argument regarding Metro's plan to comply with the necessary driver and vehicle safety regulations, noting that the presumption does not require Metro to satisfy this factor, but for Yourway to show that Metro did not satisfy this factor. Id. at 5. Metro also relies on Tolla Exhibit 1 as additional evidence demonstrating that the application should be approved. Id.

Third, Metro argued that Yourway has also not rebutted the presumption of safe and legal operation of Metro. Here, Metro rebuts Yourway's "scheme to lure a company into providing unlawful service merely because the appropriate Commission authorities did not believe the evidence presented to it." Id. at 5-6. Metro added that "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." Id. at 6. Metro again refutes the case law relied on by Yourway in its main brief, as well as the testimony of one Yourway's witnesses who testified regarding Metro's alleged illegal activity. Id. at 6-8.

Finally, Metro responded to Yourway's arguments regarding standing and request for the imposition of a civil penalty. Metro noted that the regulation relied on by Yourway does not support Yourway's argument. Id. at 9. Metro argued that Yourway's efforts to have a civil penalty imposed is "a barely disguised effort to eliminate Metro as a competitor" and that Yourway is acting as a private attorney general. Id. Metro then distinguished the cases Yourway relied upon in making these arguments. Id. at 9-10.

4. Yourway Reply Brief

In its reply brief Yourway responded to Metro's arguments that Yourway lacks standing to file its complaint by reiterating that Section 5.22 allows competitors to file complaints. Yourway R.B. at 1.

Yourway also responds to Metro's argument that it possesses a presumption of fitness as an existing carrier by noting that the presumption is rebuttable. Id. at 2. Yourway argued that Metro has not establish a *prima facie* case because it relies on the Tolla Exhibit 1 which, Yourway argued, should not be admitted into the record for the reasons Yourway previously provided. Id. Yourway added that a more extensive record should have been developed in light of the extensive geographic area requested in the application. Id. at 3.

Yourway then argued that it has rebutted Metro's presumption by arguing that Metro has failed to establish a *prima facie* case and because Yourway presented evidence of Metro's unlawful and fraudulent activities. Id. at 4. Yourway added: "Let's not sugar coat Metro's activities – they are unlawful and the record keeping is fraudulent." Id. Yourway added that its witnesses were all credible and Metro provided no rebuttal testimony against the evidence that Metro consistently provided unlawful transportation and doctored trip manifests to commit fraud on the Commission. Id. In addition, Yourway, among other things, responded to Metro's attacks on its witnesses and argued that "what is relevant is the fact that numerous unlawful trips occurred." Id.

Yourway concludes its reply brief by arguing that Metro has not met all of the requirements of Section 41.14 of the Commission’s regulations and, therefore, its application should be denied.

C. Disposition

Before addressing the underlying merits of the application and the complaint, including the request for the imposition of a civil penalty, the parties have raised two preliminary matters that must be addressed: 1) whether Yourway has standing to file the complaint and 2) whether the verified statement attached to Metro’s application should be admitted into the record.

1. Standing

Metro has argued that Yourway’s complaint should be dismissed because Yourway lacks standing to bring the complaint. Normally, this issue is addressed earlier in the conduct of a proceeding, and Metro did raise the issue of standing when it filed an answer to Yourway’s complaint. However, the issue of whether Yourway has standing to bring the complaint was never resolved due to various procedural complications affecting this case – namely, the fact that counsel for Metro did not enter his appearance in this case until several months after the application was filed and logistical complications arising from the Covid-19 pandemic and its impact on the Commission’s, and the parties’, ability to operate.² I find that

² Currently, the Commission and the Commonwealth are facing an unprecedented pandemic. As a result of this pandemic, the Commission offices have been closed and the Commission is operating under unique circumstances. On March 20, 2020, the Commission issued an Emergency Order at docket number M-2020-3019262 in response to the Proclamation of Disaster Emergency issued by Governor Wolf on March 6, 2020. Although this Initial Decision is not decided pursuant to the emergency provisions contained in the March 20th Emergency Order, the Emergency Order is noted here because it encourages all parties to Commission proceedings “to cooperate regarding the suspension, extension, waiver or change of any regulatory, statutory or procedural deadlines in connection with the performance of any obligation prescribed by the Public Utility Code or other applicable law.” The Commission also noted that “the receipt and sending of all mail from the United States Postal Service and other couriers has been interrupted while the Commission has limited, or no, access to its physical facilities.” The Commission “encourage[d] the cooperation of all persons having business before the Commission to assist with implementing measures necessary for continuing Commission operations during the effective dates of this Order and the Covid-19 disaster emergency.” Such cooperation allows the issue of standing to be addressed in this Initial Decision.

Yourway has standing to file its complaint against Metro because it has a direct, immediate and substantial interest in the subject matter of which it complains.

As Metro noted in its main brief, standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency. Pa. Nat'l Gas Assoc. v. T.W. Phillips Gas and Oil Co., 75 Pa. PUC 598, 603 (1991). 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 prop. 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, 346 A.2d 269 (Pa. 1975); Landlord Serv. Bureau, Inc. v. Equitable Gas Co., 79 Pa. PUC 342 (1993); Re Equitable Gas Co., 76 Pa. PUC 23 (1992); Mfrs.' Assoc. of Erie v. City of Erie - Bureau of Water, 50 Pa. PUC 43 (1976); Waddington v. Pa Pub. Util. Comm'n, 670 A.2d 199 (Pa.Cmwlth. 1995), *alloc. den.*, 678 A.2d 368 (Pa. 1996). In this case, Yourway's standing must be viewed in light of its ability to file a complaint, in addition to its ability to file a protest.

When viewed in light of Yourway's ability to file a complaint, it is clear that Yourway has a direct, immediate and substantial interest in the matter involving Metro's provision of transportation service outside its certificated service area.

As Yourway witness Mr. Jaffer testified, Yourway has 100 employees providing taxi, airport transfer and limousine service with as many as 13 vehicles. Tr. 33-34. The primary location of the business is in Allentown but the company has authority to operate in Lehigh County and Northampton County, including providing airport shuttle service, among other services. Tr. 34-36. Mr. Jaffer testified that he observed Metro providing service beyond their certificated operating authority that is "hurting [his] business. So that's why I'm speaking up." Tr. 36. Mr. Jaffer explained that is why Yourway filed the complaint in this matter. Tr. 37-38. Similarly, in its complaint, Yourway complained that Metro has been providing service beyond its certificated service territory and presented evidence during the hearing regarding such averments.

As a result, Yourway has a direct, immediate and substantial interest in the matters involved in this proceeding. Yourway's interest is direct because Metro's action hurt Yourway's business interests. Yourway's interest is immediate because they have occurred recently and may continue to be occurring. Yourway's interest is substantial because of the impact on its business if Metro's actions continue.

Metro's arguments to the contrary will be rejected. Yourway has argued that Metro's actions have hurt its business interests, contrary to Metro's argument in its brief that Yourway did not and therefore Yourway's interest is not direct and immediate. Furthermore, Metro's argument that Yourway's interest is not substantial because Yourway did not "indicate a discernible impact" on Yourway, as Metro argued, is also without merit. Hurting Yourway's business is a substantial interest that warrants granting Yourway standing in this proceeding. Likewise, Metro's argument that Yourway cannot act as a private attorney general to vindicate the public interest is also not sufficient to warrant denying Yourway standing in this proceeding. While it is true that the Commission has an enforcement bureau that is charged with investigating and enforcing the Commission's rules and regulations, this does not preclude Yourway from filing its own complaint when its own interests are affected, as is the case here. Metro's argument to the contrary is without merit.

As such, Yourway has standing to be involved in this proceeding and Metro's arguments to the contrary will be dismissed. The issues raised by Yourway can be fully considered in determining whether Metro's application should be granted and whether Yourway's complaint should be sustained.

2. Tolla Exhibit 1

During the hearing held in this matter on June 9, 2020, counsel for Metro inquired as to whether the application itself is part of the record of this proceeding and, if not, he would move it in to the record as Tolla Exhibit 1. Tr. 29-30. Counsel for Yourway did not object to the admission of the application, "with the exception that the application would not include the verified statement of the applicant." Tr. 30. Counsel for Metro was directed to provide an

electronic version of what he wanted admitted as Tolla Exhibit 1 and counsel for Yourway would then be given an opportunity to address any objections in brief. Tr. 31. Counsel for Metro emailed Tolla Exhibit 1 the following day and counsel for Yourway objected as follows by email that same day:

By offering the statement, Applicant is attempting to introduce additional testimony in written form. The Statement is utilized by the Pennsylvania Public Utility Code to evaluate an applicant's fitness in an uncontested case. My objection is based on the Statement being hearsay, the Statement denies my client the constitutional right to confront a witness and the Statement denies my client the constitutional right to cross examination. For these reasons, the Statement must not be admitted into evidence.

Yourway's objection to the admission of the verified statement that is included as part of the application will be denied and the entire application, including the verified statement, will be admitted into the record of this proceeding.

Section 5.403 of the Commission's regulations provides that presiding officers have all necessary authority to control the receipt of evidence, including ruling on the admissibility of evidence. 52 Pa. Code § 5.403(a)(1). The presiding officer will actively employ these powers to direct and focus the proceedings consistent with due process. 52 Pa. Code § 5.403(b). In addition, presiding officers have the authority to "exclude irrelevant, immaterial or unduly repetitive evidence, to prevent excessive examination of witnesses, to schedule and impose reasonable limitations on discovery and to otherwise regulate the course of the proceeding." 52 Pa. Code § 5.483(a).

Metro is correct that the application and the verified statement are generally considered as one document. Metro's request for the admission of "the application" was understood to include the verified witness statement during the hearing. Tr. 31. Metro is also correct that Yourway had an opportunity to conduct cross-examination on the verified witness statement and that the witness statement is not hearsay since Mr. Tolla was present at the time of the hearing. To the extent that Yourway was surprised that the verified witness statement was going to be admitted into the record of this proceeding, counsel could have asked for a brief

recess of the hearing to review the statement or another opportunity to more specifically respond to the verified statement. Yourway has otherwise not presented any valid argument why the verified witness statement should not be admitted into the record. The verified witness statement is not irrelevant, immaterial or unduly repetitive evidence and, therefore, should be admitted.

As such, Yourway's objection to the admission of the verified statement that is included as part of the application will be denied and the entire application, including the verified statement, will be admitted into the record of this proceeding

3. Metro Application and Yourway Complaint

In this consolidated proceeding, it is necessary to determine both whether Metro has satisfied its burden as the applicant to prove that the application should be approved and, at the same time, whether Yourway has satisfied its burden as the complainant that its complaint should be sustained. Such findings are not mutually exclusive. Substantial record evidence in this proceedings demonstrates both that Metro has satisfied its burden to prove that the application should be approved and Yourway has also satisfied its burden to prove that Metro has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company.

To begin, Metro is correct that, as an existing carrier seeking to expand its authorized service territory, it has a presumption of fitness. As the Commission recently stated in Application of First Class Transp., Docket No. A-2015-2466538 (Opinion and Order entered Aug. 31, 2017), current certificate holders are entitled to a presumption of technical and financial fitness for the proposed call and demand authority. *See, Rosemont Taxicab Co. v. Philadelphia Parking Authority*, 68 A.3d 29, 32 (Pa.Cmwlth. 2013), (“[a] licensed utility is entitled to a presumption that it holds the technical and financial capacity and propensity to operate safely and legally, and it is the party opposing the utility’s application that bears the burden of proof.”); Application of Three Rivers Limousine Serv., Inc., Docket No. A-2014-2412182 (Order entered February 12, 2015) (paratransit certificate holder entitled to a presumption of technical and financial fitness for proposed limousine service authority); and, Application of John C. Delauter

t/d/b/a Delauter's A-1 Servs., Docket No. A-00122443 (Final Order entered May 18, 2007) (applicant presumed to be technically and financially capable of transporting household goods based on prior Commission determination that applicant was technically and financially capable of transporting property).

Even if Metro were not entitled to this presumption of fitness, however, record evidence in this proceeding demonstrates that Mr. Tolla has been operating Metro for three years, tr. 14; Metro has insurance on all its vehicles, tr. 14; Mr. Tolla has never been convicted of a felony, tr. 14; Metro performs a background check of its drivers, tr. 14; and, Metro has sufficient funds to add additional vehicles if it is necessary to do so, tr. 15. Yourway did not rebut this evidence. This evidence, at a minimum, directly affects factors 1, 2, 3 and 6 of the Commission's regulations that deal with whether the applicant has sufficient capital, equipment, facilities and other resources necessary to serve the territory, whether an applicant has sufficient technical expertise and experience to serve the territory requested, whether sufficient and continuous insurance coverage has been secured and whether an applicant or its drivers have been convicted of a felony or a crime of moral turpitude and remains subject to supervision by a court or correctional institution. 52 Pa.Code § 41.14 (1), (2), (3) and (6).

Yourway has not presented substantial record evidence rebutting the presumption that Metro is afforded. Most significantly, Yourway presented the testimony of six witnesses who sponsored five exhibits that were admitted into the record that address factor 5 of the Commission's regulations: (5) an applicant's record, if any, of compliance with 66 Pa.C.S. (relating to the Public Utility Code), this title and the Commission's orders. 52 Pa.Code § 41.14 (5).³³ Each of Yourway's six witnesses testified regarding Metro's operation beyond its certificated service area. For example, Michael McCleave stated in a pre-served statement:

I Michael called Metro Taxi at 9:15 pm on 02/26/2019 to ask for a taxi. The driver arrived at 9:30 PM at my pick-up location which

³³ No evidence was presented regarding the Commission's fourth factor: (4) Whether the applicant has an appropriate plan to comply with the Commission's driver and vehicle safety regulations and service standards contained in Chapter 29 (relating to motor carriers of passengers). 52 Pa.Code § 41.14(4). Therefore, Metro's presumption of fitness regarding this factor is un rebutted.

was Walmart in Whitehall PA and arrived at my destination at the Sands Casino at about 10:00 PM. My final fair was \$31.05.

Exhibit P-1. This statement was accompanied by photographic evidence, including a picture of the Metro taxi outside of the Casino and a receipt noting the pick-up location, the drop off location and the fare. Id. In addition, three other witnesses testified regarding generally the same actions by Metro and provided the same photographic evidence to supplement the testimony. *See*, Exhibits P-2, P-3 and P-6.

This evidence of four total instances of Metro operating outside its certificated service territory, however, is not sufficient to rebut Metro's presumption that it complies with the Public Utility Code and the Commission's Orders. Metro's presumption of fitness is based on several years of operation and outweighs the four instances of the company operating outside its certificated service territory. In Brinks, Inc. v. Pa. Pub. Util. Comm'n, 456 A.2d 1342 (Pa. 1983), the Pennsylvania Supreme Court held that "the mere fact of prior operation in violation of a court order or the Commission's authority does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission." Id. at 1344; *see also*, Capital City Cab Serv. v. Pa. Pub. Util. Comm'n, 138 A.3d 119 (Pa. Cmwlth. 2016); Hercik v. Pa. Pub. Util. Comm'n, 586 A.2d 492, 495 (Pa. Cmwlth. 1991) (Commission is not precluded from granting authority based on an applicant's unauthorized activity but cannot grant authority solely based on evidence of an applicant's illegal operations).

Therefore, Metro has satisfied all six factors in Section 41.14 of the Commission's regulations and its application will be approved.

Nonetheless, the evidence provided by Yourway is sufficient to warrant granting Yourway's complaint and imposing a civil penalty on Metro for such actions because there is substantial evidence of four instances that demonstrate that Metro has operated outside its certificated service territory and, therefore, violated the Public Utility Code or a Commission order or regulation. In particular, these actions are violations of section 1102 of the Public Utility Code, pursuant to which Metro received its certificate of public convenience. In this instance, Metro is not entitled to a rebuttal presumption and has failed to satisfy its burden to

rebut the evidence presented by Yourway. Replogle, supra. In order to rebut Yourway satisfying its burden of proof, Metro must rebut Yourway's evidence by a preponderance of the evidence, which it did not.

Metro's arguments in response to Yourway's complaint are without merit and will be rejected. Metro argued in its brief:

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 instructed to take the pictures subsequently presented as exhibits. Perhaps most damaging was the admission by the witnesses that all of the trips they record, 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 exterritorial service.

Metro M.B. at 16. Metro also argued that all the allegations were presented to the Commission "and apparently factually insufficient and unworthy of initiating a Commission complaint." Id.

Metro's arguments are without merit because it is irrelevant whether the passengers in the exterritorial trips were employees of, or otherwise had some relationship to, Yourway. Metro provided the trips and that is sufficient to find a violation of the Public Utility Code regardless of who the passengers are. Certainly, Metro is correct that Yourway cannot act as a private attorney general and conduct its own investigations but it is irrelevant that Yourway presented the evidence to the Commission's Bureau of Investigation and Enforcement who determined not to pursue the matters. The Bureau of Investigation and Enforcement is an independent arm of the Commission and makes its own determinations regarding what matters to pursue. Just because the Bureau of Investigation and Enforcement determined not to pursue the matter does not mean that Yourway has not presented substantial evidence demonstrating violations of the Public Utility Code by Metro.

Likewise, whether or not the passengers were instructed to take pictures, make recordings or were reimbursed for their trip does not negate the fact that Metro provided these extrajurisdictional trips. Substantial record evidence demonstrates that Metro provided four trips outside its certificated service territory in violation of the Public Utility Code or the Commission's orders or regulations.

I do agree with Metro, however, that the testimony of Yourway witness Santee does not demonstrate substantial record evidence of a violation of the Public Utility Code or a Commission order or regulation. Yourway argued that Mr. Santee testified that "Mr. Tolla directed drivers 'all the time' to doctor the manifests to indicate a pick up or drop off in the city of Allentown, when in fact the trip points of origination and destination were outside the city and outside the scope of [Metro's] operating authority." Yourway M.B. at 9. Mr. Santee added that other Metro drivers were instructed to do the same thing. Id. The evidence presented by Mr. Santee in the form of screen shots of text messages does not support finding that he was directed to doctor manifests. In addition, Mr. Santee's testimony that other drivers were told to doctor manifests is also insufficient to warrant a finding that Metro violated the Public Utility Code in this regard. Metro is advised, however, to ensure that at no time are its manifests being doctored.

As a result, substantial record evidence demonstrates that Metro violated section 1102 of the Public Utility Code on four occasions by providing service outside of its authorized operating service territory. The correct response to the evidence of Metro operating outside its certificated service territory, however, is not to deny Metro its application seeking to expand its service territory, especially where the previously uncertificated service would no longer be non-compliant if the application were approved. Rather, the correct response to the evidence of Metro operating outside of its certificated service territory is the imposition of a civil penalty in response to such actions. Therefore, Yourway's complaint will be sustained.

As such, Yourway has not rebutted the presumption that Metro is afforded as an existing carrier seeking to have its authority expanded. Therefore, Metro's application will be approved. Yourway has satisfied its burden, however, that its complaint should be sustained because Yourway presented substantial record evidence that Metro engaged in the unlawful

operation on four occasions and, therefore, has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company. Yourway's complaint will be sustained and a civil penalty will be imposed, as discussed below.

4. Civil Penalty

Having found that Yourway has sustained its burden to demonstrate that Metro violated section 1102 of the Public Utility Code on four occasions, it is next required to determine whether a civil penalty should be imposed for such violations and, if so, how much.

The Commission's authority for imposing civil penalties can be found at 66 Pa.C.S. § 3301 which provides in pertinent part:

§ 3301. Civil penalties for violation.

(a) General rule. – If any public utility or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, such public utility, person or corporation . . . shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000 to be recovered by an action of assumpsit instituted in the name of the Commonwealth.

66 Pa.C.S. § 3301(a).

Furthermore, Section 69.1201 of the Commission's regulations provides a Policy Statement regarding factors and standards to be used when determining if a fine for violating a Commission order, regulation or statute is appropriate, as well as if a proposed settlement for a violation is reasonable and approval of the settlement agreement is in the public interest. 52 Pa.Code § 69.1201(a). These factors and standards are as follows:

- (1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.
- (2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.
- (3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.
- (4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.
- (7) Whether the regulated entity cooperated with the Commission's investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.
- (8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.
- (9) Past Commission decisions in similar situations.
- (10) Other relevant factors.

52 Pa.Code § 69.1201(c); *see also*, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Co., Docket No. C-0092409 (Final Order entered February 10, 2000).

With regard to factor number 1, whether the conduct was of a serious nature, substantial record evidence demonstrates that this factor warrants neither a higher civil penalty nor a lower civil penalty. Providing four trips outside of a certificated service territory is not willful fraud or misrepresentation; nor is it less egregious behavior such as an administrative filing or a technical error. It is unclear why the exterritorial trips were provided and therefore this factor warrants neither a higher civil penalty nor a lower civil penalty.

With regard to factor number 2, whether the resulting consequence of the conduct at issue were of a serious nature, such as personal injury or property damage, substantial record evidence demonstrates that this factor warrants a lower civil penalty. No personal injury or property damage or any other serious consequence occurred as a result of Metro providing the four trips beyond its certificated service territory. Certainly, it is serious whenever the Public Utility Code or a Commission order or regulation are violated but such are not consequences of Metro's conduct.

With regard to factor number 3, whether the conduct at issue was deemed intentional or negligent, substantial record evidence demonstrates that this factor warrants neither a higher civil penalty nor a lower civil penalty. It is unclear based on the record evidence presented in this case whether the four trips outside of Metro's certificated operating territory were provided intentionally or because of negligence.

With regard to factor number 4, whether Metro made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future, substantial record evidence demonstrates that this factor warrants a higher civil penalty. Metro has not presented any evidence that it will prevent similar conduct in the future. Furthermore, the fact that four violations occurred supports finding that Metro has not modified any practice or procedure to address the issue.

With regard to factor number 5, the number of customers affected and the duration of the violation, substantial record evidence demonstrates that this factor supports a lower civil penalty. Four trips beyond the authorized service territory, while unacceptable, does not constitute a high number of customers affected or a long duration of the violation to warrant a higher civil penalty.

With regard to factor number 6, Metro's compliance history, substantial record evidence demonstrates that this factor warrants a higher civil penalty. There is record evidence of two other complaints filed against Metro. The four instant violations are not isolated incidents. Metro is advised to ensure that it is compliant with the Public Utility Code and all Commission orders and regulations going forward. Continued noncompliance will likely result in higher civil penalties for any future violations.

With regard to factor number 7, whether Metro cooperated with the Commission's investigation, this factor does not impact on the amount of a civil penalty because there was no Commission investigation in this case.

With regard to factor number 8, the amount of the civil penalty or fine necessary to deter future violations, substantial record evidence demonstrates that this factor supports a higher civil penalty. Although not sufficient to warrant denying the application, the evidence of record of exterritorial activity is a violation of the Public Utility Code and Commission orders or regulations that cannot be countenanced. A higher civil penalty is necessary to deter future conduct. Metro is advised that such activities must cease immediately and will not be tolerated in the future. Evidence of such further activities may result in a revocation of the certificate of public convenience.

With regard to factor number 9, past Commission decisions in similar situations, after reasonable research, no past Commission decision is precedential to the facts of this case.⁴ Therefore, this factor will not be considered when establishing a civil penalty.

With regard to factor number 10, other relevant factors, I find that there are no additional relevant factors as all relevant issues have been addressed in the other nine factors considered when establishing a civil penalty.

When applying these factors to the facts of this case, it is clear that a \$500 civil penalty is appropriate for each of the four demonstrations of exterritorial service supported by record evidence that each constitute a violation of section 1102 of the Public Utility Code and based on the above factors for a total civil penalty of \$2,000.00.

D. Conclusion.

In conclusion, as an existing carrier seeking an expansion of service, Metro is entitled to a presumption of fitness. Yourway has not rebutted the presumption that Metro is afforded as an existing carrier seeking to have its authority expanded. Therefore, Metro's application will be approved. Yourway has satisfied its burden, however, that its complaint should be sustained because Yourway presented substantial record evidence that Metro engaged in unlawful operations on four occasions. As a result, substantial record evidence demonstrates that Metro has violated the Public Utility Code, a Commission order or regulation or a Commission-approved tariff of the company by providing service beyond its certificated service territory on four occasions. Yourway's complaint will be sustained and a civil penalty of \$2,000 will be imposed comprised of \$500 for each of the four unauthorized rides provided.

⁴ In Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Nasser Limousine, LLC., C-2015-2488425 (Opinion and Order issued December 22, 2016), the Commission's Bureau of Investigation and Enforcement alleged that the respondent unlawfully provided passenger transportation service for compensation outside of its authorized service area on May 1, 2015, and May 9, 2015, in violation of Section 1102(a) of the Code, 66 Pa. C.S. § 1102(a). In the settlement, the respondent agreed to pay a civil penalty and to refrain from transporting persons in limousine service for compensation outside its certificated service territory. *See also*, Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. B.M. Enterprises, Inc. t/a A.G Taxi, Docket No. C-2013-2321221 (Order entered March 31, 2014).

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the subject matter of and the parties to this proceeding. 66 Pa.C.S. § 1101.
2. The party seeking affirmative relief from the Commission has the burden of proof. 66 Pa.C.S. § 332(a).
3. The term “burden of proof” means a duty to establish a fact by a preponderance of the evidence. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950).
4. The term “preponderance of the evidence” means that one party has presented evidence which is more convincing, by even the slightest degree, than the opposing party. Se-Ling Hosiery v. Margulies, 364 Pa. 45, 70 A.2d 854 (1950).
5. Although the burden of going forward with the evidence shifts from one party to the other, the burden of proof never shifts. *Cf.* Replogle v. Pa. Elec. Co., 54 Pa. PUC 528 (1980); Waldron v. Philadelphia Elec. Co., 54 Pa. PUC 90 (1980).
6. The Commission must ensure that the decision is supported by substantial evidence in the record. 2 Pa.C.S. § 704.
7. Substantial evidence is such relevant evidence that a reasonable mind may accept as adequate to support a conclusion, more is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. Norfolk & Western Ry. Co. v. Pa. Pub. Util. Comm’n, 489 Pa. 109, 413 A.2d 1037 (1980); Murphy v. Pa. Dept. of Pub. Welfare, White Haven Center, 480 A.2d 382 (Pa.Cmwlth. 1984); Erie Resistor Corp. v. Unemployment Comp. Bd. of Review, 166 A.2d 96 (Pa.Super. 1961).

8. In order to provide motor carrier service in Pennsylvania, a person or entity must first obtain a certificate of public convenience from the Commission. 66 Pa.C.S. § 1101.

9. A certificate of public convenience is required for any public utility to begin to offer, render, furnish or supply within this Commonwealth service of a different nature or to a different territory than that authorized. 66 Pa. C.S. § 1102(a)(1).

10. A certificate of public convenience shall be granted by order of the Commission, only if the Commission shall find or determine that the granting of such a certificate is necessary or proper for the service, accommodation, convenience, or safety of the public. 66 Pa.C.S. § 1103.

11. The criteria used to decide motor carrier applications is whether the applicant seeking motor common carrier authority possesses the technical and financial ability to provide the proposed service. 52 Pa.Code § 41.14.

12. When determining whether an applicant for motor carrier service possesses the technical and financial ability to provide the proposed service, Commission regulations provide several standards to be used when determining fitness, including: 1) whether the applicant has sufficient capital, equipment, facilities and other resources necessary to serve the territory requested, 2) whether the 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 standards contained in Chapter 29, 5) an applicant's record, if any, of compliance with the Public Utility Code and the Commission's orders, and 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. 52 Pa.Code § 41.14(1)-(6).

13. With regard to sufficient capital, equipment, facilities and other resources necessary to serve the territory requested, the applicant should possess sufficient financial resources – assets, liabilities and expenses – to give reliable and responsible service to the public. Re: William O’Connor, 54 Pa. PUC 547 (1980).

14. Technical expertise, or fitness, is defined as: “An applicant must have the technical capacity to meet the need for the proposed service in a satisfactory fashion. An applicant must possess sufficient staff and facilities or operating skills to make the proposed service feasible, profitable and a distinct service to the public.” Re Adegbola Ige t/a Globe Limousine Service, 75 Pa. PUC 45 (1991); *see also*, Application of William Matthew Sullivan, Docket No. A-00118268F0001AMA (Order entered Feb. 2, 2004); Application of Samir Ouquerrouch, Docket No. A-2011-2218369 (Order entered September 27, 2012).

15. If any public utility or any other person or corporation subject to this part, shall violate any of the provisions of this part, or shall do any matter or thing herein prohibited; or shall fail, omit, neglect, or refuse to perform any duty enjoined upon it by this part; or shall fail, omit, neglect or refuse to obey, observe, and comply with any regulation or final direction, requirement, determination or order made by the commission, such public utility, person or corporation . . . shall forfeit and pay to the Commonwealth a sum not exceeding \$1,000 to be recovered by an action of assumpsit instituted in the name of the Commonwealth. 66 Pa.C.S. § 3301.

16. The Commission’s regulations provide a Policy Statement regarding factors and standards to be used when evaluating litigated and settled proceedings. 52 Pa.Code § 69.1201; *see also*, Rosi v. Bell Atlantic-Pa., Inc. and Sprint Communications Co., Docket No. C-0092409 (Final Order entered February 10, 2000).

17. The mere fact of prior operation in violation of a court order or the Commission’s authority does not preclude a carrier from obtaining lawful authority in a subsequent proceeding before the Commission. Brinks, Inc. v. Pa. Pub. Util. Comm’n, 456 A.2d 1342, 1344 (Pa. 1983).

18. The Commission is not precluded from granting authority based on an applicant's unauthorized activity but cannot grant authority solely based on evidence of an applicant's illegal operations. Hercik v. Pa. Pub. Util. Comm'n, 586 A.2d 492, 495 (Pa. Cmwlth 1991).

19. Metro has met its burden to demonstrate that its application should be approved.

20. Yourway has met its burden of proof to demonstrate that Metro has violated the Public Utility Code or a Commission order or regulation by providing service beyond its certificated service territory on four occasions.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the application of Metro Transportation LLC seeking an amendment and expansion of its authority to provide service to include Lehigh County, Northampton County, Bucks County, Schuylkill County, Carbon County and Monroe County at Docket Number A-2019-3011470 dated July 8, 2019 is hereby granted.

2. That the protest filed by Yourway Taxi and Limo LLC is dismissed.

3. That a Certificate of Public Convenience shall be issued evidencing Commission approval of the right of Metro Transportation LLC to provide transportation services in Lehigh County, Northampton County, Bucks County, Schuylkill County, Carbon County and Monroe County, as described above.

4. That Metro Transportation LLC shall comply with the provisions of the Public Utility Code, 66 Pa.C.S. § 101, *et seq.* and the regulations of the Commission, 52 Pa.Code § 1.1, *et seq.*

5. That the formal complaint filed by Yourway Taxi and Limo LLC against Metro Transportation LLC on October 18, 2019 at docket number C-2019-3013829 is hereby sustained.

6. That Metro Transportation LLC shall pay a civil penalty of \$2,000 due to the provision of service beyond its certificated service territory on four occasions.

7. That Metro Transportation LLC shall pay a civil penalty of \$2,000 by sending a certified check or money order payable to the Commonwealth of Pennsylvania, within thirty (30) days from the entry of the Final Commission Order to:

Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

8. That Metro Transportation LLC shall cease and desist from further violations of the Public Utility Code or any regulations of the Public Utility Commission.

9. That this matter be marked closed upon payment by Metro Transportation LLC of the \$2,000 civil penalty.

Date: October 21, 2020

/s/
Joel H. Cheskis
Deputy Chief Administrative Law Judge