

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement

v.

Diamond Cargo Express LLC

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C-2023-3037641

INITIAL DECISION

Before
Conrad A. Johnson
Administrative Law Judge

INTRODUCTION

This decision sustains the Complaint and grants the Motion for Default Judgment filed in this proceeding by the Bureau of Investigation and Enforcement (I&E) of the Pennsylvania Public Utility Commission (Commission) against Diamond Cargo Express LLC (Diamond or Respondent) and directs the Respondent to pay a \$14 assessment plus a \$550.00 civil penalty payable to the Commonwealth of Pennsylvania in the total amount of \$564.00.

HISTORY OF THE PROCEEDING

The Filings

The Commission issued the Respondent a Certificate of Public Convenience (Certificate) on September 7, 2005, at Docket No. A-00121989 for truck authority.

On January 13, 2023, I&E filed a Complaint with the Commission’s Secretary’s Bureau (Secretary) against Diamond. On January 18, 2023, the Secretary served the Complaint by first-class certified mail to Respondent at Diamond Cargo Express LLC at 1728 Route 30, Clinton, PA 15026, which is the last known address that Respondent provided to the Commission.

In the Complaint, I&E alleged that Diamond violated Section 510(b) of the Public Utility Code (Code), 66 Pa C.S. § 510(b), by failing to file assessment reports demonstrating its gross intrastate operating revenue for the 2019 and 2020 calendar years. I&E proposed a civil penalty of \$500.00 for these violations. In addition, I&E alleged that the Respondent violated Section 510(c) of the Code, 66 Pa.C.S. § 510(c), by failing to pay its \$14 assessment for fiscal year 2021-2022 based in part upon Diamond’s estimated revenue for the 2020 calendar year. For failure to pay its 2021-2022 assessment, I&E proposed that Diamond pay a \$50.00 penalty.

For relief, I&E requested that Diamond be ordered to pay a total of \$564, which consists of Diamond’s outstanding assessment balance of \$14 and a total civil penalty of \$550.

A Notice was attached to the Complaint informing Diamond that it must file an Answer within 20 days of the date of service of the Complaint. The Notice also informed Diamond that if it failed to answer the Complaint, I&E would request that the Commission issue an Order imposing the penalty set forth above.

The 20 days to file an Answer to the Complaint expired on February 7, 2023. Diamond did not file an Answer to the Complaint.

On February 23, 2023, I&E filed a Motion for Default Judgment (Motion). I&E averred that Diamond had not filed an Answer to the Complaint. Accordingly, I&E submitted, “Pursuant to Section 5.61(c) of the Commission’s regulations, a Respondent who fails to file an Answer to a Complaint within the 20-day response period may be deemed in default, and the relevant facts stated in the Complaint may be deemed admitted. 52 Pa. Code § 5.61(c).” Motion ¶ 9. Thus, I&E reiterated its request for a Commission order directing Diamond to pay the \$14

assessment plus the \$550 penalty for a total amount of \$564. I&E also requested Diamond's Certificate of Public Convenience be canceled if it failed to pay the total amount within 30 days of the entry date of the Commission's order.

By Call-In Telephone Hearing Notice dated February 27, 2023, the Parties were informed that a call-in telephonic hearing on the Complaint would be convened by me on April 4, 2023, at 10:00 a.m. The Hearing Notice provided the Parties with the Toll-Free Bridge Number and the PIN to dial on the morning of the hearing to participate in the telephonic hearing. The Hearing Notice further stated as follows:

FAILURE TO APPEAR: You may lose the case if you do not take part in this hearing and present evidence on the issue(s) raised. Your case may be dismissed "with prejudice" which means that you will be barred from filing another complaint raising the same claim(s) and issue(s) presented in the dismissed complaint.

CONTINUANCES. You may request a continuance of the hearing if you have a good reason. All continuances will be granted only for good cause. To request a continuance, you must submit a written request (a "motion") at least five (5) days before the hearing. Your motion should include: 1) The case name, number, and hearing date; 2) The reason for the request; and 3) Whether the other party agrees (or if you do not know).

(Emphasis in original).

On February 28, 2023, I issued a Prehearing Order reminding the Parties to call-in, on the date and at the time of the hearing scheduled for April 4, 2023, at 10:00 a.m., the Toll-Free Bridge Number and enter the PIN to participate in the telephonic hearing. The Prehearing Order again stated the **FAILURE TO APPEAR** warning. Additionally, the Prehearing Order informed the Parties about the applicable procedural rules, and again included the procedure to follow for hearing **CONTINUANCES**.

The Hearing Notice and Prehearing Order informing the Parties of the manner, date and time of the hearing, were eServed to Complainant and mailed to Respondent in the ordinary course of the Commission's business to the email address and street address provided

by them, respectively, to the Commission. Neither the Hearing Notice nor the Prehearing Order were returned by the U.S. Postal Service as undeliverable to Respondent.

The Hearing and Record

On April 4, 2023, at 10:05 a.m., the hearing convened. Counsel for I&E, Alphonso Arnold, Esquire,¹ and his witness, I&E's Chief of Finance and Assessment, Amy Zuvich (Witness Zuvich), were present. However, no one was present for Diamond. The hearing was briefly recessed to provide additional time for an attorney or representative to appear on Diamond's behalf. Tr. 7.

The hearing reconvened at 10:33 a.m. However, no one appeared on behalf of Diamond to explain Diamond's absence. Consequently, the hearing proceeded in Diamond's absence. Tr. 8. I&E reiterated its Motion. Tr. 11. The Motion is addressed below. Testimony was received from I&E's Witness Zuvich, who sponsored Exhibits 1 through 5, which were admitted into the record. Tr. 33. The initial hearing generated 44 pages of transcribed testimony. On June 14, 2023, an interim order was issued confirming the closing of the record upon receipt of the hearing transcript on April 26, 2023. This case is procedurally ripe for ruling.

FINDINGS OF FACT

1. Complainant is the Commission's Bureau of Investigation and Enforcement.
2. Respondent, Diamond Cargo Express LLC, maintains a principal place of business at 1728 Route 30, Clinton, Pennsylvania. Complaint ¶ 4.
3. The Commission issued Diamond a Certificate of Public Convenience on September 7, 2005, at Docket No. A-00121989, for truck authority. Complaint ¶ 6.

¹ On July 10, 2023, Attorney Arnold filed a Withdrawal and Entry of Appearance, thereby withdrawing his appearance and entry the appearance of Michael L. Swindler, Esquire, on behalf of I&E.

4. Diamond, in transporting property as a common carrier for compensation, is subject to the power and authority of the Commission pursuant to Section 501(c) of the Code, 66 Pa.C.S. § 501(c), which requires a public utility to comply with Commission regulations. Complaint ¶ 5.

5. On or about February 11, 2020, the Commission mailed to Diamond an assessment report along with instructions for Diamond to report its gross intrastate operating revenues for the 2019 calendar year on or before March 31, 2020. Tr. 20-22; Exhibit 1.

6. Diamond did not file an assessment report for its intrastate operating revenues for the 2019 calendar year. Tr. 18, 19, 22.

7. On or about February 11, 2021, the Commission mailed to Diamond an assessment report along with instructions for Diamond to report its gross intrastate operating revenues for the 2020 calendar year on or before March 31, 2021. Tr. 23-24; Exhibit 2.

8. Diamond did not file an assessment report for its intrastate operating revenues for the 2020 calendar year. Tr. 18, 19, 24.

9. On September 8, 2021, via certified mail, the Commission sent Diamond a September 10, 2021, Assessment Invoice, for \$14 for the July 1, 2021, to June 30, 2022, Fiscal Year (2021-2022 Fiscal Year) that was based, in part, on Diamond's estimated revenues for the 2020 calendar year due to Respondent's failure to file an assessment report stating its 2020 calendar year revenues. Tr. 25-26, 32; Exhibit 3.

10. The Commission's September 10, 2021, Assessment Invoice to Diamond included a Notice of Assessment informing Diamond that it was obligated to pay the \$14 assessment invoice within 30 days of receipt or file objections within 15 days. Tr. 27-28; Exhibit 4.

11. The Commission's September 10, 2021, Assessment Invoice to Diamond was received by Diamond on September 10, 2021. Tr. 30-31; Exhibit 5.

12. Diamond did not pay its 2021-2022 Fiscal Year Assessment Invoice in the amount of \$14. Tr. 18, 19.

13. By Call-In Telephone Hearing Notice dated February 27, 2023, the Parties were informed that a call-in telephonic hearing in this proceeding would convene on April 4, 2023, at 10:00 a.m. Tr. 8.

14. The Hearing Notice provided the Parties with the Toll-Free Bridge Number and the PIN to dial on the morning of the hearing to participate in the telephonic hearing. Tr. 8.

15. The Hearing Notice informed the Parties that failure to participate in the hearing may cause that party to lose the case.

16. The Hearing Notice, in the ordinary course of the Commission's business, was mailed to Diamond at the address provided by Diamond to the Commission. Tr. 38.

17. The Hearing Notice was not returned by the U.S. Postal Service as undeliverable to Diamond. Tr. 8.

18. By approximately 11:18 a.m. on April 4, 2023, neither an attorney nor a representative had appeared on behalf of Diamond for the telephonic hearing. Tr. 8, 43.

19. There is nothing in the record to indicate that Diamond's failure to appear for the telephonic hearing was unavoidable.

Legal Standards

Due Process

The Commission satisfies the requirement of affording a respondent with administrative due process, by providing timely notice of the hearing on the complaint and the opportunity to be heard. *Schneider v. Pa. Pub. Util. Comm'n*, 479 A.2d 10 (Pa. Cmwlth. 1984).

On February 27, 2023, the Call-In Telephone Hearing Notice was mailed to Diamond at the address Diamond had provided to the Commission. The Hearing Notice was not returned by the U.S. Postal Service as undeliverable to Diamond. Tr. 8. Accordingly, there is a presumption in the law that Diamond received notice of the hearing and elected not to participate in the hearing. *Berkowitz v. Mayflower Sec., Inc.*, 317 A.2d 584 (Pa. 1974); *Meierdierck v. Miller*, 147 A.2d 406 (Pa. 1959); *Samaras v. Hartwick*, 698 A.2d 71 (Pa. Super. 1997); *Judge v. Celina Mut. Ins. Co.*, 449 A.2d 658 (Pa. Super. 1982). Therefore, Diamond's due process rights have been fully protected. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Opinion and Order entered Oct. 25, 1993); 52 Pa. Code § 5.245(a).

Burden of Proof

Section 332(a) of the Code provides that a complainant, as the party seeking affirmative relief from the Commission, has the burden of proof. 66 Pa.C.S. § 332(a). To establish a legally sufficient case and satisfy the burden of proof, a complainant must show that the named utility is responsible or accountable for the problem described in the complaint in that the named utility has violated the Code, a regulation or order of the Commission. *Patterson v. The Bell Tel. Co. of Pa.*, 72 Pa.P.U.C. 196 (1990). Such a showing must be by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. Pub. Util. Comm'n*, 578 A.2d 600 (Pa. Cmwlth. 1990). A preponderance of the evidence is evidence that is more convincing, by even the smallest amount, than that presented by the respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 70 A.2d 854 (Pa. 1950).

Additionally, this Commission's decision must be supported by substantial evidence in the record. More is required than a mere trace of evidence or a suspicion of the existence of a fact sought to be established. *Norfolk & W. Ry. Co. v. Pa. Pub. Util. Comm'n*, 413 A.2d 1037 (Pa. 1980).

Assessments

Public utilities regulated by this Commission are required under Section 510 of the Code to file and pay an assessment that provides a reasonable share of the Commission's costs in administering regulatory oversight. 66 Pa.C.S. § 501(a). Section 510(b) of the Code, in relevant part, provides as follows:

(b) Allocation of assessment.—On or before March 31 of each year, every public utility shall file with the commission a statement under oath showing its gross intrastate operation revenues for the preceding calendar year. If any public utility shall fail to file such statement on or before March 31, the commission shall estimate such revenues, which estimate shall be binding upon the public utility for the purposes of this section.

66 Pa.C.S. § 510(b).

Respondent as a certificated trucking authority is a public utility and is therefore subject to the power and authority of this Commission pursuant to Section 501(a) of the Code, 66 Pa.C.S. § 501(a). As a public utility, Respondent is required to comply with Section 501(c) of the Code, which in relevant part, provides as follows:

The commission shall give notice by registered or certified mail to each public utility of the amount lawfully charged against it under the provisions of this section, which amount shall be paid by the public utility within 30 days of receipt of such notice[.]

66 Pa.C.S. § 501(a).

Penalties

Sections 3301(a) and (b) of the Code, 66 Pa.C.S. §§3301 (a) and (b), authorize the Commission to impose a maximum civil penalty of \$1,000 per day for violations of its statutes, regulations and orders. When a violation has occurred, the Commission employs specific factors and standards in determining whether a fine is appropriate. These standards and factors were first articulated in *Rosi v Bell Atlantic-Pennsylvania, Inc. and Sprint Communications Co.*, Docket No. C-00992409 (Order entered Feb. 10, 2000) (*Rosi*) and afterwards published as Policy Statements and Guidelines at 52 Pa. Code §69.1201. The subject policy, in part, reads:

- (a) These factors and standards will be utilized by the Commission in 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.
- (b) Many of the same factors and standards may be considered in the evaluation of both litigated and settled cases.

52 Pa. Code § 69.1201(a), (b).

DISCUSSION

The Evidence

Respondent, as a certificated public utility, is engaged in transporting property for compensation. Therefore, Respondent is subject to the power and authority of the Commission pursuant to Section 501(a) of the Code. Public utilities regulated by the Commission are required under Section 510 of the Code to file and pay an assessment that provides a reasonable share of the Commission's costs in administering regulatory oversight.

Here, the evidence establishes that on or about February 11, 2020, the Commission mailed to Diamond an assessment report along with instructions for Diamond to report its gross intrastate operating revenues for the 2019 calendar year on or before March 31,

2020. Tr. 20-22; Exhibit 1. However, Diamond failed to file an assessment report for its intrastate operating revenues for the 2019 calendar year. Tr. 18, 19, 22. Further, on or about February 11, 2021, the Commission mailed to Diamond an assessment report along with instructions for Diamond to report its gross intrastate operating revenues for the 2020 calendar year on or before March 31, 2021. Tr. 23-24; Exhibit 2. Again, Diamond failed to file the required assessment report. Tr. 18, 19, 24.

On September 8, 2021, via certified mail and pursuant to Section 501(a) of the Code mentioned above, the Commission sent Diamond a September 10, 2021 Assessment Invoice for \$14 for the 2021-2022 Fiscal Year. Tr. 25-26, 32; Exhibit 3. However, Diamond failed to pay the required assessment. Tr. 18, 19.

As the party seeking relief from the Commission, I&E had the burden of proving that Diamond violated a Commission statute, regulation or order. 66 Pa.C.S. § 332(a). Here Diamond did not file an Answer to the Complaint within the requisite time period. Pursuant to Section 5.61(c) of the Code, 52 Pa. Code § 5.61(c), a respondent who fails to file an Answer may be deemed in default, and the relevant facts stated in the Complaint may be deemed admitted. *See Fusaro v. Pa. Pub. Util. Comm'n*, 382 A.2d 794 (Pa. Cmwlth. 1978). Diamond was provided with adequate notice of the alleged violations against it and had the opportunity to respond and attend the hearing. Diamond was also clearly advised that, if it did not file an Answer, then I&E would request that the Commission issue an Order imposing the penalties as set forth in the Complaint.

Based upon the above evidence and Diamond's failure to file an Answer to the Complaint or to participate in the hearing, a ruling is required that I&E established its burden of proof. Accordingly, in the ordering paragraphs below, the Complaint will be sustained, and I&E's Motion will be granted.

Calculation of the Penalty

Diamond's failure to file assessment reports for calendar years 2019 and 2020 and its failure to pay its \$14 Assessment Invoice for the 2021-2022 Fiscal Year constitute violations of the Code. Pursuant to Section 3301 of the Code, 66 Pa.C.S. § 3301, the Commission is authorized to impose civil penalties on any public utility, or any other person or corporation subject to the Commission's authority, for violation(s) of the Code and/or Commission Regulations. The Commission, in *Pennsylvania Public Utility Commission, Bureau of Investigation and Enforcement v. Jadon Trucking, Inc.*, Docket No. C-2021-3028563 (Opinion and Order entered Dec. 8, 2023) (*Jadon Trucking*), explained the process when considering whether to impose a civil penalty:

Through the years, the civil penalties in Motion for Default Judgment cases have been calculated in various ways. Notwithstanding our past practice, we believe that on a going-forward basis, it is prudent to ensure a fair, reasonable, and consistent approach to the levying of civil penalties in these cases, and we will use this approach in this matter.

Specifically, the Commission developed a multifactor process for the assessment of civil penalties, for failure to pay annual assessments and/or failure to file annual assessment reports. The process is based on several factors: (1) the type of violation involved which can be the failure to pay the assessment amount and/or the failure to file an assessment report; (2) the assessment amount in question; and (3) the utility's compliance history with Commission Regulations for the three years prior to the filing of the Complaint. Considering those factors, the Commission uses the following approach.

If the Company fails to pay its assessment, the civil penalty process includes the following: (1) if the Company's past-due assessment amount is less than or equal to \$350, then the civil penalty is \$50 for any company with a good compliance history and \$100 for any company with an unacceptable compliance history; or (2) if the Company's past-due assessment amount is greater than \$350, then the civil penalty is 15% of the past-due yearly assessment on a company with a good compliance history or 25% of the past-due yearly assessment on a company with an unfavorable compliance history.

If the company fails to file its annual assessment reports, the civil penalty process also includes the following: (1) if the company's yearly assessment amount is less than or equal to \$500 and the company has a good compliance history then the civil penalty is \$250; but if the company has an unfavorable compliance history then the civil penalty is \$500; or (2) if the company's yearly assessment amount is greater than \$500 and the company has a good compliance history then the civil penalty is \$500; but if the company has an unfavorable compliance history then the civil penalty is \$1000.

We note that the Respondent's compliance history and the need to deter future violations are important considerations when weighing the amount of a civil penalty. 52 Pa. Code § 69.1201.

Jadon Trucking (footnotes omitted).

During the hearing I&E represented that Diamond has a good compliance history. Tr. 13-14. The evidence establishes that Diamond's estimated annual assessment amount is \$14. This amount warrants a \$250.00 penalty for each year, 2019 and 2020, Diamond failed to file an assessment report, in keeping with the Commission's reasoning in *Jadon Trucking*. The \$14 Assessment Invoice which Diamond also failed to pay warrants a \$50.00 penalty under the Commission's reasoning in *Jadon Trucking*.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this proceeding. 66 Pa.C.S. §§ 501, 510, and 701.
2. The due process rights of Respondent have been fully protected in this proceeding. *Sentner v. Bell Tel. Co. of Pa.*, Docket No. F-00161106 (Order entered Oct. 25, 1993).
3. Complainant carries the burden of proving Respondent has in some manner violated the provisions of the Public Utility Code or the Commission's regulations in the course of providing property transportation services to the public. 66 Pa.C.S. § 332(a).

4. Complainant carried its burden of proving Respondent violated the Public Utility Code in failing to file assessment reports for the 2019 and 2020 calendar years. 66 Pa.C.S. § 510(b).

5. Complainant carried its burden of proving Respondent violated the Public Utility Code in failing to pay its \$14 Assessment Invoice for the 2021-2022 Fiscal Year. 66 Pa.C.S. § 510(c).

6. The Commission is authorized to consider and impose civil monetary penalties against a public utility, person or corporation that violates the Pennsylvania Public Utility Code. 66 Pa.C.S. § 3301 et seq.

7. A civil penalty against Respondent in the amount of \$550.00 to deter future violations is appropriate under the circumstances of this case. *See Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Jadon Trucking, Inc.*, Docket No. C-2021-3028563 (Opinion and Order enter Dec. 8, 2023); 52 Pa. Code § 69.1201.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Complaint in Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement v. Diamond Cargo Express LLC at Docket No. C-2023-3037641 is sustained.

2. That the Pennsylvania Public Utility Commission Bureau of Investigation and Enforcement's Motion for Default Judgement filed in Bureau of Investigation and Enforcement v. Diamond Cargo Express LLC at Docket No. C-2023-3037641 is granted.

3. That Diamond Cargo Express LLC shall pay its \$14 Assessment Invoice for the 2021-2022 Fiscal Year, as required by 66 Pa.C.S. § 510(c).

4. That I&E's request for a \$550 penalty against Diamond Cargo Express LLC is granted pursuant 66 Pa.C.S. § 3301, and 52 Pa. Code § 69.1201.

5. That within thirty (30) days of the entry date of the Commission's Final Order, Diamond Cargo Express LLC shall remit \$564 (\$14 outstanding assessment and \$550 outstanding civil penalty), payable by certified check or money order to "Commonwealth of Pennsylvania" with the docket number of this proceeding listed, and sent to:

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

6. That Diamond Cargo Express LLC, report its gross intrastate operating revenues for all future calendar years, pursuant to requirements at 66 Pa.C.S. § 510, and further cease and desist from further violations of the Public Utility Code and the Public Utility Commission's regulations.

7. That the Public Utility Commission's Bureau of Technical Utility Services suspend or revoke the Certificates of Public Convenience at Docket No. C-2023-3037641 if payments of the civil penalty (\$550.00) plus the outstanding assessment balance (\$14) are not received from Diamond Cargo Express LLC, within thirty (30) days after service of the Public Utility Commission's Order.

8. That if Diamond Cargo Express LLC fails to comply with the Public Utility Commission's Order and pay the civil penalty and assessment balance within thirty (30) days of the Public Utility Commission's Order, the Public Utility Commission shall forward a copy of the Order to the Pennsylvania Department of Transportation for the purpose of having

