



COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA PUBLIC UTILITY COMMISSION
COMMONWEALTH KEYSTONE BUILDING
400 NORTH STREET, HARRISBURG, PA 17120

BUREAU OF
INVESTIGATION
&
ENFORCEMENT

December 30, 2024

Via Electronic Filing

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

Re: Pennsylvania Public Utility Commission,
Bureau of Investigation and Enforcement, v.
Jerome McCree, Sr.
Docket No. C-2023-3037385
I&E Exceptions

Dear Secretary Chiavetta:

Enclosed for electronic filing are the **Exceptions** of the Bureau of Investigation and Enforcement (“I&E”) of the Pennsylvania Public Utility Commission in the above-referenced matter.

Copies have been served on the parties of record in accordance with the Certificate of Service. If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Colby B. Widdowson', is written over a light blue circular stamp.

Colby B. Widdowson
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 326185
(717) 787-2139
cwiddowson@pa.gov

CBW/ac
Enclosures

cc: Per Certificate of Service
Michael L. Swindler, Deputy Chief Prosecutor (*via email* – mwindler@pa.gov)
Administrative Law Judge Katrina L. Dunderdale (*via email* – kdunderdal@pa.gov)
Office of Special Assistants (*via email* – ra-OSA@pa.gov)

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

| | | |
|--|---|---------------------------|
| Pennsylvania Public Utility Commission, | : | |
| Bureau of Investigation and Enforcement, | : | |
| Complainant | : | |
| | : | |
| v. | : | Docket No. C-2023-3037385 |
| | : | |
| Jerome McCree, Sr., | : | |
| Respondent | : | |

**EXCEPTIONS OF THE
BUREAU OF INVESTIGATION AND ENFORCEMENT**

Colby B. Widdowson
Prosecutor
PA Attorney ID No. 326185

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, PA 17120

Dated: December 30, 2024

I. INTRODUCTION

On December 9, 2024 the Initial Decision of presiding Administrative Law Judge Katrina L. Dunderdale (“ALJ”) was issued in the instant proceeding. The Initial Decision grants the Formal Complaint filed on July 6, 2023 (“Complaint”) by the Commission’s Bureau of Investigation and Enforcement (“I&E”), but only assesses a nominal civil penalty.

The Initial Decision orders:

1. That the Formal Complaint of the Pennsylvania Public Utility Commission, Bureau of Transportation and Safety, at Pa. Public Utility Commission v. Jerome B. McCree, Sr., at Docket No. C-2023-3047385, is hereby granted.
2. That within 30 days after entry of the Commission’s Final Order in this case, Jerome B. McCree, Sr., shall pay a civil penalty of One Hundred Dollars (\$100) pursuant to Sections 3301 of the Public Utility Code, 66 Pa.C.S. § 3301.
3. That Jerome B. McCree, Sr. shall cease and desist from further violations of the Public Utility Code, 66 Pa.C.S. §§101–3316, and the regulations of this Commission, 52 Pa. Code §§1.1–1065.1.

These Exceptions are filed pursuant to 52 Pa. Code § 5.533. I&E does not take exception to the granting of the Complaint in and of itself, and in fact believes that is the correct result. Rather, these exceptions are filed based on the Findings of Fact and the downward revision to the amount of the civil penalty imposed upon Respondent.

II. I&E EXCEPTIONS

1. **The Record does not support the witness credibility determinations or the Findings of Fact drawn from those credibility determinations.**

For the reasons described in greater detail below, I&E respectfully submits that the record of the case does not support the witness credibility determinations found at Findings

of Fact 25 and 26.¹ The ALJ found that “Respondent’s testimony was accepted as credible except his recollection that the dome light on his car was not illuminated on April 28, 2023” and “[t]he testimony of Witness Rosenberger was accepted as credible except his recollections about his interactions with Respondent and who initiated the discussion of a ride for remuneration.”² It is the position of I&E that Respondent’s testimony should be treated with serious skepticism because Respondent’s credibility was impeached, upon cross-examination, and shown to be unreliable. On the other hand, the credibility of Motor Carrier Enforcement Officer Andrew Rosenberger (“Officer Rosenberger”) was not impeached nor, at any point in time, shown to be unreliable. I&E requests that the Commission, after review of the record, substitute its own Findings of Fact for the Initial Decision’s Findings of Fact at 10, 11, 13, 15, 16, 17, 18, 19, 25, and 26.

“On review of the initial decision, the Commission has all the powers which it would have in making the initial decision.”³ The Commission, not the administrative law judge, is the ultimate fact finder in proceedings before it, and is charged with the responsibility of considering all relevant evidence and of determining the weight of the evidence, the credibility of witnesses, and the reliability of estimates and opinions.⁴ The Commission must determine the credibility of witnesses and the reliability of estimates and opinions, resolve conflicts in testimony, and weigh the evidence presented.⁵ Thus, the Commission has full

¹ *Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Jerome McCree, Sr.*, Docket No. C-2023-3037385 (Initial Decision entered December 9, 2024) at 10.

² *Id.*

³ 66 Pa.C.S. § 335(a).

⁴ *Hess v. Pennsylvania Public Utility Com’n*, 107 A.3d 246 (Pa. Commw. Ct. 2014); *York Water Company v. Pennsylvania Public Utility Commission*, 414 A.2d 138 (Pa. Commw. Ct. 1980); *Pennsylvania Communities Organizing for Change, Inc. v. Pennsylvania Public Utility Com’n*, 89 A.3d 338 (Pa. Commw. Ct. 2014).

⁵ *Id.*

authority to disregard the initial decision of the administrative law judge and overrule it if the Commission reaches a contrary result, even where the administrative law judge's decision is eminently reasonable.⁶

The ALJ's Findings of Fact at 14, finding that "[o]n April 28, 2023, the dome lights on the subject vehicle were illuminated" supports the conclusion that Respondent's credibility had been impeached. Respondent specifically testified that the dome light atop his vehicle, which advertised the vehicle as "Available," "was not on" and "wasn't plugged in."⁷ During cross-examination, Respondent was given an opportunity to correct the statement that his dome light was off, but instead chose to double down on his testimony that it was off.⁸ Respondent was presented with I&E Exhibit 1, which had previously been admitted into evidence, clearly showing Respondent's vehicle with an illuminated dome light advertising as "Available."⁹ Despite being shown undeniable photographic proof that the dome light was illuminated, Respondent continued to proffer inaccurate testimony that the dome light was off.¹⁰

Respondent's credibility was never rehabilitated after it was impeached through the documentary evidence. Additionally, there was not a finding of fact or any discussion as to why Respondent's testimony should be found credible despite the impeachment.¹¹ Based on this impeachment of credibility and the lack of rehabilitation, Respondent's testimony should

⁶ *AT & T Commc'ns of Pennsylvania v. Pennsylvania Pub. Util. Comm'n*, 568 A.2d 1362 (Pa. Commw. Ct. 1990) citing to *East Goshen Township v. Pennsylvania Public Utility Commission*, 486 A.2d 550 (Pa. Commw. Ct. 1985).

⁷ Transcript at 48.

⁸ Tr. at 56.

⁹ I&E Exhibit 1 and *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Jerome McCree, Sr.*, Docket No. C-2023-3037385 (Initial Decision entered December 9, 2024) at 8.

¹⁰ Tr. at 56.

¹¹ *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Jerome McCree, Sr.*, Docket No. C-2023-3037385 (Initial Decision entered December 9, 2024).

not be treated as credible and should be treated with skepticism, unless corroborated by additional evidence or testimony, which it was not.

The ALJ found, at Findings of Fact at 26, that Officer Rosenberger was not credible as it relates to “his recollections about his interactions with Respondent and who initiated the discussion of a ride for remuneration.”¹² However, there is no evidence in the record, no Findings of Fact, and no discussion or support for the ALJ’s conclusion that Officer Rosenberger’s testimony should not be wholly treated as credible.¹³ Officer Rosenberger’s credibility was not impeached, his testimony was not proven to be inaccurate, and he was not shown to have any motivation to lie. As such, Officer Rosenberger’s testimony can not and should not be discredited and should be treated as wholly credible.

The credibility of the witnesses is important as it relates to Findings of Fact at 10, 11, 13, 15, 16, 17, 18, and 19, which are later relied upon by the ALJ in the determination of a civil penalty amount. These Findings of Fact center around whether Respondent was at the location for the purpose of providing an Uber ride, who approached who for a ride, and who brought up compensation.

In his testimony related to the above contested Findings of Fact, Respondent claimed the following:

1. Respondent arrived at the casino to provide a ride through the Uber application;
2. Respondent’s vehicle had a dome light that advertised as “Available” and was not lit;
3. Respondent used the dome light to help Uber riders find his car;

¹² *Id.* at 10.

¹³ Transcript and *Pa. Pub. Util. Comm’n, Bureau of Investigation and Enforcement v. Jerome McCree, Sr.*, Docket No. C-2023-3037385 (Initial Decision entered December 9, 2024).

4. Respondent parked by the entrance to the Casino;
5. Respondent was approached by Officer Rosenberger and asked to provide a ride for two persons;
6. Respondent informed Officer Rosenberger that he was driving for Uber and was waiting for a rider, but would provide a ride if the rider did not show up;
7. Respondent informed Officer Rosenberger that he would not charge him, but would accept a donation and Officer Rosenberger offered \$20 per person; and
8. After April 28, 2023, Respondent talked with Uber and replaced the “Checker” dome light with an “Uber” dome light on the subject vehicle ¹⁴

Respondent’s claims are without the support of additional witness testimony or documentary evidence and rely solely on the credibility of Respondent’s own testimony. Counter to Respondent’s claims, Officer Rosenberger credibly testified to the following, as it relates to the contested Findings of Fact:

1. Officer Rosenberger was standing in front of the casino;
2. Officer Rosenberger observed Respondent pull up to the casino in a vehicle with a dome light;
3. Officer Rosenberger was asked, by Respondent, if Officer Rosenberger needed a ride;
4. Officer Rosenberger indicated that he needed a ride to the Hofbrauhaus in Pittsburgh; and
5. Respondent offered to provide transportation for \$20 per person for a total of (\$40).¹⁵

As discussed, Officer Rosenberger’s credibility was not challenged or impeached in this proceeding and Officer Rosenberger’s recounting of events should be taken as fact.

¹⁴ *Id.* at 44-59.

¹⁵ *Id.* at 11-29.

I&E files this Exception to the Findings of Fact at 10, 11, 13, 15, 16, 17, 18, 19, 25, and 26. I&E requests that the Commission substitute its own Finding of Facts that reflect that Officer Rosenberger's testimony was entirely credible, Respondent's credibility was impeached and his testimony was not credible, and Officer Rosenberger's testimony of events be found to be fact, as it relates to the aforementioned Findings of Fact.

2. The Initial Decision errs in its assessment of a nominal civil penalty of \$100.

For the reasons described in greater detail below, I&E respectfully submits that the record of the case does not support the nominal \$100 civil penalty assessed in this matter. The \$100 civil penalty assessed in this matter is a significant deviation from the PUC Motor Carrier Services & Enforcement Penalty Guidelines, which dictate that the provision of passenger transportation for compensation without Commission authority – or holding one's self out as having such authority – warrants a civil penalty of \$1,000. In determining the amount of civil penalty to assess, the ALJ analyzed the ten factors found at 52 Pa. Code § 69.1201 and relied on facts found through the discredited testimony of Respondent, as discussed above, and failed to consider an aggravating factor.

The ALJ's Initial Decision in this matter did not give any discussion or consideration to the PUC Motor Carrier Services & Enforcement Penalty Guidelines ("Penalty Guidelines"). The Penalty Guidelines are a comprehensive guide that sets the standard civil penalty for various violations of the Public Utility Code and Commission Regulations, as they relate to motor carriers. The Penalty Guidelines were developed by the PUC's independent Investigation and Enforcement Division, and reviewed, approved, and published

by the Commission.¹⁶ The current version of the Penalty Guidelines was approved and published by the Commission on April 1, 2011. The Penalty Guidelines prescribe a \$1,000 civil penalty and suspension of vehicle registration for operating as a motor carrier without holding a certificate of public convenience, in violation of 66 Pa.C.S. §1101. The Commission regularly follows its Penalty Guidelines and, as discussed more fully below, there is not a sufficient reason to deviate from that standard in this matter.

In justifying a mitigated civil penalty the ALJ relied upon the following:

Mr. McCree was in the taxi area to pick up an Uber rider, not to transport for Mr. McCree did not come to the taxi area for the purpose of operating in call or demand service; Mr. McCree did not approach the plainclothes officer to make an offer to transport; [and] Mr. McCree made it clear he could not take compensation while operating under the Uber application.¹⁷

These facts rely solely upon the discredited testimony of Respondent, as was argued in detail above. If the Commission finds the testimony of Officer Rosenberger to be more credible than that of Respondent and substitutes its own Findings of Fact, as sought herein, then the above-cited reasons for mitigation are no longer relevant to the civil penalty consideration.

In further justification of a mitigated civil penalty, the ALJ argued the following:

The testimonies convincingly established Mr. McCree made more than one attempt to deny the plainclothes officer's requests. Under persistent requests from the officer and with no Uber rider appearing, Mr. McCree agreed to provide transportation for compensation. The presiding officer finds Mr. McCree was identified by the plainclothes officer as a jitney driver upon his arrival in the entrance area, who then pursued Respondent with

¹⁶ The I&E Inspection Division [now known as "Motor Carrier Division"] maintains a comprehensive schedule, periodically reviewed and approved by the Commission, of guidelines for civil penalties and suspensions. Pennsylvania Public Utility Commission, *Procedures Manual*, 1314(F) (December 2012).

¹⁷ *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Jerome McCree, Sr.*, Docket No. C-2023-3037385 (Initial Decision entered December 9, 2024) at 16-17.

*persistent questioning to such a degree that the officer's actions convinced Respondent to acquiesce.*¹⁸

However, there is a complete lack of support in the transcript and the ALJ's own Findings of Fact to support this characterization of the interaction between Officer Rosenberger and Respondent. The testimony of Officer Rosenberger supports a higher civil penalty, in that Respondent entered the taxi area at the casino, with a lit "Available" dome light, initiated contact with Officer Rosenberger, and initiated the conversation regarding compensation. Again, the conclusion reached in the Initial Decision is based solely upon the discredited testimony of Respondent. Even if the Commission were to adopt the testimony of Respondent, the ALJ's characterization lacks support. At no point during Respondent's testimony, does he testify that Officer Rosenberger's interactions with him amounted to persistence, badgering, or forcing Respondent to agree to transportation in exchange for compensation.¹⁹ Additionally, the ALJ does not make any Findings of Fact to support the characterization of the interaction as "persistent questioning to such a degree the officer's actions convinced Respondent to acquiesce." The ALJ's Findings of Fact merely identify the interaction as a "discussion" and specifically find that:

Respondent advised Officer Rosenberger that he could not provide a ride for money outside the Uber application, although he could accept a donation but only if his Uber rider did not exit the casino within a few minutes. (Tr. 45, 48). After discussion, Mr. McCree agreed to provide transportation for two people to the Hofbrauhaus if Respondent's Uber rider did not come out within five minutes, in exchange for a donation. (Tr. 15, 45, 48, 55).²⁰

¹⁸ *Id.* at 17.

¹⁹ Tr. at 44-59.

²⁰ *Pa. Pub. Util. Comm'n, Bureau of Investigation and Enforcement v. Jerome McCree, Sr.*, Docket No. C-2023-3037385 (Initial Decision entered December 9, 2024) at 9.

Finally, the ALJ did not give consideration to Respondent's knowledge that he was violating the Public Utility Code by transporting passengers for compensation. Specifically, the ALJ found that Respondent knew that it was impermissible to provide transportation for compensation in Findings of Fact 18, which states "Respondent advised Officer Rosenberger that he could not provide a ride for money outside the Uber application, although he could accept a donation but only if his Uber rider did not exit the casino within a few minutes." Additional consideration should be given to Respondent's use of the term "donation." Attempting to qualify the compensation received for transporting passengers as a mere "donation" instead of compensation is a blatant attempt to circumvent the compensation element of the charged offense and this Commission's authority to regulate motor carriers. Pennsylvania courts have previously addressed the issue of donations as compensation, having found that when there is an indiscriminate holding out to the general public to provide transportation service, then whether a fixed charge was demanded is irrelevant. *Commonwealth v. Babb*, 70 A.2d 660 (Pa. Super. 1950). (Finding that it was not necessary for defendant to charge a specific fee or even ask for compensation in order to conclude that he operated as a taxi without a Certificate of Public Convenience.) "Such an arrangement [of obtaining funds as a donation or tip] is only an artifice or subterfuge." *Id.* at 668. *See also Pa. PUC v. Israel*, 52 A.2d 317 (Pa. 1947) (affirming a lower court order enjoining drivers from providing transportation service when the funds received for the transportation are obtained as a "donation or tip" and not by a fixed charge).

III. CONCLUSION

For the reasons set forth above, I&E respectfully requests that the Commission adopt the Initial Decision's ultimate conclusion granting I&E's Formal Complaint, but setting aside the Initial Decision's Findings of Fact, substituting its own, assessing a \$1,000 civil penalty and serving a copy of its Order to the Pennsylvania Department of Transportation for the suspension or revocation of vehicle registrations that were used under Jerome B. McCree, Sr's operating authority.

Respectfully submitted,



Colby B. Widdowson
Prosecutor
PA Attorney ID No. 326185
(717) 787-2139
cwiddowson@pa.gov

Michael L. Swindler
Deputy Chief Prosecutor
PA Attorney ID No. 43319
(717) 783-7369
mwindler@pa.gov

Pennsylvania Public Utility Commission
Bureau of Investigation and Enforcement
Commonwealth Keystone Building
400 North Street
Harrisburg, Pennsylvania 17120

Dated: December 30, 2024

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**


| | | |
|--|---|---------------------------|
| Pennsylvania Public Utility Commission, | : | |
| Bureau of Investigation and Enforcement, | : | |
| Complainant | : | |
| | : | |
| v. | : | Docket No. C-2023-3037385 |
| | : | |
| Jerome McCree, Sr., | : | |
| Respondent | : | |

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a true copy of the foregoing **Exceptions of the Bureau of Investigation and Enforcement** dated December 30, 2024 upon the parties listed below, in accordance with the requirements of 52 Pa. Code § 1.54 (relating to service by a party).

Served via First Class Mail:

Jerome McCree, Sr.
232 Chalfont Street
Pittsburgh, PA 15210



Colby B. Widdowson
Prosecutor
Bureau of Investigation and Enforcement
PA Attorney ID No. 326185
(717) 787-2139
cwiddowson@pa.gov