

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17120**

Public Meeting held February 6, 2025

Commissioners Present:

Stephen M. DeFrank, Chairman
Kimberly Barrow, Vice Chair
Kathryn L. Zerfuss
John F. Coleman, Jr.
Ralph V. Yanora

Pennsylvania Public Utility Commission,
Bureau of Investigation & Enforcement

C-2023-3037385

v.

Jerome McCree, Sr.

OPINION AND ORDER

BY THE COMMISSION:

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of the Bureau of Investigation and Enforcement (I&E), filed on December 30, 2024, to the Initial Decision (I.D.) of Administrative Law Judge (ALJ) Katrina L. Dunderdale, issued on December 9, 2024. No Reply Exceptions have been filed. For the reasons stated below, we shall deny I&E's Exceptions and adopt the ALJ's Initial Decision, as modified, consistent with this Opinion and Order.

I. History of the Proceeding

On July 6, 2023, I&E filed a Formal Complaint (Complaint) against Jerome McCree Sr. (Respondent or Mr. McCree), wherein it alleged that the Respondent operated a vehicle for the purposes of transporting passengers for compensation, in call or demand service, without possessing the necessary authority from the Commission, in violation of Section 1101 of the Public Utility Code (Code), 66 Pa.C.S. § 1101. In the Complaint, I&E specifically averred that on April 28, 2023, the Commission's Enforcement Supervisor James Murray (Supervisor Murray), and Enforcement Officers Christopher Urey (Officer Urey) and Andrew Rosenberger (Officer Rosenberger) were conducting an enforcement detail at the Rivers Casino in Pittsburgh. According to I&E, during the enforcement detail, Officer Rosenberger received a quote for a trip from the casino to the Hofbräuhaus House.¹ I&E also alleged that Supervisor Murray then approached the driver and identified himself as a Commission Enforcement Supervisor and requested the carrier's driver's license and registration. I&E further indicated that the driver was subsequently identified as Jerome McCree (Respondent or Mr. McCree). I&E Complaint at ¶¶ 4-5.²

After identifying the Respondent as the driver, Officer Urey completed a Driver Vehicle Compliance Report on the subject vehicle, which was registered to the

¹ The Hofbräuhaus House is a Bavarian establishment in Pittsburgh.
Tr. a 19.

² I&E's Complaint also alleged that "[o]n September 14, 2016, Respondent was issued a warning letter for the transportation of passengers for compensation without authority/certificate. Respondent was also advised that by attaching a yellow roof light with the word "[a]vailable" on its vehicle it was I [in] violation of 75 Pa.C.S. § 4307 [use and display of illuminated signs] and directed to cease and desist from further violations." I&E Complaint at ¶ 3 (citing 2016 Cease and Desist Letter). At the hearing, Officer Rosenberger later clarified that the 2016 Cease and Desist Letter was not issued on the basis that Respondent was an uncertificated carrier, and it was not a Formal Complaint. Tr. at 39-40.

Respondent. Supervisor Murray explained to the Respondent that the Commission must provide certification of authority to drivers who operate a vehicle for purposes of transporting passengers for compensation, in call or demand service, within the Commonwealth of Pennsylvania. Because I&E's review of the Commission's records concluded with the determination that the Respondent did not hold a certificate of public convenience and, therefore, was unauthorized by the Commission to provide call or demand service, Supervisor Murray instructed the Respondent to cease and desist operating as a call or demand operator. I&E Complaint at ¶¶ 4-6.

Accordingly, I&E alleged that by operating a vehicle for the purpose of transporting passengers for compensation, in call or demand service, within the Commonwealth of Pennsylvania without authority from the Commission, the Respondent violated Section 1101 of the Code, 66 Pa.C.S. § 1101.³ I&E Complaint at 1, ¶ 6. In the final paragraph of its Complaint, I&E asserted that the penalty for the alleged violation is \$1,000 and possible suspension of the subject vehicle registration by the Pennsylvania Department of Transportation (PennDOT). *Id.* In its request for relief, I&E specifically requested that the Commission "impose a civil penalty upon Jerome McCree, Sr., in the amount of one thousand dollars (\$1,000.00) for the violations described in this Complaint and order such other remedy as the Commission may deem to be appropriate." *Id.* at 2.

³ 66 Pa.C.S. § 1101, provides as follows:

Upon the application of any proposed public utility and the approval of such application by the commission evidenced by its certificate of public convenience first had and obtained, it shall be lawful for any such proposed public utility to begin to offer, render, furnish, or supply service within this Commonwealth. The commission's certificate of public convenience granted under the authority of this section shall include a description of the nature of the service and of the territory in which it may be offered, rendered, furnished or supplied.

I&E's Complaint and an accompanying Secretarial Letter were served upon the Respondent on July 6, 2023 via Certified Mail, Return Receipt Requested, through the United States Postal Service (USPS). The Secretarial Letter advised the Respondent that the Notice section of I&E's Complaint contained detailed instructions on how to proceed, and that the Respondent was advised to read everything carefully or consult with an attorney. The Notice section of I&E's Complaint directed the Respondent to file a verified Answer to the Complaint within twenty (20) days of the date of service, pursuant to 52 Pa. Code §1.56(a).⁴ Additionally, I&E's Complaint advised the Respondent that failure to answer the Complaint within twenty (20) days would result in I&E's request for the Commission to issue a Secretarial Letter imposing a penalty that could include "a fine, the suspension or revocation of your certificate of public convenience or other remedy." I&E Complaint at 4.

On August 10, 2023, the Commission's Secretary's Bureau received a certified mail receipt from the USPS indicating that the Complaint was being returned to sender as unclaimed mail, and that no forwarding address was available.

On August 19, 2023, I&E's Complaint was published in the Pennsylvania Bulletin at 53 *Pa.B.* 5263.

On August 23, 2023, I&E's Complaint and an accompanying Secretarial Letter were re-served upon the Respondent in the same manner, and at the same address, as used for service by the Commission on July 6, 2023.⁵ USPS did not return the

⁴ Twenty (20) days from the Complaint service date of July 6, 2023 was July 26, 2023.

⁵ The accompanying Secretarial Letter contained the same information as the Secretarial Letter served on July 6, 2023. Given the Complaint service date of August 23, 2023, pursuant to 52 Pa. Code §1.56(a), the Respondent's Answer was due within 20 days, or by September 12, 2023.

Complaint to the Commission as undeliverable. *See Second Interim Order*, issued July 22, 2024 (*Second Interim Order*) at 2.

On September 18, 2023, Mr. McCree submitted a letter in response to I&E's Complaint (*Respondent's September 18 Letter*). The *Respondent's September 18 Letter* contained the following content: "I, Jerome B McCree Sr., request a hearing before an administrative judge. At this time, I will not make any legal arguments against the allegations until I seek legal counsel." *Respondent's September 18 Letter*. On November 27, 2023, in an additional response to I&E's Complaint, the Respondent submitted a second letter identical to the *Respondent's September 18 Letter* (*Respondent's November 27 Letter*).

On December 28, 2023, I&E filed Preliminary Objections to the *Respondent's September 18 Letter*. I&E Preliminary Objections at 2-4. Specifically, in its Preliminary Objections, I&E alleged that the *Respondent's September 18 Letter* was legally insufficient because it did not meet the required elements of an Answer as set forth in the Commission's Regulations. I&E Preliminary Objections at ¶¶ 10, 14-17 (citing 52 Pa. Code § 5.61(b)). Additionally, I&E also alleged in its Preliminary Objections that the *Respondent's September 18 Letter* was insufficiently specific in multiple respects, including, *inter alia*, that the Respondent failed to admit or deny the material allegations of the Complaint, and that the Respondent failed to advise of the nature of any defense and facts relied upon. I&E Preliminary Objections at ¶¶ 10, 18-21. As relief, I&E requested that the *Respondent's September 18 Letter* be struck and that the Respondent be directed to file an Answer that conformed to the requirements outlined in 52 Pa. Code § 5.61. *Id.* at 4-5. Pursuant to the Commission's Regulation at 52 Pa. Code § 5.101(b), I&E's Preliminary Objections properly included a Notice to Plead, indicating that any written response the Respondent intended to submit must be submitted within ten (10) days of service.

On January 10, 2024, the Respondent submitted a letter in response to I&E's Preliminary Objections (*Respondent's January 10 Letter*). The *Respondent's January 10 Letter* contained the following content: "I Jerome B McCree Sr, requested a hearing before an administrative judge. At this time I will not make any legal arguments against the allegations." *Respondent's January 10 Letter; Second Interim Order* at 3.

On March 4, 2024, ALJ Dunderdale was assigned as the Presiding Officer as a Motion Judge for purposes of ruling on I&E's Preliminary Objections.

On March 8, 2024, ALJ Dunderdale issued a *First Interim Order*, wherein she determined that the Respondent had failed to provide a sufficient and responsive Answer to I&E's Complaint. *See, First Interim Order* at 4. Yet, because both the *Respondent's September 18 Letter* and the *Respondent's November 23 Letter* indicated the Respondent's requests for a hearing before an administrative law judge, ALJ Dunderdale determined to provide the Respondent with a final opportunity to respond to I&E's Complaint, directing him to indicate "in writing and with specificity - what his legal responses and defenses are with sufficient specifics to enable BIE⁶ to prepare for the administrative hearing." In the event that the Respondent provided a specific Answer on or before 4 p.m. on April 12, 2024, the ALJ indicated that an initial hearing would be scheduled where the Respondent could provide proof that I&E's Complaint should be dismissed. The ALJ also explained that the Respondent's written response to I&E's Complaint must comply with the requirements of 52 Pa. Code § 5.61, including, *inter alia*, responding in the form of admitting or denying I&E's averments in a manner that corresponded to the allegations in I&E's Complaint. If the Respondent failed to file a compliant Answer, the ALJ cautioned that the Commission may grant the relief requested in I&E's Complaint. *Id.* at 5.

⁶ The ALJ refers to 'I&E' as 'BIE.' As a result, I&E and BIE may be used interchangeably throughout this Opinion and Order. Specifically, I&E and BIE both refer to the Commission's Bureau of Investigation and Enforcement.

On April 22, 2024, I&E filed a Motion for Default Judgment indicating that the Respondent failed to file an Answer to I&E’s Complaint by 4 p.m. on April 12, 2024, as required by the ALJ’s *First Interim Order*.⁷ Motion for Default Judgment at ¶¶ 8-10. As a result, I&E requested that the Commission enter a Default Order against the Respondent, assess a civil penalty of One Thousand Dollars (\$1,000) against the Respondent, order such other relief as the Commission may deem appropriate, and, in the event of non-payment, refer the matter to the Pennsylvania Office of Attorney General for collection of outstanding amounts due and any other appropriate action. *Id.* at ¶ 14.

On May 7, 2024, the Respondent filed a letter in response to I&E’s Motion for Default Judgment (*Respondent’s May 7 Letter*). In the *Respondent’s May 7 Letter*, the Respondent again requested a hearing, and, in support, the Respondent cited the principle of due process and the need for a “crucial platform to review the evidence presented against me, to cross-examine such evidence, and to argue the merit and legality of the impending fine.” Additionally, the Respondent indicated that I&E did not provide a detailed explanation of the grounds for seeking a \$1,000 fine. The Respondent also indicated his belief that, after a thorough review, “the concerns leading to this penalty may be resolved in my favor.” In closing, the Respondent requested that he be informed of the available dates and any procedures he must follow to secure a hearing. *Respondent’s May 7 Letter*.

By correspondence dated May 20, 2024, and in recognition that the *Respondent’s May 7 Letter* did not contain any indication of service, the ALJ served the *Respondent’s May 7 Letter* upon I&E (the *ALJ’s Service Letter*). Additionally, the *ALJ’s Service Letter* reminded the Parties of the need to properly serve documents, and it also

⁷ We note that I&E’s Motion for Default Judgment included a certificate of service indicating that service was made upon the Respondent by U.S. mail.

directed I&E to file any written objection or comments regarding the *Respondent's May 7 Letter* by May 29, 2024.

On May 22, 2024, I&E filed a Motion to Strike Respondent's Document [*i.e.* the *Respondent's May 7 Letter*] (Motion to Strike). In its Motion to Strike, I&E argued that the Respondent's failure to attach a certificate of service to the *Respondent's May 7 Letter* and the failure to serve it resulted in non-compliance with the Commission's Regulations. I&E Motion to Strike at ¶¶22-26. Consequently, I&E argued that such non-compliance should result in the *Respondent's May 7 Letter* being stricken. *Id.* (citing 52 Pa. Code § 1.57(b) and 52 Pa. Code § 1.54(a)). In the alternative, I&E argued that the ALJ should grant I&E's pending Motion for Default Judgment due to the Respondent's continued failure to timely file an Answer to I&E's Complaint. I&E Motion to Strike at ¶¶ 27-28. If its Motion for Default Judgment were granted, I&E requested that the Commission enter a Default Order against the Respondent, assess a civil penalty of \$1,000 against the Respondent, order such other relief as the Commission may deem appropriate, and, in the event of non-payment, refer the matter to the Pennsylvania Office of Attorney General for collection of outstanding amounts due and any other appropriate action. Motion to Strike at 5-6.

On July 22, 2024, ALJ Dunderdale issued a *Second Interim Order*, wherein she: (1) denied I&E's Preliminary Objections, (2) denied I&E's Motion to Strike, and (3) granted the Respondent's request for an Initial Hearing. *Second Interim Order* at 1, 9. Although the ALJ opined that since the proceeding began, the Respondent had not provided I&E with an adequate response to its Complaint nor had he retained an attorney, the ALJ also recognized that the Respondent consistently requested a hearing where he could hear and respond to evidence. *Second Interim Order* at 8. The ALJ also concluded that in I&E's Preliminary Objections, as well as in its various motions, I&E neglected to justify why a requested civil penalty of \$1,000 is an appropriate civil penalty pursuant to enumerated factors provided in the Commission's Policy Statement at 52 Pa. Code

§ 69.1201. *Id.* Accordingly, the ALJ indicated that a telephonic hearing would be scheduled as soon as practicable in order to afford I&E with an opportunity to present evidence and to justify the requested civil penalty. *Id.* at 9.

On July 24, 2024, an Initial Call-In Telephone Hearing Notice was issued in this case. The Telephonic Hearing Notice established August 27, 2024 at 10 a.m. as the date and time for the telephonic hearing to begin, and it also provided instructions for telephonic participation.

On July 25, 2024, ALJ Dunderdale issued an *Initial Prehearing Order for Telephone Hearing (Initial Prehearing Order)*. ALJ Dunderdale's *Initial Prehearing Order* established the process and procedures for the telephonic hearing on August 27, 2024, including, *inter alia*, the process for presenting exhibits and for serving documents. *Initial Prehearing Order* at 1-7.

On August 19, 2024, I&E's counsel filed a certificate of service indicating that I&E provided service of I&E's pre-marked exhibits, I&E Exhibits 1 and 2, upon the ALJ and the Respondent. I&E Exhibit 1 is comprised of two pictures of the subject vehicle. The first picture included in I&E Exhibit 1 is a photo of the roof of the subject vehicle displaying an illuminated "Checker Available" dome light. The second picture contained in I&E Exhibit 1 is a photo of the subject vehicle's license plate. I&E Exhibit 2 is a two-page document comprised of the Respondent's driver's license (partially redacted) and the Respondent's vehicle registration.

On August 27, 2024, an Initial Telephonic Hearing was conducted. I&E was represented by counsel who presented the testimony of two witnesses, Supervisor Murray and Officer Rosenberger. Tr. at 10-44. I&E's counsel also presented I&E Exhibits 1 and 2, which were both admitted into the record. Tr. at 36, 38. The

Respondent also appeared at the hearing and provided testimony. Tr. at 44-61. The record consists of I&E's Exhibits Nos. 1-2, as well as a sixty-four (64) page transcript.

On September 11, 2024, ALJ Dunderdale issued an *Interim Order Closing the Hearing Record*, which, *inter alia*, indicated that no further hearings would be held in this case and that an Initial Decision would be prepared and issued.

On December 9, 2024, the Commission issued ALJ Dunderdale's Initial Decision, wherein she : (1) determined that I&E's Complaint should be granted; and, (2) concluded that a \$100 civil penalty should be assessed upon the Respondent instead of the \$1,000 civil penalty sought by I&E. I.D. at 1, 13, 18-20.

As previously noted, I&E filed its Exceptions to the Initial Decision on December 30, 2024. No reply to I&E's Exceptions has been filed.

II. Discussion

A. Legal Standards

As the proponent of a rule or order, I&E in this proceeding bears the burden of proof pursuant to Section 332(a) of the Code. 66 Pa.C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, I&E must show that the Respondent is responsible or accountable for the problem described in the Complaint. *Patterson v. The Bell Telephone Company of Pennsylvania*, 72 Pa. P.U.C. 196 (1990). Such a showing must be made by a preponderance of the evidence. *Samuel J. Lansberry, Inc. v. Pa. PUC*, 578 A.2d 600 (Pa. Cmwlth. 1990), *alloc. denied*, 529 Pa. 654, 602 A.2d 863 (1992). That is, I&E's evidence must be more convincing, by even the smallest amount, than that presented by the Respondent. *Se-Ling Hosiery, Inc. v. Margulies*, 364 Pa. 45, 70 A.2d 854 (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 & Western Ry. Co. v. Pa. PUC*, 489 Pa. 109, 413 A.2d 1037 (1980).

Upon the presentation by I&E of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence (burden of persuasion) to rebut the evidence of I&E shifts to the Respondent. If the evidence presented by the Respondent is of co-equal weight, I&E has not satisfied its burden of proof. I&E would be required to provide additional evidence to rebut the evidence of the Respondent. *Burleson v. Pa. PUC*, 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff'd*, 501 Pa. 433, 461 A.2d 1234 (1983).

While the burden of persuasion may shift back and forth during a proceeding, the burden of proof never shifts. The burden of proof always remains on the party seeking affirmative relief from the Commission. *Milkie v. Pa. PUC*, 768 A.2d 1217 (Pa. Cmwlth. 2001).

B. The ALJ's Initial Decision

In this proceeding, the ALJ made twenty-seven (27) Findings of Fact (FOF) and reached seven (7) Conclusions of Law. I.D. at 6-10, 18-19. The Findings of Fact and Conclusions of Law are incorporated herein by reference and are adopted without comment unless they are either expressly or by necessary implication rejected or modified by this Opinion and Order.

Although the Initial Decision ultimately granted I&E's Complaint, the ALJ determined that I&E failed to provide convincing evidence that the Respondent *offered* to provide transportation for compensation. I.D. at 13 (emphasis added). Because the ALJ determined that I&E's Complaint should be granted, the ALJ also determined that a civil

penalty should be imposed, but that the civil penalty amount should be reduced from \$1,000 penalty (*i.e.* the amount sought by I&E) to \$100. I.D. at 1, 13-19.

1. The Respondent Agreed to Provide Transportation for Compensation

First, the ALJ found that while I&E provided convincing evidence that the Respondent *agreed* to transport two individuals in his vehicle for compensation, I&E failed to prove that Respondent *offered* to provide transportation for compensation. I.D. at 10, 13 (emphasis added). In weighing the evidence, the ALJ concluded that the plainclothes officer [Officer Rosenberger] approached the Respondent and made repeated requests for a ride, and that the Respondent eventually agreed to transport two people for compensation. *Id.* at 10. In the Initial Decision, the ALJ identified two of the most influential facts that led to her finding that I&E's Complaint should be granted: (1) the Respondent's admission that he was willing to transport persons for compensation; and (2) the presence of the dome lights on the subject vehicle. *Id.* at 13.

According to the ALJ, the Respondent's statements that he would accept a "donation" to provide transportation while operating the Uber application, but that he could not accept compensation, evidenced the Respondent's willingness to transport for compensation and his knowledge that doing so was not permitted without a Certificate of Public Convenience. Additionally, the ALJ found that the Respondent knew that the dome lights on the subject vehicle were impermissible, but that the Respondent continued to use the dome lights despite that knowledge. I.D. at 13. In assessing the evidence, the

ALJ determined that the Respondent knowingly violated the Code provisions at 66 Pa.C.S. §§ 1101-1103, and the transportation provisions at 75 Pa.C.S. § 1375.⁸ *Id.*

2. Civil Penalty

After determining that I&E's Complaint should be granted, the ALJ next addressed the issue of the appropriate civil penalty to impose for the Respondent's violations. At the outset, the ALJ recognized that 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. *I.D.* at 14. Next, the ALJ referenced the Commission's Policy Statement at 52 Pa. Code § 69.1201, which sets forth ten (10) factors that the Commission may consider in evaluating whether, and to what extent, a civil penalty for violating a Commission Order,

⁸ In pertinent part, 75 Pa.C.S. § 1375, Suspension of registration of unapproved carriers, provides as follows:

General rule.--The department shall suspend the registration of any vehicle upon the presentation to the department of a certificate of the Pennsylvania Public Utility Commission or notice of the Philadelphia Parking Authority setting forth, after hearing and investigation, that the commission or the Philadelphia Parking Authority has found and determined that the vehicle has been operated as a common carrier or contract carrier by motor vehicle within this Commonwealth without the approval of the commission or the Philadelphia Parking Authority and either that no appeal was filed from such determination in the manner and within the time provided by law or that the determination was affirmed on appeal.

75 Pa.C.S. § 1375(a). While the ALJ cited to 75 Pa.C.S. § 1375, the ALJ did not explain the basis for concluding that the Respondent had violated this provision. We note that 75 Pa.C.S. § 1375(a) pertains to the Commission's authority to seek suspension of registration upon a finding of operating without a Certificate of Public Convenience, rather than a provision which creates a separate violation. To the extent the ALJ has misconstrued this provision, we shall reject the ALJ's analysis.

Regulation, or Statute is appropriate. *Id.* The ALJ identified the following ten (10) Policy Statement factors as the standards to be evaluated:

- (1) Whether the conduct at issue is of a serious nature, such as willful fraud or misrepresentation, which may warrant a higher penalty;
- (2) Whether the resulting consequences of the conduct at issue are of a serious nature, such as personal injury or property damage;
- (3) Whether the conduct at issue is deemed intentional or negligent⁹;
- (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;
- (5) The number of customers affected and the duration of the violation.
- (6) The compliance history of the regulated entity which committed the violation.
- (7) Whether the regulated entity cooperated with the Commission's investigation.
- (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; and
- (10) Other relevant factors.

Id. at 14-15 (citing 52 Pa. Code § 69.1201(c)(1)-(c)(10)).

⁹ The ALJ's Initial Decision recognized that this factor may only be evaluated in the context of litigated proceedings. I.D. at 14.

After identifying the applicable Policy Statement factors, the ALJ concluded that although I&E requested a civil penalty totaling \$1,000, plus the possible suspension of the Respondent's vehicle registration if the civil penalty is not timely paid, I&E did not explain why it requested imposition of the maximum civil penalty (*i.e.*, \$1,000). I.D. at 15. The ALJ also noted that I&E did not provide any support for its request that the Commission impose a civil penalty of \$1,000, as there were no statements made in I&E's Complaint, other filings, or during the initial hearing to explain how I&E reached the conclusion that a \$1,000 civil penalty was warranted or how that amount would act as a deterrent for the Respondent's future compliance. I.D. at 15. As I&E did not provide support for its recommended civil penalty, the ALJ reviewed the evidence as presented by I&E and the Respondent and the applicable standards to reach a determination of the appropriate civil penalty. *Id.* at 15-16.

In considering aggravating factors supporting a higher civil penalty, the ALJ reiterated her finding that I&E justified that a civil penalty should be appropriately imposed upon Respondent. Specifically, the ALJ recognized that the Respondent agreed to transport two people for compensation, and that the Respondent also intentionally violated the Department of Transportation's prohibitions against dome lights. The ALJ concluded that the Respondent has "known since 2016 that dome lights are not permitted on his vehicle. . . ." as under the law, only taxicabs and ambulances are permitted to have dome lights. I.D. at 16.

In considering the mitigating factors supporting a lower civil penalty, the ALJ pointed to her determinations that the Respondent did not come to the taxi area for the purpose of operating in a call or demand service and that the Respondent did not approach the plainclothes officer [Officer Rosenberger] to make an offer to transport. In support of these determinations, the ALJ indicated that no evidence was presented that the Respondent approached or, otherwise tried, to engage passengers. The ALJ also found that the Respondent made it clear that he could not take compensation while

operating under the Uber application, and that the Respondent fully cooperated with the motor carrier enforcement officers. I.D. at 16-17.

Additionally, the ALJ found that, but for the presence of the dome lights on the Respondent's vehicle, it would be unlikely that the officer would have either approached the Respondent or that I&E would have filed a Complaint in this case. I.D. at 17. The ALJ reasoned that while it is understood that, in the context of an investigation, a motor carrier officer must seek out rides and initiate interactions with potential non-certificated carriers, the officer's actions in this case were excessive. According to the ALJ, the result may have been different if, after learning that the Respondent was expecting an Uber rider, the officer would have retreated and waited to see if the Respondent would subsequently approach the officer. *Id.* While the ALJ considered the officer's approach to be a mitigating factor in evaluating an appropriate civil penalty in this case, the ALJ also cautioned that "the Respondent is forewarned that he will not be able to use entrapment or undue influence as a defense again if he offers or agrees to drive an individual for compensation." *Id.* at 17-18.

After evaluating all of the evidence presented, the ALJ found that a civil penalty in the amount of \$100 would be just, reasonable, and in the public interest. As part of the evaluation, the ALJ concluded that the amount of \$100 would be a sufficient deterrent, but that if the Respondent's conduct led to another offense, the civil penalty would increase. Furthermore, the ALJ's conclusion was based upon the findings that the Respondent had no prior violations and that the Respondent may have acquiesced due to the officer's persistent requests. Moreover, the ALJ acknowledged that the Respondent has a small operation, consisting of himself as an Uber driver, and that the Respondent was cooperative with the investigative officers. I.D. at 18.

While the ALJ determined that a civil penalty of \$100 was appropriate for this case, consistent with the request made in I&E's Complaint, the ALJ also determined

that if the Respondent fails to pay the \$100 civil penalty within thirty (30) days of the entry date of the Commission's Final Order in this case, the Commission should "send a copy of its Order to the Pennsylvania Department of Transportation for suspension or revocation of vehicle registrations that were used under the Respondent's operating authority." I.D. at 20, ¶ 6(a). Finally, in the same event of non-payment for 30 days, the ALJ indicated that this matter should also be referred to the Pennsylvania Office of Attorney General for collection of the total due and appropriate action. I.D. at 21, ¶ 6(b).

C. I&E's Exceptions

In its Exceptions, I&E argues that while the ALJ correctly granted I&E's Complaint, the ALJ erred in making certain credibility determinations. Specifically, I&E's Exceptions are two-fold, and are based on I&E's challenges to the ALJ's credibility determinations that underlie certain identified Findings of Fact which, in turn, formed the basis for the ALJ's downward revision to the amount of the civil penalty imposed upon the Respondent from \$1000 to \$100. I&E Exc. at 1.

1. I&E Exception No. 1- The ALJ's Credibility Determinations

At the outset of its first Exception, I&E avers that the record does not support the witness credibility determinations, as set forth in the Initial Decision's Findings of Fact Nos. 25 and 26. I&E Exc. at 1-2. Findings of Fact Nos. 25 and 26 read as follows:

25. Respondent's testimony was accepted as credible except his recollection that the dome light on his car was not illuminated on April 28, 2023.

26. The 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.

I.D. at 10, FOF Nos. 25-26. According to I&E, the Respondent's testimony should be "treated with serious skepticism" because during cross-examination, the Respondent's credibility was impeached and therefore the Respondent was shown to be unreliable. I&E Exc. at 2. In contrast, I&E claims that its witness, Officer Rosenberger, was not impeached or shown to be unreliable at any point in time. On this basis, I&E requests that the Commission "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." *Id.*¹⁰

10. Respondent uses the dome lights to help Uber riders to find his car. (Tr. 47, 50, 57).

11. After April 28, 2023, Respondent talked with Uber and replaced the "Checker" dome light with an "Uber" dome light on the subject vehicle. (Tr. 47, 48).

13. On April 28, 2023, Respondent drove through the entrance, pulled the subject vehicle over to the curb at the casino's entrance near a designated smoking area, and awaited the Uber rider who requested service through the application. (Tr. 45-47).

15. While Respondent waited for his Uber rider, Officer Rosenberger, who was smoking a cigar in the designated smoking area, approached Mr. McCree and complained about the lack of available cabs. (Tr. 22-26, 45-47).

16. Officer Rosenberger asked Respondent if he was available to give him and a friend a ride over to the Hofbräuhaus restaurant on the Southside of Pittsburgh, in exchange for receiving \$20 per person, or \$40 total. (Tr. 12-15, 25, 50-57).

¹⁰ Although I&E's Exceptions do not fully set out FOF Nos. 10, 11, 13, 15, 16, 17, 18, 19, 25, and 26, we have included them, *supra*, in order to provide the full context of I&E's position. *See* I.D. at 8-10.

17. Respondent informed Officer Rosenberger that he (Respondent) was an Uber driver waiting for his Uber rider to come out of the casino. (Tr. 45).

18. 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).

19. After discussion, Mr. McCree agreed to provide transportation for two people to the Hofbräuhaus if Respondent's Uber rider did not come out within five minutes, in exchange for a donation. (Tr. 15, 45, 48, 55).

In support of its position that the Commission should substitute its own Findings of Fact for each of those identified above, I&E avers, *inter alia*, that the Commission, not the administrative law judge, is the ultimate fact finder in this case, and that the Commission is responsible to weigh all relevant evidence, and to determine the credibility of witnesses. I&E Exc. at 2-3; n. 4 (citing *Hess v. Pa. PUC*, 107 A.3d 246 (Pa. Cmwlth. 2014); *York Water Company v. Pa. PUC*, 414 A.2d 138 (Pa. Cmwlth. 1980); *Pennsylvania Communities Organizing for Change, Inc. v. Pa. PUC*, 89 A.3d 338 (Pa. Cmwlth. 2014)). I&E points to the cited authority to support its position that the Commission has full authority to disregard the ALJ's I.D. and to overrule it if the Commission reaches a contrary result. I&E Exc. at 2-3.

Specifically, I&E points to the ALJ's Finding of Fact No. 14, as set forth *supra*, which found that the dome lights on the subject vehicle were illuminated, as determinative because it demonstrated the ALJ's rejection of the Respondent's testimony that the dome light atop his vehicle was "not on" and "was not plugged in." I&E Exc. at 3 (citing Tr. at 48). I&E argues that because the Respondent consistently offered testimony that the dome light was not illuminated, despite being shown "undeniable photographic proof" that the dome light was on, the Respondent's credibility was impeached and "never rehabilitated." I&E Exc. at 3 (citing I&E Exh. 1). I&E contends

that because the ALJ did not find the Respondent to be credible in the testimony regarding the dome light, and because there was no rehabilitation of the Respondent's credibility or any finding of fact or discussion of why the Respondent's testimony should be found credible despite impeachment, the Respondent's testimony should not be treated as credible. I&E Exc. at 3.

Additionally, I&E contends that Finding of Fact No. 26, as set forth *supra*, which accepted the testimony of Officer Rosenberger except for his recollections about his interactions with the Respondent and who initiated the discussion of a ride for remuneration, should also be rejected. According to I&E, there is no evidence in the record, no Finding of Fact, and no discussion or support for the ALJ's failure to treat Officer Rosenberger's testimony as wholly credible. I&E also argues that 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. I&E Exc. at 4.

Moreover, I&E takes issue with Findings of Fact Nos. 10, 11, 13, 15, 16, 17, 18, and 19 (penalty findings), as set forth *supra*, as I&E indicates that the ALJ relied upon them in determining the civil penalty amount in this case. In general, I&E characterizes the civil penalty findings as centering around whether the Respondent was truly at the location for the purpose of providing an Uber ride, whether the Respondent approached Officer Rosenberg for a ride—or vice versa—and whether the Respondent or Officer Rosenberg raised the issue of compensation. I&E Exc. at 4.

I&E argues that the Respondent's testimony regarding the following eight (8) claims is not credible because they are unsupported by the testimony of other witnesses or by documentary evidence, and therefore, their acceptance relies upon the discredited credibility of the Respondent: (1) the Respondent arrived at the casino to provide a ride through the Uber application; (2) the Respondent's vehicle had a dome light that advertised as "Available" and was not lit; (3) the Respondent used the dome

light to help Uber riders find his car; (4) the Respondent parked by the entrance to the Casino; (5) the Respondent was approached by Officer Rosenberger and asked to provide a ride for two persons; (6) the 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) the 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, the Respondent talked with Uber and replaced the “Checker” dome light with an “Uber” dome light on the subject vehicle. I&E Exc. at 4-5.

In contrast, I&E contends, Officer Rosenberger’s testimony regarding the following five (5) claims should be accepted as fact because Officer Rosenberger’s credibility was not challenged or impeached in this case: (1) Officer Rosenberger was standing in front of the casino; (2) Officer Rosenberger observed the Respondent pull up to the casino in a vehicle with a dome light; (3) Officer Rosenberger was asked, by the Respondent, if Officer Rosenberger needed a ride; (4) Officer Rosenberger indicated that he needed a ride to the Hofbräuhaus in Pittsburgh; and (5) the Respondent offered to provide transportation for \$20 per person for a total of \$40. I&E Exc. at 5. According to I&E, based on the unimpeached credibility of Officer Rosenberger, compared to the impeached and unrehabilitated credibility of the Respondent, Findings of Fact Nos. 10, 11, 13, 15, 16, 17, 18, 19, 25, and 26 should be rejected in favor of the Commission substituting its own Findings of Fact consistent with Officer Rosenberger’s testimony. I&E Exc. at 5-6.

2. I&E Exception No. 2- Civil Penalty Amount

In its Exception No. 2, I&E argues that the record of this case does not support the nominal \$100 civil penalty assessed. More specifically, I&E avers that the \$100 civil penalty significantly deviates from the penalty guidelines set forth in the “PUC Motor Carrier Services & Enforcement Penalty Guidelines” (Penalty Guidelines). I&E

Exc. at 6. I&E explains that the Penalty Guidelines, which were developed by the Commission’s independent Investigation and Enforcement Division, and which are reviewed, approved, and published by the Commission, dictate that the provision of that passenger transportation for compensation without Commission authority – or holding one’s self out as having such authority – warrants a civil penalty of \$1,000. I&E Exc. at 6-7.¹¹ I&E claims that instead of discussing and considering the Penalty Guidelines, the ALJ’s Initial Decision erred in relying on facts that were dependent upon acceptance of the Respondent’s discredited testimony in the analysis of the ten factors found at 52 Pa. Code § 69.1201. *Id.* at 6. I&E contends that there is no reason to deviated from the \$1,000 penalty that the Penalty Guidelines “prescribe” and it also asserts that the Commission regularly follows the Penalty Guidelines. *Id.* at 7.

I&E also takes issue with the below passage of the Initial Decision, regarding the ALJ’s findings that there were mitigating factors that support the imposition of a lower civil penalty in this case. In this passage, the ALJ determined that: (1) the Respondent came to the taxi area with an intent to pick up an Uber rider; (2) the Respondent did not approach Officer Rosenberger with an offer to transport; and (3) the Respondent indicated that he could not accept compensation while operating under the Uber application:

Mr. McCree was in the taxi area to pick up an Uber rider, not to transport for [compensation;] Mr. McCree did not come to the taxi area for the purpose of operating in call or demand

¹¹ I&E includes the following background information about the Penalty Guidelines: “[t]he 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).” I&E Exc. at 7, n. 16. Although I&E indicated that the current version of the Penalty Guidelines was approved and published by the Commission on April 1, 2011, I&E did not attach the Penalty Guidelines to its Exceptions nor did it provide a publicly accessible citation to the referenced Penalty Guidelines. *See* I&E Exc. at 7.

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.[. . .]

I&E Exc. at 7 (citing I.D. at 16-17). I&E contests the above-referenced passage by arguing that Officer Rosenberger's testimony was more credible than the testimony of the Respondent, and that civil penalty mitigation based upon the testimony of the Respondent is unwarranted.

I&E makes virtually the same claims regarding the Initial Decision's passage below, whereby the ALJ concluded that Officer Rosenberger identified the Respondent as a jitney¹² driver, and that while Respondent made more than one attempt to deny Officer Rosenberger's request for transportation, the Respondent acquiesced:

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

I&E Exc. at 7-8 (citing I.D. at 17). According to I&E, due to the Respondent's lack of credibility, there is a complete lack of support for the ALJ's findings in the passage above, and no basis to support mitigation of the civil penalty. Additionally, I&E avers that even if the Respondent's testimony were to be accepted, the Respondent did not testify that Officer Rosenberger's interactions amounted to persistence, badgering, or

¹² A 'Jitney' is defined as an unlicensed taxicab. *See* Merriam-Webster's online dictionary at [Jitney Definition & Meaning - Merriam-Webster](#).

forcing the Respondent to agree to provide transportation in exchange for compensation. I&E Exc. at 8 (citing Tr. at 44-59). I&E also indicates that the ALJ did not make any Findings of Fact to support the ALJ's characterization of the Respondent's interaction with Officer Rosenberger as consisting of "persistent questioning to such a degree [that] the officer's actions convinced Respondent to acquiesce." I&E Exc. at 8.

Finally, I&E contends that in establishing a civil penalty, the ALJ failed to consider the Respondent's knowledge that the Respondent was violating the Code by transporting passengers for compensation. In support, I&E points to the ALJ's Finding of Fact No. 18, which states as follows: "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." I&E Exc. at 9 (citing I.D. at 8, FOF No. 18). I&E argues that the Respondent's use of the term 'donation' was a "blatant attempt to circumvent the compensation element of the charged offense and this Commission's authority to regulate motor carriers." I&E Exc. at 9. I&E cites to several authorities to support its position 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. *Id.* (citing *Commonwealth v. Babb*, 70 A.2d 660 (Pa. Super. 1950); *Pa. PUC v. Israel*, 52 A.2d 317 (Pa. 1947)). On these points, I&E avers, the ALJ failed to consider the Respondent's known disregard for the Code when recommending a civil penalty in this case. I&E Exc. at 8-9.

I&E concluded its Exceptions with a request that the ALJ's grant of its Complaint be adopted, but that the civil penalty assessed upon the Respondent be increased to a total of \$1,000, and that a copy of the Commission's Order be served upon

PennDOT for the suspension or revocation of vehicle registrations that were used under Jerome McCree, Sr.'s operating authority.¹³ I&E Exc. at 10.

D. Disposition

At the outset, we note that any argument or Exception that we do not specifically delineate shall be deemed to have been duly considered and denied without further discussion. The Commission is not required to consider, expressly or at length, each contention or argument raised by the parties. *Consolidated Rail Corp. v. Pa. PUC*, 625 A.2d 741 (Pa. Cmwlth. 1993); *see also, generally, University of Pennsylvania v. Pa. PUC*, 485 A.2d 1217 (Pa. Cmwlth. 1984).

On review of the record evidence and the Exceptions in this case, we will adopt the ALJ's Initial Decision, in part, and modify it, in part. While we agree with the ALJ's determination that I&E's Complaint should be granted, and that a penalty in the amount of \$100 is appropriate in this matter, we will strike the Initial Decision's ordering paragraph 6(a), as set forth below:

6. That, if Jerome B. McCree, Sr. fails to make the payment required by Ordering Paragraph No. 2 above, within 30 days of the entry date of the Commission's Final Order, it is further ordered:

(a) That the Commission will send a copy of this Order to the Pennsylvania Department of Transportation for the suspension or revocation of

¹³ I&E makes its request for the Commission's Order to be served upon PennDOT concurrently with the Commission assessment of a \$1,000 civil penalty for the first time in Exceptions.

vehicle registrations that were used under Jerome B. McCree, Sr's operating authority.

I.D. at 20, ¶ 6(a).¹⁴ As explained further below, ordering paragraph 6(a) of the Initial Decision would adopt relief which does not align with the several variations of relief I&E has requested throughout this proceeding, and which is also inconsistent with the ALJ's ultimate determination that the Respondent provided transportation for compensation *without* operating authority.

1. I&E Exception No. 1: The ALJ's Credibility Determinations

We shall deny I&E's first Exception, which is based upon I&E's challenges to the credibility determinations that underlie the ALJ's civil penalty findings. Although we agree with I&E that the Commission, not the ALJ, is the ultimate finder of fact in this case, and that the Commission has full authority to, *inter alia*, weigh evidence, make determinations regarding the credibility of witnesses, and to disregard the ALJ's decision, we will decline to do so here. *See* I&E Exc. at 2-3, n. 4. I&E contends that the Respondent's testimony should be found to be not credible based upon I&E's position that the Respondent was impeached during cross examination, and that its own witness, Officer Rosenberger, was not impeached. However, we decline to apply I&E's subjective analysis of credibility, which fails to account for all the factors which a fact finder may consider in assessing credibility. We find that the Initial Decision demonstrates that the ALJ carefully weighed all of the evidence presented, including the

¹⁴ Conversely, we will retain Paragraph 6(b) of the Initial Decision, which provides that if Mr. McCree fails to make the payment required by Ordering Paragraph No. 2 (of the Initial Decision) above, within 30 days of the entry date of the Commission's Final Order in this proceeding, it is further ordered that "[t]he Bureau of Administrative Services, Assessment Section, shall refer this matter to the Pennsylvania Office of Attorney General for collection of the total set forth above and appropriate action."

weight of the witnesses' testimony and the credibility of the witnesses' testimony, and that the ALJ made reasoned determinations in establishing the civil penalty findings.

In essence, I&E's position would require us to depart from longstanding guidance about the multitude of factors that should be considered in determining witness credibility, in favor of finding that a witness found not to be credible on one issue must be deemed not to be credible on any issue at all. We will not do so, as an all-or-nothing approach to weighing credibility is at odds with the wholistic evaluation of credibility that is established through precedent. More specifically, in evaluating the credibility of a witness, the fact finder must consider the witness's manner of testifying, as well as the apparent candor, intelligence, personal interest and bias, or lack of it, when determining what weight shall be given to their testimony. *Danovitz v. Portnoy*, 399 Pa. 599, 161 A.2d 146 (1960) (*Danovitz*). A trier of fact may also consider such factors as the witness's conduct on the stand, demeanor, manner of testifying, such as candor or frankness or clearness of statements, intonation of voice, and the witness's positiveness and uncertainty as to facts. *In re Gaston's Estate*, 361 Pa. 105, 62 A.2d 904 (1949) (*Gaston's Estate*).

Our review of the ALJ's Initial Decision reveals that the ALJ carefully considered and weighed each witness's credibility from a wholistic perspective. The wholistic nature of the ALJ's credibility determinations is evident in the fact that the evaluation of evidence concluded with varying acceptance of witnesses' credibility. As an example, the ALJ fully accepted all of Supervisor Murray's testimony as credible. I.D. at 10, FOF No. 27. For the remaining witnesses, the Respondent and Officer Rosenberger, the ALJ accepted their credibility on certain points, and rejected their credibility on other points. As I&E indicated, the ALJ ultimately rejected the Respondent's testimony in the determination that the dome light on the subject vehicle was illuminated; however, the ALJ also accepted the remainder of the Respondent's testimony. I.D. at 10, FOF No. 25. Thus, it is apparent that like I&E, the ALJ did not

find the Respondent to be credible in his testimony regarding the dome light; however, the ALJ also determined that the Respondent's perceived lack of credibility on that issue alone did not automatically warrant the full rejection of the Respondent's testimony on all other issues, as she found the Respondent to be otherwise credible.

In a similar vein, while the ALJ did not accept Officer Rosenberger's testimony regarding his interactions with the Respondent and who initiated the discussion of a ride for remuneration,¹⁵ the remainder of Officer Rosenberger's testimony was accepted as credible. I.D. at 10, FOF No. 26. In accepting some, but not all, of Officer Rosenberger's testimony, the ALJ again weighed credibility in a manner that did not adopt an all-or-nothing approach, but that made precise determinations consistent with a holistic assessment of credibility.

Finally, while I&E argues that the ALJ failed to set forth any findings of fact or discussion explaining why the Respondent's testimony should be found credible, I&E failed to identify any authority for any such requirement. *See* I&E Exc. at 3. Additionally, we note that I&E's argument is asymmetric, as I&E does not claim that the ALJ was required to support the credibility determinations for I&E's witnesses through findings of fact or discussion. Accordingly, we find that the ALJ was not required to expressly justify the credibility determinations that underlie the penalty findings and we reject I&E's claim that the record does not support the ALJ's determinations. Accordingly, we will deny I&E Exception No. 1.

2. I&E Exception No. 2, The Appropriate Civil Penalty

We shall also deny I&E Exception No. 2, which is based upon I&E's argument that the ALJ erred in her assessment of a "nominal civil penalty of \$100." We

¹⁵ *See* Tr. at 21-26.

find that in the absence of record-based support from I&E, the ALJ reasonably evaluated the Commission's Policy Statement factors to arrive at the \$100 civil penalty for this case.

As a preliminary matter, we must reject I&E's arguments asserting that the ALJ erred by failing to consider the Penalty Guidelines in this case. I&E Exc. at 6-7. I&E's reliance upon the Penalty Guidelines is misplaced in multiple respects. Preliminarily, before addressing the merits of I&E's position regarding the Penalty Guidelines, we first recognize that I&E did not assert the Penalty Guidelines during the record phase of this case. Instead, our review indicates that I&E has invoked the Penalty Guidelines for the first time in its Exceptions. I&E's untimely assertion of the Penalty Guidelines is significant because the Commission's Regulations prohibit the introduction of evidence in a rebuttal phase of the case that should have been included in the party's case-in-chief. *See* 52 Pa. Code § 5.243(e). Here, I&E's untimely assertion of the Penalty Guidelines extends beyond being submitted in a rebuttal phase of the case because I&E not only failed to introduce them in its direct case, but it waited to assert them after the record was closed. It is well-established that parties cannot introduce new evidence at the exceptions stage. *Application of Apollo Gas Co.*, 1994 Pa. PUC Lexis, at *8-14 (Order entered February 10, 1994).

It should also be noted that I&E's reliance upon the Penalty Guidelines has also been rejected by the Commission in the past. *See Pa. PUC v. Dollar Taxi, LLC*, C-2014-2437291, (Final Order entered October 21, 2015) (*Dollar Taxi*). In *Dollar Taxi*, the Commission determined that the Penalty Guidelines are just that—guidelines that need not be strictly followed. *See* Initial Decision in *Dollar Taxi* at 13.

Outside of its assertion of the Penalty Guidelines, I&E opposes the civil penalty amount for reasons that align with its arguments contesting the Respondent's credibility. *See* I&E Exc. at 7-9. As we have addressed I&E's arguments regarding the

ALJ's credibility determinations, *supra*, and as we find that the ALJ's Findings of Fact are supported in the record, we will not again address I&E's credibility claims in the context of determining the appropriate civil penalty to be assessed in this case.

Additionally, while I&E contends that the ALJ improperly considered the Respondent's testimony as a basis to support mitigation of the civil penalty,¹⁶ we agree with ALJ Dunderdale that I&E "did not explain why it requested the imposition of the most severe civil penalty (\$1,000)" and that I&E also failed to provide any argument to support the requested civil penalty. I.D. at 15. Significantly, in the *Second Interim Order*, the ALJ specifically pointed to the fact that I&E neglected to justify its request for imposition of a \$1,000 civil penalty pursuant to the enumerated factors set forth in 52 Pa. Code §69.1201, providing I&E with notice of the deficiency. *Second Interim Order* at 8. Yet, I&E did not include statements in its Complaint, statements in any of its various filings, or statements at the hearing explaining how it determined that \$1,000 is the appropriate civil penalty. I&E also failed to provide any evidence or argument regarding the Policy Statement factors to establish a basis for the \$1,000 civil penalty. *See* I.D. at 15.

In the absence of I&E's justification for the imposition of a \$1,000 civil penalty, the ALJ reviewed the evidence and authority provided by I&E and the Respondent to reach a determination regarding the appropriate civil penalty. I.D. at 16. Our review of the ALJ's analysis concludes with the determination that the ALJ correctly determined that a \$100 civil penalty is appropriate under the facts of this case.

¹⁶ Key components of I&E's argument are that (1) the ALJ improperly determined that Respondent was in the taxi area to pick up an Uber rider and that Officer Rosenberger approached and pursued the Respondent for a ride; and (2) this resulted in the ALJ also improperly considering these facts as mitigating factors supporting the imposition of a lower civil penalty. I&E Exc. at 7-9.

As indicated *supra*, in her analysis, ALJ Dunderdale identified the ten (10) Policy Statement factors, outlined, *supra*, as the standards to be evaluated. *Id.* at 14-15 (citing 52 Pa. Code § 69.1201(c)(1)-(c)(10)). Although the ALJ did not perform an exhaustive review of each independent factor, she considered factors that both aggravated and mitigated the level of civil penalty that would be appropriate to assess in this case. The ALJ considered the nature of the Respondent's conduct (52 Pa. Code § 69.1201(c)(1)) in the assessment that the Respondent improperly agreed to transport two people for compensation and that he intentionally violated PennDOT's prohibitions against dome lights. *I.D.* at 16. The nature of the Respondent's conduct, the ALJ determined, warranted assessment of a civil penalty.

On the other hand, the ALJ weighed mitigating factors, including the determination that the Respondent was not initially present in the area with the intention of transporting for compensation. Instead, the ALJ concluded that while the Respondent did not have an initial intention to transport persons for compensation, the Respondent did agree to do so only after attempting to deny the plainclothes officer's request. (52 Pa. Code § 69.1201(c)(3)). The ALJ also factored in the conclusion that the only evidence presented, prior to the officer approaching the Respondent, was the presence of dome lights on the subject vehicle (52 Pa. Code § 69.1201(c)(10)). Additionally, the ALJ considered the Respondent's compliance history and determined that the Respondent had no prior violations (52 Pa. Code § 69.1201(c)(6)). The ALJ also pointed out that the Respondent cooperated fully with the motor carrier enforcement officers in this matter (52 Pa. Code § 69.1201(c)(7)). Finally, the ALJ found that a civil penalty of \$100 would be sufficient to deter the Respondent from transporting persons for compensation, without first obtaining a Certificate of Public Convenience from the Commission, and she also factored in the small size of the Respondent's operation, consisting of himself as an Uber driver. (52 Pa. Code § 69.1201(c)(8)). *See I.D.* at 17-18. We find that the ALJ's assessment of a \$100 civil penalty is well-reasoned and supported in the record.

For purposes of completeness, we will consider the remaining Policy Statement factors identified in 52 Pa. Code § 69.1201(c). First, we find that the Respondent’s conduct, which did not involve personal injury or property damage, did not produce serious consequences (52 Pa. Code § 69.1201(c)(2)). We also find that the record supports a determination that the Respondent made efforts to modify his practices and procedures to prevent similar conduct in the future because the Respondent testified that he removed the “checker sign” from the subject vehicle (52 Pa. Code § 69.1201(c)(4)). See Tr. at 47-48. Furthermore, we find that no customers were affected by the Respondent’s conduct and that the duration of it was limited to the timing of I&E’s enforcement detail (52 Pa. Code § 69.1201(c)(5)).

Finally, because of the unique circumstances of this case, past Commission decisions do not directly translate to the facts of this case; however, in the past, we recognize that the Commission previously approved a \$100 civil penalty for resolution of a violation of 66 Pa.C.S. §§ 1101 in a case involving the unauthorized transportation of persons for compensation. *Pennsylvania Public Utility Commission, Bureau of Transportation and Safety v. John Henry Briggs, III*, C-2011-2215209 (Opinion and Order entered August 1, 2011) (*Briggs*). In *Briggs*, after receiving an informal complaint alleging that John Henry Briggs, III, was transporting Amish passengers, the Commission’s Bureau of Transportation and Safety (BTUS)¹⁷ conducted an investigation. During the course of the BTUS investigation, Mr. Briggs, who did not hold Commission authority to transport passengers for compensation, was directly observed providing transportation in Erie County, Pennsylvania for compensation of \$15. As a result, BTUS initiated a Complaint against Mr. Briggs, which eventually culminated in a settlement with the Commission’s Law Bureau Prosecutory Staff¹⁸ whereby Mr. Briggs agreed to

¹⁷ BTUS was a predecessor of what has now become I&E’s Motor Carrier Enforcement Division.

¹⁸ The Commission’s Law Bureau Prosecutory Staff was the predecessor of I&E’s Enforcement Division.

pay a civil penalty of \$100, and the Commission approved the settlement without modification. *Briggs* at 2-3, 6.

In evaluating the civil penalty component of the settlement, the Commission found that Mr. Briggs' conduct did not rise to the level of willful conduct or being of a serious nature. The Commission also considered the very limited impact and duration of Mr. Briggs' violation, finding that Mr. Briggs only transported one customer for \$15 on one occasion. Additionally, the Commission recognized that Mr. Briggs fully cooperated with the investigation and with Commission staff. *Briggs* at 4-6. Turning to the instant case, we find that similar mitigating factors considered in *Briggs* exist with respect to the Respondent's conduct. Here, the Respondent's conduct was not willful, and although the Respondent eventually agreed to transport two passengers for \$40, had he done so, the transportation would have been of a very limited impact and duration. Finally, the Respondent fully cooperated with I&E's investigation, which was verified in the testimony of Supervisor Murray. Tr. at 33.

In summary, based upon our review of the evidence in this case, and the ALJ's reasonable analysis of the Policy Statement factors, we agree with the ALJ that \$100 is an appropriate civil penalty. For these reasons, and noting the lack of record-based support for its requested civil penalty of \$1,000, we will deny I&E's Exception No. 2.

We admonish the Respondent, however, that any further violations of the Code, the Commission's Regulations or Orders, will result in the Commission pursuing all remedies provided by law, which may include, but are not limited to, increased fines and referrals for further action where warranted.

3. Potential Suspension or Revocation of Vehicle Registration

Finally, as noted above, we will modify the Initial Decision by striking Ordering Paragraph 6(a) of the Initial Decision for two reasons: (1) Ordering Paragraph 6(a) provides for relief that I&E has inconsistently requested; and (2) Ordering Paragraph 6(a) is directly at odds with the ALJ's determination that the Respondent provided call or demand service for compensation *without* authority. As described, *supra*, Ordering Paragraph 6(a) of the Initial Decision provides as follows:

6. That, if Jerome B. McCree, Sr. fails to make the payment required by Ordering Paragraph No. 2 above, within 30 days of the entry date of the Commission's Final Order, it is further ordered:

(a) That the Commission will send a copy of this 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.

I.D. at 20, ¶ 6(a).

First, our review of I&E's requests for relief made throughout this case, beginning with its Complaint, extending throughout its multiple pleadings and counsel's request at the hearing, and now concluding with I&E's Exceptions, demonstrates that I&E has altered the scope of its original request related to the potential suspension or revocation of the Respondent's registration. At the outset, while I&E's Complaint referenced "possible suspension of the vehicle registration by the Pennsylvania Department of Transportation," I&E's request for relief specifically requested imposition of \$1,000 fine and "such remedy as the Commission may deem appropriate." Complaint at 1-2. In subsequent filings, I&E's request for relief omitted a request that PennDOT be served with a copy of the Commission's Order for the suspension or revocation of any

vehicle registration. *See*, I&E’s Motion for Default Judgment at ¶14; I&E Motion to Strike Document at 5-6.

Subsequently, in a closing statement at the evidentiary hearing, I&E’s counsel requested that a \$1,000 civil penalty be imposed, and that the matter be referred to PennDOT for suspension of the Respondent’s registration and “any future registrations attempted to be made” by Respondent *if* Respondent failed to pay the \$1,000 civil penalty within 30 [days]. Tr. at 62-63 (emphasis added). Finally, in its Exceptions, I&E makes a novel request for the Commission to serve its Order upon PennDOT upon assessing the civil penalty, now omitting non-payment of the civil penalty as a condition precedent. I&E Exc. at 10.

We find that I&E’s varying relief requests related to the potential suspension or revocation of the Respondent’s vehicle registration violate the Commission's Regulations at 52 Pa. Code § 5.91 *et. seq.*, *Amendments and Withdrawal of Pleadings*. More specifically, the Commission’s Regulations provide, as follows:

[a]modification of or supplement to an application, complaint, petition or other pleading shall be deemed as an amendment to the pleading, and must comply with the requirements of this subchapter relating to the pleading amended.

52 Pa. Code § 5.91(a). As referenced above, because I&E’s relief requests related to the Respondent’s vehicle registration have demonstrably varied throughout this case, each iteration serves as an amendment. In turn, Section 5.92(e) of our Regulations, 52 Pa. Code § 5.92(e), provides as follows:

Notice of amendment. If an amendment adopted under this section has the effect of broadening the issues in the proceeding, notice of the amendment shall be given in the same manner as notice was given at the commencement of

the proceeding and to the same persons who received the notice.

52 Pa. Code § 5.92 (e). In this case, because I&E modified its requests seeking potential suspension of the Respondent's vehicle registration, broadening the issue and scope of the penalty sought in this matter, I&E should have amended its Complaint and served the amendment upon the Respondent when it modified the relief requested in its Complaint. Because I&E did not amend and serve its Complaint consistent with its varying relief requests, we find that subjecting the Respondent to any potential suspension or revocation of his vehicle registration would be incompatible with the provision of due process.

As a final matter, we also note that the language of Ordering Paragraph 6(a) of the Initial Decision, which, in pertinent part, contemplates the potential "suspension or revocation of vehicle registrations that were used under Jerome B. McCree, Sr's operating authority" directly contradicts the ALJ's determination that Mr. McCree was operating without authority in violation of the Code. See I.D. at 13, 19. In the Initial Decision, the ALJ "came to the determination that Mr. McCree knowingly violated the Public Utility Code provisions at 66 Pa.C.S. §§ 1101-1103. . . ." I.D. at 13.

In this case, I&E expressly alleged that the Respondent was operating a vehicle for purposes of transporting passengers for compensation without the Commission's authority under 66 Pa.C.S. § 1101. I&E Complaint at ¶ 6. Additionally, the ALJ expressly determined that the Commission has not granted the Respondent a Certificate of Public Convenience to transport passengers for compensation. I.D. at 9, FOF No. 23. Finally, the Respondent has not claimed that the Commission granted him a Certificate of Public Convenience. In combination, the facts conclusively establish that the Respondent did not possess a vehicle registration that was used under his operating authority. Accordingly, we will modify the Initial Decision by striking Ordering

Paragraph 6(a), as being necessary to align the terms of our Order with the facts of this case.

III. Conclusion

Based upon our review of the Exceptions, the Initial Decision, and the record in this proceeding, we shall adopt the ALJ's Initial Decision, as modified, deny I&E's Exceptions, and direct the Respondent to pay a civil penalty of \$100, consistent with this Opinion and Order; **THEREFORE,**

IT IS ORDERED:

1. That the Exceptions of the Bureau of Investigation and Enforcement, filed on December 30, 2024, to the Initial Decision of Administrative Law Judge Katrina L. Dunderdale, issued on December 9, 2024, are denied, consistent with this Opinion and Order.
2. That the Initial Decision of Administrative Law Judge Katrina L. Dunderdale, issued on December 9, 2024, is adopted as modified, consistent with this Opinion and Order.
3. That the Formal Complaint filed by the Bureau of Investigation and Enforcement against Jerome McCree, Sr. at Docket No. C-2023-3037385 is sustained, in part, consistent with this Opinion and Order.

4. That, within thirty (30) days of the entry date of this Opinion and Order, Jerome McCree, Sr. shall remit \$100, payable by certified check or money order, to “Commonwealth of Pennsylvania” with the docket number of this proceeding listed to:

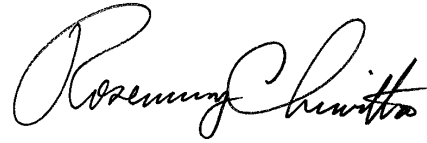
Rosemary Chiavetta, Secretary
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
400 North Street
Harrisburg, PA, 17120

5. That if Jerome McCree, Sr. fails to make the payment required by Ordering Paragraph No. 4, above, within thirty (30) days of the entry date of this Opinion and Order, it is further ordered that the Bureau of Administrative Services, Assessment Section, shall refer this matter to the Pennsylvania Office of Attorney General for collection of the total set forth above and appropriate action.

6. 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.

7. That upon receipt of the payment of \$100 by Jerome McCree, Sr., as directed by Ordering Paragraph No. 4 above, this proceeding be marked closed.

BY THE COMMISSION,

A handwritten signature in black ink, appearing to read "Rosemary Chiavetta". The signature is written in a cursive style with a large initial "R".

Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: February 6, 2025

ORDER ENTERED: February 7, 2025