BEFORE THE

**PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Pennsylvania Public Utility Commission :

Bureau of Transportation and Safety :

:

v. : C-2011-2245312

:

Blue & White USA, Inc. t/d/b/a :

Altoona USA & Transfer :

Pennsylvania Public Utility Commission :

Bureau of Investigation and Enforcement :

:

v. : C-2011-2244900

:

Blue & White USA, Inc. t/d/b/a :

Altoona USA & Transfer :

**INITIAL DECISION**

Before

Mary D. Long

Administrative Law Judge

PROCEDURAL HISTORY

On July 29, 2011, the Commission’s Bureau of Transportation and Safety (BTS) filed a complaint against Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer (Blue & White) at PUC Docket No. C-2011-2245312. The complaint alleged that one taxi failed to have operative air conditioning during an inspection on June 3, 2011, and BTS assessed a civil penalty of $100. An answer to the complaint was filed on August 8, 2011.

On August 16, 2011, the Commission’s Bureau of Investigation and Enforcement (BIE)[[1]](#footnote-1) filed a second complaint against Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer (Blue & White) at PUC Docket No. C-2011-2244900. This complaint alleged that during an inspection on June 3, 2011, a Blue & White taxi did not have operative air conditioning and was missing a battery securement device. BIE assessed a $100 penalty for each of these violations. An answer to the complaint was filed on September 13, 2011.

By hearing notice dated August 16, 2012, both of these cases were assigned to me and set for hearing on Thursday, September 27, 2012. The hearing took place as scheduled. Vincente Velez, the president of Blue & White appeared but did not have counsel and therefore Blue & White was not permitted to offer testimony or other evidence. BIE appeared and was represented by Heidi Wushinske, Esquire. The August 16, 2011 Complaint was heard first. BIE presented the testimony of one witness and offered one exhibit which was admitted into evidence. The hearing generated a transcript of 14 pages.

After a brief recess, the July 29, 2011 Complaint was heard. BIE reported that it had reached a settlement with Blue & White and summarized the terms of the settlement for the record.

I consolidated the two complaints for the purposes of disposition and directed BIE to file a memorandum of law in support of the penalty on the August 16, 2011 Complaint and a statement in support of the settlement reached in the July 29, 2011 Complaint following the receipt of the transcripts. The transcripts for the hearings were received on October 15, 2012. BIE’s memoranda were received on November 5, 2012. However, an executed copy of the Settlement Agreement was not filed until November 30, 3012. By order dated December 3, 2012, the record was closed.

As discussed below, I find that the settlement of the July 29, 2011 complaint reached between BIE and Blue & White is in the public interest and is approved. However, BIE failed to sustain its burden of proving that a civil penalty is appropriate concerning the violations alleged in the August 16, 2011 complaint.

FINDINGS OF FACT

1. PUC Enforcement Officer Ernest Snyder performed an annual inspection of Blue & White on June 3, 2011, in Altoona, Pennsylvania. (N.T. 8)
2. During the course of Officer Snyder’s inspection he found that “Cab No. 3” had an unsecured battery and that the air conditioner was inoperable. (N.T. 8)
3. Officer Snyder observed that the battery had no securement device when it wiggled when he grabbed it. (N.T. 9)
4. Officer Snyder concluded that the air conditioning was inoperable because after running it for two minutes, the air inside the vehicle was not colder than the air outside the vehicle. (N.T. 9)
5. Officer Snyder completed a driver/vehicle report and gave a copy to the carrier. (N.T. 8, 11)
6. As a result of this inspection, BIE assessed a civil penalty of $100 for failure to have operative air conditioning in the vehicle and an additional $100 due to the lack of a securement device on the battery. (BIE Ex. 1)

DISCUSSION

The Commission is empowered and charged with the duty to enforce the requirements of the Public Utility Code.[[2]](#footnote-2) BIE is the proponent of a rule or order and, therefore, as the party seeking an order from the Commission, BIE bears the burden of proof in this case.[[3]](#footnote-3) Accordingly, BIE must provide 1) that the violations alleged in the complaint occurred, 2) that the assessment of a civil penalty is appropriate in the circumstances, and 3) that the amount assessed is reasonable.

***July 29, 2011 Complaint and Settlement Agreement***

The Commission encourages parties in contested on-the-record proceedings to settle cases.[[4]](#footnote-4) Settlements eliminate the time, effort and expense of litigating a matter to its ultimate conclusion, which may entail review of the Commission’s decision by the appellate courts of Pennsylvania. Such savings benefit not only the individual parties, but also the Commission and all ratepayers of a utility, who otherwise may have to bear the financial burden such litigation necessarily entails.

By definition, a “settlement” reflects a compromise of the positions that the parties of interest have held, which arguably fosters and promotes the public interest. When active parties in a proceeding reach a settlement, the principal issue for Commission consideration is whether the agreement reached suits the public interest.[[5]](#footnote-5)

Further, in proceedings involving violations of the Public Utility Code, the Commission has set forth as a policy other factors which should be considered in evaluating the terms of a settlement:

(1) Whether the conduct at issue was of a serious nature. When conduct of a serious nature is involved, such as willful fraud or misrepresentation, the conduct may warrant a higher penalty. When the conduct is less egregious, such as administrative filing or technical errors, it may warrant a lower penalty.

(2) Whether the resulting consequences of the conduct at issue were of a serious nature. When consequences of a serious nature are involved, such as personal injury or property damage, the consequences may warrant a higher penalty.

(3) Whether the conduct at issue was deemed intentional or negligent. This factor may only be considered in evaluating litigated cases. When conduct has been deemed intentional, the conduct may result in a higher penalty.

(4) Whether the regulated entity made efforts to modify internal practices and procedures to address the conduct at issue and prevent similar conduct in the future. These modifications may include activities such as training and improving company techniques and supervision. The amount of time it took the utility to correct the conduct once it was discovered and the involvement of top-level management in correcting the conduct may be considered.

(5) The number of customers affected and the duration of the violation.

(6) The compliance history of the regulated entity which committed the violation. An isolated incident from an otherwise compliant utility may result in a lower penalty, whereas frequent, recurrent violations by a utility may result in a higher penalty.

(7) Whether the regulated entity cooperated with the Commission’s investigation. Facts establishing bad faith, active concealment of violations, or attempts to interfere with Commission investigations may result in a higher penalty.

(8) The amount of the civil penalty or fine necessary to deter future violations. The size of the utility may be considered to determine an appropriate penalty amount.

(9) Past Commission decisions in similar situations.

(10) Other relevant factors.[[6]](#footnote-6)

In settled cases, these factors will not be applied in as strict a fashion as in litigated cases. This allows the parties the flexibility to reach an amicable resolution to complaints.[[7]](#footnote-7)

The Settlement Agreement[[8]](#footnote-8) identifies the respondent as Blue & White USA. The parties agreed to the following facts: Blue & White has held a certificate of public convenience from the Commission since 2003 and maintains its principle place of business at 1024 Chestnut Avenue, Altoona, Pennsylvania. On June 3, 2011, Commission Enforcement Officer Robert E. Crawford inspected Blue & White’s 2005 Ford Taxi with license PA TX 43779 and found that it failed to have operative air conditioning. In a complaint dated July 29, 2011, the Bureau of Transportation and Safety (BTS)[[9]](#footnote-9) requested a civil penalty in the amount of $100 as a result of this violation. The Settlement Agreement also provides that Blue & White made a partial payment in an unspecified amount and rectified the inoperative air conditioning the same day that the inspection took place. The terms of the settlement include the acknowledgement by Blue & White that failing to have operative air conditioning violates 52 Pa. Code § 29.403(8), and therefore Blue & White agrees to pay a civil penalty in the amount of $50.

Based on the terms of the Settlement Agreement, I find that a civil penalty of $50 is a reasonable resolution of BIE’s complaint against Blue & White for failure to have operative air conditioning in one of its taxis. First, there is no evidence that this violation is serious or a result of fraud or misrepresentation by Blue & White.[[10]](#footnote-10) Indeed, as part of the Settlement Agreement, Blue & White has acknowledged that operative air conditioning is a requirement of the Commission’s regulations and BIE avers that Blue & White corrected the violation the same day that it was discovered. Accordingly, there were also no serious consequences of the violation as there is no evidence that the air conditioning was inoperative for a long time or that it exposed the public to any danger.[[11]](#footnote-11) Further, there is no evidence that any customers were affected and it appears that Blue &White cooperated with the Commission inspection by repairing the air conditioning on the day of the inspection.[[12]](#footnote-12)

Finally, other than the complaint at PUC Docket No. C-2011-2244900, there is no evidence in the record concerning Blue & White’s compliance history. BIE notes in its statement in support of the Settlement Agreement that the Commission has issued eight formal complaints against Blue & White, including the two at issue in this decision. (Statement in Support at ¶ 23). This fact was not stipulated by the parties in the Settlement Agreement. Nor did BIE offer any details as to the nature and disposition of the six complaints, such as whether the complaints were for the same violations cited in this complaint, were complaints involving consumers or were merely paperwork or administrative violations. BIE also did not offer evidence as to whether the complaints resulted in settlement, if civil penalties were paid, of if the complaints were withdrawn or dismissed.

Two violations on the same day do not appear to raise serious concerns about Blue & White’s willingness and ability to comply with the Commission’s regulations.[[13]](#footnote-13) Therefore a lower penalty is appropriate.

Finally, it appears that Blue & White has been made aware of the Commission’s regulatory requirements, has a good compliance history and exercised good faith in rectifying the violation that was found during a routine inspection. In these circumstances, deterrence is not a significant consideration. I find that $50 is a sufficient amount to deter Blue & White from further violations of the Public Utility Code. No other factors are apparent in this record that should be considered in reaching this conclusion.[[14]](#footnote-14) Therefore, the Settlement Agreement between BIE and Blue & White resolving the complaint is approved.

***August 16, 2011 Complaint***

On August 16, 2011, BIE served a complaint on Blue & White for violations resulting from the annual Commission inspection of Blue & White’s vehicles used in taxi service. The complaint alleged that one of Blue & White’s vehicles did not have operative air conditioning and did not have a securement device on the vehicle’s battery. The complaint sought a civil penalty in the amount of $200. Blue & White appeared at the hearing represented by its president, Vincente Velez. However, as a corporation, Blue & White was required to be represented by counsel. Therefore, Blue & White was not permitted to present evidence and the facts are not in dispute.[[15]](#footnote-15)

The facts are straightforward. Commission Enforcement Officer Ernest Snyder performed an annual inspection of Blue & White on June 3, 2011. Officer Snyder inspected a vehicle referred to as “Cab No. 3.” He observed that the battery had no securement device. He also observed that the air conditioning for the vehicle did not cool the air inside the vehicle to a temperature lower than the outside temperature. Officer Snyder determined that a failure to have operative air conditioning was a violation of Section 29.403(8) of the Public Utility Code. Failure to have a battery securement device was a violation of Section 29.402(1).

The Commission’s regulations provide a comprehensive list of equipment that carriers are required to have in vehicles used as taxis. This includes operative air conditioning:

A common carrier or a contract carrier may not permit a vehicle having a designed seating capacity of 15 passengers or less, including the driver, to be operated to transport passengers unless it complies with the following requirements, in addition to those in §  29.402 (relating to vehicle equipment requirements):

. . .

   (8)  A vehicle must have operative air conditioning.[[16]](#footnote-16)

Similarly, in accordance with Section 29.402(1), vehicles are required to have a battery securement device which is required by the Pennsylvania Department of Transportation inspection standards.[[17]](#footnote-17) Enforcement Officer Snyder’s testimony that Cab No. 3 did not have operative air conditioning and did not have the battery properly secured is credible. Therefore, the facts support the conclusion that Blue & White was in violation of the Commission’s regulations regarding required equipment in vehicles used as taxis.

However, the inquiry does not end with the fact of the violation. Consideration now turns to whether a civil penalty is appropriate and what amount is appropriate. BIE relies solely on a document attached to its brief entitled “Penalty Guidelines.” This document was not presented at the hearing. It appears to be an internal guidance document used by BIE to determine a civil penalty for certain violations of the Public Utility Code. Although such guidance may be useful in encouraging consistency in assessing transportation-related penalties statewide, the Commission has been clear that the proper consideration are the factors set forth in Section 69.1201. Accordingly, those factors guide my consideration of whether the assessment of a civil penalty for the two violations noted in the record is reasonable and appropriate.

Section 3301 of the Public Utility Code authorizes the Commission to levy a civil penalty for violations of the Public Utility Code, Commission regulations, or orders of the Commission. The maximum penalty permitted by statute is $1,000 per day for each violation.[[18]](#footnote-18) As discussed above, the Commission has set forth ten factors which should be considered in determining a proper penalty for violations at 52 Pa. Code § 69.1201.

The first and second factors are whether the violations were of a serious nature and resulted in serious consequences. A serious violation of the Commission’s regulation or a violation which results in personal injury or property damage may warrant a higher penalty. There is no evidence in the record noting whether these violations were serious. There is no evidence that the air conditioning was inoperative or the battery securement device was missing for a long period of time or put the public safety at risk.

Similarly, an intentional violation of the regulations may merit a higher penalty. Here there is no evidence that Blue & White intentionally allowed the air conditioning to become inoperative or knew about the lost battery securement device and failed to correct it.

The fourth factor is the important consideration of whether the carrier made efforts to modify internal practices to address the conduct at issue and the amount of time it took the carrier to correct the violations once the violation was discovered. Officer Snyder testified that he provided an inspection report to Blue & White to inform it of the violations resulting from his inspection, but he did not offer any testimony that Blue & White failed to correct the violations in a timely manner.

The fifth factor is the number of customers affected and the duration of the violation. There is no evidence that any customers were affected, or as noted above, that it took Blue & White a long time to correct the violations.

The sixth and seventh factors are consideration of the carrier’s compliance history and cooperation with the Commission investigation. There is no evidence of Blue & White’s compliance history other than the July 29, 2011 Complaint discussed above that was resolved by the Settlement Agreement.[[19]](#footnote-19) BIE avers that Blue & White cooperated with the Commission’s investigation of the inoperative air conditioning in the other taxi and acted in good faith in resolving the July 29, 2011 Complaint. There is no evidence in the record that Blue & White acted differently in relation to the violations resulting from the inspection of Cab No. 3 which occurred on the same day.

The final considerations are the amount of civil penalty necessary to deter future violations, past Commission decisions and other relevant factors. I find that deterrence is not a significant factor in considering these violations. There is no evidence that this carrier is a habitual violator or lacks the ability and intent to comply with Commission regulations. I am further persuaded by the fact that the president of Blue & White travelled from Altoona to Pittsburgh to represent Blue & White at the hearing on what appear to be minimal violations and minimal penalties. A carrier who did not have respect for the Commission and the importance of compliance with the Commission’s regulations would likely not have made that trip.

Viewed in totality, it is not necessary or appropriate to assess a civil penalty in this case. Although the Commission is authorized to assess a civil penalty, it is not required to do so. Indeed, the Commission does not require its utilities to be perfect or to operate flawlessly. There is no evidence that Blue & White has a history of violating Commission regulations or that its president is insensitive to the Commission’s requirements. There is no evidence that the annual inspection resulted in violations in many of the taxis in Blue & White’s fleet in violation of the Commission’s regulations. The violations noted in the inspection do not appear to have placed the public at any risk. Blue & White did agree to pay a penalty for a similar violation in another taxi in the July 29, 2011 Complaint and cooperated with the Commission’s investigation. Further, Blue & White is on heightened notice of the Commission’s equipment requirements for taxis. Therefore, there is no public purpose to be served by assessing further penalties for the violations cited in the August 16, 2011 Complaint.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and subject matter of these complaints.

2. Blue & White operated two vehicles used in taxi service with inoperable air conditioning in violation of 52 Pa. Code § 29.403.

3. Blue & White operated a vehicle without a proper battery securement device in violation of 52 Pa. Code § 29.402.

4. The Commission is authorized to levy a civil penalty for violations of the Public Utility Code, Commission regulations and order, but is not required to do so. 66 Pa. Code § 3301.

5. The Settlement Agreement reached between the Bureau of Investigation and Enforcement and Blue & White regarding the complaint filed on July 29, 2011 is in the public interest.

ORDER

THEREFORE,

IT IS ORDERED:

1. That the Settlement Agreement between the Bureau of Investigation and Enforcement and Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer at PUC Docket No. C-2011-2245312 is approved.

2. That within 60 days of the final Commission order in this proceeding Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer shall pay a civil penalty in the amount of $50, less any monies already paid to the Commission as a result of the violation of Section 29.403(8) at PUC Docket No. C-2011-2245312. That amount shall be payable to the Public Utility Commission and forwarded to:

Pennsylvania Public Utility Commission

P.O. Box 3265

Harrisburg, PA 17105-3265

3. That the complaint of the Bureau of Investigation and Enforcement against Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer at PUC Docket No. C-2011-2244900 is sustained as to the facts of the violations.

4. That the complaint of the Bureau of Investigation and Enforcement against Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer at PUC Docket No. C-2011-2244900 is dismissed as to the assessment of a civil penalty.

5. That Blue & White USA, Inc. t/d/b/a Altoona USA & Transfer shall cease and desist from further violations of the Public Utility Commission’s regulations.

Date: December 3, 2012 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Mary D. Long

Administrative Law Judge

1. By Order entered August 11, 2011, at Docket No. M-2008-2071852, the Commission transferred the prosecutory function of BTS to the new Bureau of Investigation and Enforcement. [↑](#footnote-ref-1)
2. 66 Pa. C.S. § 501(a). [↑](#footnote-ref-2)
3. 66 Pa. Code § 332; *Public Utility Commission v. Okey Cab Co*., PUC Docket No. C-2011-2132453 (Opinion and Order entered May 10, 2012). [↑](#footnote-ref-3)
4. See, 52 Pa. Code § 5.231. [↑](#footnote-ref-4)
5. 52 Pa. Code § 69.1201(a); *Pa. P.U.C. v. CS Water and Sewer Associates*, 74 Pa. P.U.C. 767, 771 (1991). [↑](#footnote-ref-5)
6. 52 Pa. Code § 69.1201(c). [↑](#footnote-ref-6)
7. 52 Pa. Code § 69.1201(b). [↑](#footnote-ref-7)
8. The Settlement Agreement is included as Attachment B to BIE’s brief filed on November 5, 2012. [↑](#footnote-ref-8)
9. The Commission has undergone a reorganization and the Bureau of Transportation and Safety is now known as the Bureau of Investigation and Enforcement. [↑](#footnote-ref-9)
10. Section 69.1201(c)(1). [↑](#footnote-ref-10)
11. Section 69.1201(c)(2) and (c)(4). [↑](#footnote-ref-11)
12. Section 69.1201(c)(5) and (c)(7). [↑](#footnote-ref-12)
13. Section 69.1201(c)(6). [↑](#footnote-ref-13)
14. Section 69.1201(c)(9) and (c)(10). It should be noted that factor (c)(3) which considers whether a violation was negligent or intentional is only considered in litigated cases. 69.1201(c)(10). [↑](#footnote-ref-14)
15. *Public Utility Commission v. Okey Cab Co.,* PUC Docket No. C-2010-2132453 (Opinion and Order entered May 10, 2012); *Cars R Us c/o Holman Copeland v. Philadelphia Gas Works*, Docket No. 2008-2033437 (Order entered February 4, 2010). [↑](#footnote-ref-15)
16. 52 Pa. Code § 29.403(8). [↑](#footnote-ref-16)
17. 52 Pa. Code § 29.402(1). *See* 67 Pa. Code § 175.66(n)( “*Battery fastening*. A vehicle specified under this subchapter shall be equipped with a system specifically designed for the secure fastening of the battery.”) [↑](#footnote-ref-17)
18. 66 Pa. C.S. § 3301. [↑](#footnote-ref-18)
19. See discussion above. [↑](#footnote-ref-19)