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May 6, 2015

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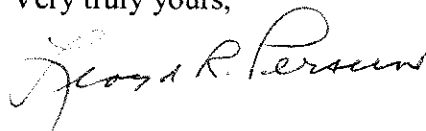
**Re: Application of Rasier-PA, LLC
A-2015-2469287**

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

Dear Secretary Chiavetta:

We file herewith electronically on behalf of Protestant, MTR Transportation, Inc., t/d/b/a K-Cab Co., its Answer to Applicant's Preliminary Objections to its Protest. A Certificate of Service is attached to the Answer.

Very truly yours,



Lloyd R. Persun

LRP:pg
Attachment

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In Re: : A-2015-2469287
:
Application of Rasier-PA, LLC : **FILED ELECTRONICALLY**

MTR'S ANSWER TO APPLICANT'S PRELIMINARY OBJECTIONS

AND NOW, this 6th day of May, 2015, pursuant to 52 Pa. Code §5.101(f), MTR TRANSPORTATION, INC. (MTR), t/d/b/a K-Cab Co., a Protestant, by its attorneys, files the following Answer to Applicant's Preliminary Objections:

1-9. Denied. The allegations in these paragraphs constitute conclusions of law and, therefore, require no answer. The Application speaks for itself. The Application seeks authority to serve territories different than the Applications of Rasier-PA, LLC, Docket Nos. A-2014-2416127 ("Rasier I") & A-2014-2424608 ("Rasier II"), which the Commission granted by its Orders entered December 5, 2014.¹ The Commission's grant of those Applications is not controlling in this case. The Commission may not infer need in this case from Applicant's evidence of need in the different territories sought in Rasier I and Rasier II, which also involved different parties. Applicant must demonstrate at hearing by reliable, probative and substantial evidence public demand or need for the service which it proposes in this Application. 66 Pa. C.S.A. §332; 52 Pa. Code §41.14(a). Although as an existing carrier Applicant is presumed fit, Re: V.I.P. Travel Service, Inc., 56 Pa. P.U.C. 625 (1982), the Protestants are entitled to rebut that

¹ Rasier I and Rasier II are not final. Many protestants appealed the Commission's Orders to the Commonwealth Court of Pennsylvania. Executive Transportation Co. et al. v. Pa. PUC, Nos. 252 & 253 CD 2015. The Court may modify or reverse the Commission's Rasier I and Rasier II decisions.

presumption at hearing in an on-the-record proceeding after discovery. Application of Newhurst, Docket No. A-00093160, F.1, Am-E (February 3, 1995). MTR has standing. Its Protest is not deficient.

10. Denied. The Application speaks for itself.

11. Denied. The Commission's Regulation, 52 Pa. Code §29.352, speaks for itself. See also, Application of Lyft, Inc., Docket No. A-2014-2415047, Interim Order (June 26, 2014) issued by Administrative Law Judges Long and Watson holding that MTR possessed standing through its paratransit or call or demand authority to protest an experimental or transportation network service application.²

12. Admitted.

13. Denied. The Application speaks for itself.

14. Admitted, except that the notice did not include as part of the Application territory the County of Allegheny, the County of Montour or that portion of the County of Luzerne which is located within an airline distance of 15 statute miles of the limits of the Borough of Berwick, Columbia County. 45 Pa. Bulletin 1474-1475 (March 21, 2015). The notice is defective. The Commission must publish a new notice showing the correct territory or, in the alternative, dismiss the Application.

15. Admitted.

² The Interim Order is attached hereto as Appendix A.

16. Admitted.

17. Denied. The Preliminary Objections speak for themselves. MTR's Protest is legally sufficient and sufficiently specific. MTR possesses standing.

18-21. Denied. The Commission's Rules of Administrative Practice and Procedure and the case law applicable thereto speak for themselves.

22-33. Denied. The allegations of these paragraphs are legal conclusions and, therefore, require no answer. MTR's Protest is legally sufficient. The Protest satisfies notice pleading and also establishes a territorial conflict between Applicant's proposed service and MTR's existing and proposed service. See, ALJs' Lyft Interim Order, finding that the applicant's experimental service was "sufficiently similar to the service [call or demand and paratransit] provided by [MTR] to create a conflict with [MTR's] authority." Interim Order at 3-5.³ The Commission's findings of fact and conclusions of law in Rasier I and Rasier II are not binding in this case which involves different parties and different territory. Each case is decided on its own record after every party has the opportunity to present testimony and to conduct cross-examination. 66 Pa. C.S.A. §332.

Applicant must demonstrate by reliable, probative and substantial evidence that its proposed service is responsive to public demand or need. 52 Pa. Code §41.14(a); 66 Pa. C.S.A. §332(b). The Commission retained the need criterion for experimental service, unlike for household goods service. By rulemaking, the Commission eliminated the need criterion for

³ MTR's Protest in Lyft was worded similarly to its Protest in this case.

household goods carriers. It did not do so for experimental service carriers. Compare Rasier II and 45 Pa. Bulletin 2219-2220 (May 2, 2015).

34. Denied. MTR's Protest, certificated operating authority and proposed operating authority speak for themselves. Protest ¶¶3, 4, Exs. "A" & "B".

35-41. Denied. The allegations in these paragraphs constitute conclusions of law and, therefore, require no answer. In Lyft, supra, the ALJs by their Interim Order (June 26, 2014) rejected the same standing argument which Applicant advances instantly. The ALJs ruled:

. . . [T]he service proposed by the Applicant [transportation network service] is sufficiently similar to the service provided by the Protestant [MTR's call or demand and paratransit service] to create a conflict with the Protestant's [MTR's] authority. Protestant [MTR] avers that like Protestant [MTR], Applicant will use passenger vehicles with drivers, and that Applicant's drivers will be dispatched by the internet or an app, just as Protestant's [MTR's] drivers are dispatched by telephone or radio.

. . . Commission precedent provides that a protestant must have some operating rights in actual or potential conflict with the authority sought by an applicant in order to have standing to protest and application [Citations omitted]. The Applicant contends that the Protestant [MTR] has not furnished evidence of an interest directly affected by the proceeding or otherwise in the public interest. Specifically, Applicant asserts as [it] is not proposing to offer call or demand, transportation of property, or paratransit service, the interests of Protestant [MTR] are not directly or potentially affected by the application and the protest should be dismissed for lack of standing.

* * *

. . . [w]e reject the notion that only carriers holding experimental authority which uses "App-based" technology are in a position to challenge the application. By its very nature, the purpose of

experimental authority is to provide the Commission with the flexibility to consider “innovative” transportation schemes that do not fit within the other types of service denied by the Commission’s regulations [citing 52 Pa. Code §29.352]

* * *

The regulation [52 Pa. Code §29.352] provides the Commission with the discretion to apply the regulatory requirements from any of the other classes of transportation authority and to also create additional requirements, depending on the details of the service proposed. To adopt the narrow view of standing espoused by the Applicant would be so limiting, that virtually no carriers would be in a position to protest. Interim Order at 3-5 (Emphasis added).

App-based technology is a method to dispatch drivers and taxis, like telephone and radio. It does not make Applicant’s proposed service new or innovative, any more than “smart meter technology” used to read water, electric and gas meters remotely or on a drive-by basis distinguishes those services from water, electric and gas services whose consumption historically was recorded by meter readers on foot. Applicant’s claim to experimental service is an attempt to avoid the evidentiary criteria which common carrier applicants must prove, especially in contested on-the-record proceedings – public demand or need for the proposed service, for example. 52 Pa. Code §41.14.⁴

In Application of Yellow Cab Company of Pittsburgh, Inc., t/a Yellow X, Docket No. A-2014-2410269, 2014 WL 2427000 (May 22, 2014), the Commission was not required to

⁴ Applicant must meet this burden of proof by presenting reliable, probative and substantial evidence. 66 Pa. C.S.A. §332(a), (b). Thinly populated areas like Columbia and Montour Counties, western Luzerne County and the Borough of Riverside, Northumberland County lack the passenger base to support multiple carriers. The Administrative Law Judge may judicially notice the population of the Application area, in whole and in part. 66 Pa. C.S.A. §332(e).

address these criteria or any conflict between the applicant's proposed service and the existing call or demand or paratransit service of any protestant. The application was not opposed. Testimony was not taken. Yellow X sought authority to originate or terminate service only within Allegheny County, excluding trips originating from the Pittsburgh International Airport, with no impact on existing carriers, as the absence of protests demonstrates. By comparison, Applicant seeks authority impacting the operations of at least three different carriers in thinly populated areas.

Applicant's styling its proposed service "experimental" does not differentiate its proposed service from MTR's existing call or demand or paratransit service. The Application, Protest and Preliminary Objections suggest that the parties' existing and proposed services are similar and conflict in all or portions of Columbia, Montour, Luzerne and Northumberland Counties. Lyft, supra.

A genuine issue of material fact is whether the services are **in fact** different. Applicant bears the burden of proving that difference by reliable, probative and substantial evidence. Only oral testimony under oath with the right of cross-examination and rebuttal in an on-the-record proceeding will provide the Administrative Law Judge credible facts to make that determination. 66 Pa. C.S.A. §§332(c), (d).

MTR filed an Application with the Commission seeking authority to transport by motor vehicle persons in experimental service (known as transportation network service) between points in the Counties of Columbia and Montour, the Townships of Salem and

Nescopeck and the Borough of Nescopeck, Luzerne County and the Borough of Riverside, Northumberland County, and from points in those counties, townships and boroughs to points in Pennsylvania and return, excluding areas under the jurisdiction of the Philadelphia Parking Authority (Docket No. A-2014-2428671). A true and correct copy of the Application is attached to the Protest as Exhibit “B” and made a part thereof. MTR’s Application conflicts with a portion of the operating authority proposed by Applicant. This conflict also demonstrates MTR’s standing. Re: Francis M. Bauer, 50 Pa. P.U.C. 825 (1977) (late filed protest allowed where protestant had an application for conflicting authority pending).⁵

42-45. Denied. The Protest satisfies the requirements of the Commission’s regulation. 52 Pa. Code §3.381(c)(1)(A). Protest ¶¶1-9, Exs. “A” & “B”. Approval of the Application will impair the operations of existing carriers – Billtown Cab Co., Inc., Prime Time Limo Service and MTR – by duplicating their equipment and drivers and diverting their ridership in their thinly populated service territories, thereby threatening unrestrained and destructive competition. The Commission announced this test for impairment in Blue Bird Coach Lines, Inc., 72 Pa. P.U.C. 262, 286 (1990), citing subsection 41.14(c). See also, Rasier II at 14. Protestants are entitled to present evidence at hearing to establish impairment. Applicant is entitled to discovery on the issue.

The Application area conflicts squarely with MTR’s existing and proposed operations in the same area. Protest ¶¶3, 4, Exs. “A” & “B”. For this reason, MTR is not aware

⁵ The period to protest MTR’s Application expired. The protests were withdrawn. The Application is before the Commission for decision on modified procedure. The ALJ may judicially notice these facts. 66 Pa. C.S.A. §332(e).

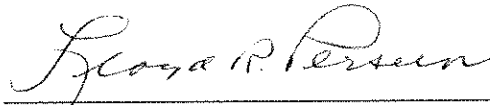
of a restrictive amendment which would satisfy its interest, but is willing to discuss with Applicant the possibility of such a restrictive amendment, if Applicant so desires. The Regulation does not require MTR to propose a restriction or an amendment if none appears to exist in light of the territorial conflict. 52 Pa. Code §3.381(c)(1)(A)(VI).

46. If the ALJ sustains or grants Applicant's Preliminary Objections in whole or in part, MTR is entitled to file an Amended Protest within ten (10) days of service of the ALJ's Order sustaining or granting the Preliminary Objections, either in whole or in part. 52 Pa. Code §5.101(h).

47. Applicant and the Protestants should be encouraged to attempt to resolve this Application through mediation. 52 Pa. Code §§41.31, 41.32.

WHEREFORE, MTR respectfully requests that the Administrative Law Judge enter an Order overruling and denying Applicant's Preliminary Objections, directing the parties to attempt to resolve this Application through mediation, setting a Resolution Conference and permitting MTR to participate therein as a Protestant and party in interest.

Respectfully submitted,



Lloyd R. Persun, Esquire

Persun & Heim, P.C.

P.O. Box 659

Mechanicsburg, PA 17055-0659

(717) 620-2440

Attorneys for MTR Transportation, Inc., t/d/b/a
K-Cab Co., Protestant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served upon each of the following persons, in the manner indicated, in accordance with the requirements of 52 Pa. Code §§1.54 and 1.59:

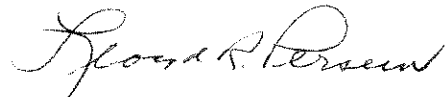
VIA EMAIL AND FIRST-CLASS MAIL

Karen O. Moury, Esquire
Buchanan Ingersoll & Rooney PC
409 North Second Street, Suite 500
Harrisburg, PA 17101-1357

VIA FIRST CLASS MAIL

Charles E. Rainey, Jr., Chief Admin. Law Judge
Pennsylvania Public Utility Commission
Commonwealth Keystone Building
P.O. Box 3265
Harrisburg, PA 17105-3265

May 6, 2015



Lloyd R. Persun, Esquire
Attorney for MTR Transportation, Inc.
t/d/b/a K-Cab Co.

**BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION**

Application of Lyft, Inc., a corporation of the State of : A-2014-2415047
Delaware, for the right to begin to transport, by motor :
vehicle, persons in the experimental service of :
Transportation Network Company for passenger trips :
between points in Pennsylvania :

**INTERIM ORDER DISMISSING LYFT, INC.'S MOTION FOR PARTIAL JUDGMENT
ON THE PLEADINGS AS TO PROTEST OF MTR TRANSPORTATION CO., INC.,
T/D/B/A K-CAB CO.**

Lyft, Inc. (Applicant) filed an application for motor common carrier of persons in experimental service between points throughout the Commonwealth of Pennsylvania:

This Application of Lyft, Inc. (“Lyft”) for an experimental service proposes to operate a peer-to-peer ride-sharing network using digital software to facilitate transactions between passengers and ridesharing operators using their own vehicles to provide transportation (known as a transportation network service) between points within the Commonwealth of Pennsylvania for the purpose of enhancing access to transportation alternatives, supplementing existing public transportation, reducing single occupancy vehicle trips, vehicle ownership and usage, and assisting the state in achieving reductions in greenhouse gas emissions.¹

Commission regulations permit certification of transportation providers for “experimental” service in order to “allow . . . a new, innovative or experimental type or class of common carrier service.”²

¹ Application at Attachment A, p. 1.

² 52 Pa.Code § 29.352.

Notice of the application was published in the Pennsylvania Bulletin on April 19, 2014. The notice provided that the deadline for the filing of protests was May 5, 2014.³ On May 2, 2014, MTR Transportation Co., Inc., t/d/b/a K-Cab Co. (Protestant) filed a protest to the application.⁴ The Applicant filed a Motion For Partial Judgment on the Pleadings which seeks dismissal of the protest due to lack of standing. Protestant filed its answer to the motion for partial judgment on the pleadings on June 13, 2014.

DISCUSSION

Legal Standard

A motion for judgment on the pleadings may be granted if the applicable pleadings, depositions, answers to interrogatories and admissions, etc. demonstrate that there is no genuine issue of material fact in dispute and the moving party is entitled to judgment in its favor as a matter of law.⁵

Judgment on the pleadings should be granted only in a case where the moving party's right to prevail is so clear that a trial would be a fruitless exercise. *Kenneth E. Nein v. UGI Utilities, Inc.*, Docket No. C-2012-2298099 (Final Order entered November 9, 2012) (citing *Williams v. Lewis*, 446 A. 2d 682 (Pa.Super. 1983)); *Service Employees International Union, Local 69, AFL-CIO v. The Peoples Natural Gas Company, d//b/a Dominion Peoples*, Docket No. C-20028539 (Order entered December 19, 2003). Judgment on the pleadings should be entered only when the case is clear and free from doubt. *Id.* (citing *Reuben v. O'Brien*, 496 A. 2d 913 (Pa.Super. 1985)).

³ 44 Pa.B. 2493 (April 19, 2014).

⁴ Numerous others filed protests as well. The preliminary objections to the other protests will be resolved by separate order.

⁵ 52 Pa.Code § 5.102(d)(1).

The Protest

The Protestant holds several types of operating authority from the Commission generally in a service territory throughout Pennsylvania, including portions of Columbia, Montour, Luzerne and Northumberland Counties, which Protestant avers is in conflict with Applicant's proposed service⁶ as a call or demand, paratransit service and common carrier. The Protestant objects to the grant of experimental authority to the Applicant because, *inter alia*, there is no established need for the service, approval of the application is not necessary or proper for the accommodation, service, necessity or safety of the public, Applicant is not fit to provide the proposed service, the entry of a new carrier conflicts with and will impair the Protestant's operation, Transportation Network Company (TNC) does not possess a certificate of public convenience from the Commission and is the proper applicant, not Lyft, Inc. Protestant also identifies several technical deficiencies in the application, including an improper identification of the Applicant, improper advertisement of the application, and that the application for statewide authority should be dismissed to the extent it conflicts with the Applicant's application in Allegheny County.⁷

The Applicant's motion for partial judgment on the pleadings seeks dismissal of the protest because the Protestant fails to adduce sufficient facts to establish its standing to protest. In its answer, the Protestant argues that there are sufficient facts set forth in its application to support its standing to protest the application. Specifically, the service proposed by the Applicant is sufficiently similar to the service provided by the Protestant to create a conflict with the Protestant's authority. Protestant avers that like Protestant, Applicant will use passenger vehicles with drivers, and that Applicant's drivers will be dispatched by the internet or an app, just as Protestant's drivers are dispatched by telephone or radio.

⁶ MTR'S Answer To Motion For Partial Judgment On The Pleadings, p. 1; Protest Paragraph 3, Exhibit A.

⁷ See A-2014-2415045.

Generally, Commission precedent provides that a protestant must have some operating rights in actual or potential conflict with the authority sought by an applicant in order to have standing to protest an application.⁸ The Applicant contends that the Protestant has not furnished evidence of an interest directly affected by the proceeding or otherwise in the public interest. Specifically, Applicant asserts as Lyft is not proposing to offer call or demand, transportation of property, or paratransit service, the interests of Protestant are not directly or potentially affected by the application and the protest should be dismissed for lack of standing. The primary difference in service cited by the Applicant is the method of hail and the exclusivity of the service.

Standing to participate in proceedings before an administrative agency is primarily within the discretion of the agency.⁹ “In simple terms, “standing to sue” is a legal concept assuring that the interest of the party who is suing is really and concretely at stake to a degree where he or she can properly bring an action before the court.”¹⁰ Accordingly, we reject the notion that only carriers holding experimental authority which uses “App-based” technology are in a position to challenge the application. By its very nature, the purpose of experimental authority is to provide the Commission with the flexibility to consider “innovative” transportation schemes that do not fit within the other types of service defined by the Commission’s regulations:

In order to advance and promote the public necessity, safety and convenience, the Commission may, upon application, grant a new certificate or an amendment to an existing certificate in order to allow to be provided a new, innovative or experimental type or class of common carrier service. An application for a certificate or amendment shall state that it is an application for an experimental service. Holders of experimental certificates shall abide by this chapter except those which the Commission shall explicitly state

⁸ *Application of Germantown Cab Company*, PUC Docket No. A-2012-2295131 (Initial decision served August 23, 2012) (and the cases cited therein).

⁹ *Pennsylvania National Gas Association v. T.W. Phillips Gas and Oil Co.*, 75 Pa. PUC 598, 603 (1991).

¹⁰ *In re Milton Hershey School*, 867 A.2d 674, 683 (Pa.Cmwlth. 2005), *reversed on other grounds*, 911 A.2d 1258 (Pa. 2006) (citing *Baker v. Carr*, 369 U.S. 186 (1962)).

do not apply. Holders of experimental certificates shall abide by any additional regulations or requirements, including informational and reporting requirements, which the Commission shall stipulate upon granting the certificate. A certificate for experimental service shall be valid only until the service is abandoned, until 2 years have elapsed from the time the certificate was approved or until the Commission enacts amendments to this chapter pertaining to the new class of service represented by the experimental service, whichever event occurs first.¹¹

The regulation provides the Commission with the discretion to apply the regulatory requirements from any of the other classes of transportation authority and to also create additional requirements, depending on the details of the service proposed.¹² To adopt the narrow view of standing espoused by the Applicant would be so limiting, that virtually no carriers would be in a position to protest.

The application provides that the vehicles which will be eligible to participate in the Applicant's transportation program will include "street-legal coupes, sedans or light-duty vehicles, including without limitation, vans, minivans, sport utility vehicles ("SUVs"), hatchbacks, convertibles, and pickup trucks." The application does not explicitly state that there would be any particular restriction on the transportation, i.e. that it would be exclusive or non-exclusive, that the transportation would exclude trips to and from airports or that vans and minivans would only transport one person at a time. Indeed, read as a whole, it appears that the Applicant would use the proposed service to meet nearly any sort of transportation need sought. The Protestant holds authority which provides transportation services similar to that which may be provided by the Applicant, under the auspices of traditional call or demand or paratransit authority.

In the instant case, Protestant has made sufficient averments in its protest to warrant a hearing or further proceedings in this matter. Accordingly Applicant is not entitled to partial judgment in its favor as a matter of law. Therefore, the application presents at least a

¹¹ 52 Pa.Code § 29.352.

¹² 52 Pa.Code §§ 29.351-29.352.

potential conflict with the Protestant's authority and the motion for partial judgment on the pleadings will be dismissed.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties and the subject matter of this dispute. 66 Pa.C.S. § 701.

2. The Applicant failed to demonstrate that the Protestant did not adduce sufficient facts in its protest to assert standing to challenge the application.

3. The Applicant failed to demonstrate there is no issue of material fact, authorizing the Commission to dismiss the protest for lack of standing as a matter of law. 52 Pa.Code § 5.102(d)(2).

ORDER

THEREFORE,

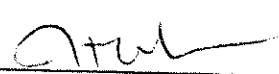
IT IS ORDERED:

That the Motion for Partial Judgment on the Pleadings filed by Lyft, Inc., seeking a dismissal of the protest filed by MTR Transportation Co., Inc., t/d/b/a K-Cab Co. is denied.

Date: June 26, 2014



Mary D. Long
Administrative Law Judge



Jeffrey A. Watson
Administrative Law Judge