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|  | **PENNSYLVANIA**  **PUBLIC UTILITY COMMISSION**  **Harrisburg, PA 17105-3265** |  |

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|  | Public Meeting held August 20, 2015 |
| Commissioners Present: |  |

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| Gladys M. Brown, Chairman | |  |
| John F. Coleman, Jr., Vice Chairman | |  |
| James H. Cawley | |  |
| Pamela A. Witmer | |  |
| Robert F. Powelson | |  |
|  |  |
| Proposed Rulemaking Amending 52 Pa. Code Chapters 3, 5, and 23; Scheduled Route and Airport Transfer Service | Docket No. L-2015-2478052 |

**PROPOSED RULEMAKING ORDER**

**BY THE COMMISSION:**

Pursuant to Section 1101 of the Public Utility Code (Code), 66 Pa. C.S. § 1101, a public utility must obtain a certificate of public convenience from the Commission in order to offer, render, furnish, or supply public utility service in Pennsylvania. Section 1103 of the Code, 66 Pa. C.S. § 1103, establishes the procedure to obtain a certificate of public convenience. That provision provides, *inter alia*, that “[A] certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.”

#### Pursuant to Section 102 of the Code, 66 Pa. C.S. § 102, common carriers by motor vehicle are public utilities. The Commission recognizes distinct types of common carriers in its regulations. 52 Pa. Code Chapters 21, 29, and 31. One of these common carrier types is the scheduled route carrier, which operates over a scheduled route and picks up and discharges persons at points along that route, as authorized by its certificate. 52 Pa. Code § 29.302. Another type of common carrier service is the airport transfer carrier, which “transport(s) persons on a nonexclusive, individual charge basis from points authorized by the certificate to the airport specified by the certificate, and *vice versa*.” 52 Pa. Code § 29.342. Airport transfer service may be offered on a scheduled basis serving specified points according to a published time schedule or on a request basis with the origin or destination of the transportation to or from the airport arranged between the individual and the carrier, or on both bases. *Id.* A material change in a time schedule shall be posted at terminals and in vehicles engaged in service affected by the change for a period of not less than 7 days prior to the effective date of the change. *Id.*

Historically, the Commission has required applicants for scheduled route or airport transfer service to establish that they are technically and financially fit, can operate safely and legally, and that there is a public demand or need for the services. 52 Pa. Code §§ 3.381, 41.14.

We believe that it is appropriate to eliminate the requirement that an applicant for scheduled route or airport transfer authority establish that approval of the application will serve a useful public purpose, responsive to a public demand or need. Rather than determining public need by means of an administrative process, competition among these carriers in regard to price, quality and reliability, as well as the experienced demand for their services by consumers who may freely choose among those competing carriers, will determine whether a given carrier’s service is needed by the public. In a competitive market with low barriers to entry, the Commission finds no reason to continue to protect, by an administrative process, carriers whose services are no longer demanded by consumers who have chosen other carriers. Indeed, lowering these outdated barriers to entry will further promote competition in this industry, which will, in turn, provide consumers with more choices and more competition among carriers as to price, quality and reliability.[[1]](#footnote-1)

We note that our authority to eliminate the public need requirement has been considered and affirmed by the Pennsylvania Supreme Court. *Elite Industries, Inc. v. Pa. Public Utility Commission*, 832 A.2d 428 (Pa. 2003). In *Elite*, the Court posited:

Allowing the applicant to meet a less stringent evidentiary burden makes expansion of the market possible. This situation falls squarely within the PUC’s area of expertise and is best left to the commission’s discretion. (432)

The Court found that an agency may revise its policies and amend its regulations in interpreting its statutory mandates. Citing *Seaboard Tank Lines v. Pa. Public Utility Commission*, 502 A.2d 762 (Pa. Cmwlth. 1985), the Court reiterated that an agency’s past interpretation of a statute, though approved by the judiciary, does not bind that agency to that particular interpretation. Moreover, the Court in *Elite* cited, with approval, the *Seaboard* description of the Commission’s scope of authority, as follows:

The PUC’s mandate with respect to the granting of certificates of public convenience is a broad one: “a certificate of public convenience shall be granted by order of the commission, only if the commission shall find or determine that the granting of such certificate is necessary or proper for the service, accommodation, convenience, or safety of the public.” The legislature, however, provided no definition of specifically what the criteria were to be in determining the propriety of granting a certificate, leaving the formulation of such criteria to the PUC. …

Id. at 432 Accordingly, the *Elite* and *Seaboard* cases hold that the various and specific factors to be considered in determining whether to grant a certificate of public convenience to an applicant for motor carrier authority, beyond those expressly stated in the statute, are matters left to the administrative expertise, sound discretion, and good judgment of the Commission.

Other jurisdictions, such as New Jersey, Maryland, and Ohio, as well as the Federal Motor Safety Administration, do not require applicants for scheduled route or airport transfer authority to establish a public demand or need as a prerequisite to certification. We believe that at this juncture, it is appropriate and in the public interest to eliminate the need requirement from the application process for these carriers. This will foster further competition in this market.

As a corollary to the proposed elimination of public demand or need in the application process, we envision an industry that will grow even more competitive. Competition drives market pricing, obviating the need to engage in traditional ratemaking processes geared toward monopoly markets. Chapter 23 of our regulations, 52 Pa. Code Chapter 23, governs tariffs and ratemaking procedures for common carriers. Specifically, 52 Pa. Code § 23.68 provides that small passenger carriers with gross annual intrastate revenue of less than $500,000 need not file substantiating data required by 52 Pa. Code § 23.64, to support changes in rates. We now propose eliminating the threshold amount completely for scheduled route and airport transfer carriers, permitting all scheduled route and airport transfer carriers to change rates without filing supporting financial justification required by 52 Pa. Code § 23.68. We will continue to review such filings to ensure that rates are just and reasonable based on the required submittal.[[2]](#footnote-2)

Another consequence of eliminating the public need requirement for airport transfer applicants is that the current territorial restrictions that accompany a carrier’s certificate will no longer be necessary. Therefore, we will no longer restrict an applicant to a jurisdictional operating territory, unless that applicant would indicate it desired such a limitation.[[3]](#footnote-3) Also, existing airport transfer carriers would be deemed to have statewide authority, unless they would advise the Commission otherwise.[[4]](#footnote-4)

Given the nature of scheduled route service and the necessary specification of territorial details concomitant with that service, we will continue to require applicants to specify the service routes within the application. However, we will not require proof of public demand or need for the proposed service territory. Additionally, carriers will be permitted to serve all areas of Pennsylvania, but must specify to the Commission actual service routes.

Given the elimination of the public need requirement for applicants as well as the statewide authorization for all scheduled route and airport transfer carriers, we believe that the regulatory provisions providing for Emergency Temporary Authority (ETA) and Temporary Authority (TA) are no longer applicable to airport transfer and scheduled route carriers. 52 Pa. Code §§ 3.383- 3.385. The regulations governing ETA and TA are designed to meet emergency situations when there is an immediate need for service that cannot be met by existing carriers. These provisions would not be relevant in a competitive market served by carriers that are not constrained by artificial entry and territorial restrictions. To the extent an emergency would arise requiring service, we believe that our regulations governing Emergency Relief in general, would suffice. 52 Pa. Code §§ 3.1-3.12.

We stress that scheduled route and airport transfer applicants will still be required to establish that they have the technical and financial ability to provide the proposed service safely and legally*.*[[5]](#footnote-5)

In sum, while we are eliminating certain outdated barriers to entry for scheduled route and airport transfer carriers, applicants will continue to be required to demonstrate their technical and financial fitness to provide the proposed service, including adequate training and experience, capitalization and insurance coverage. Moreover, we intend to remain vigilant as to consumer protection and will not hesitate to bring enforcement actions against carriers that fail to maintain proper levels of insurance, fail to operate safely or lawfully, or otherwise fail to meet their fundamental duty to provide safe, reasonable, and adequate service to the public. 66 Pa. C.S. § 1501.

The attached Annex A, proposed regulations, is permitted by sections 501, 1102, and 1103 of the Public Utility Code. Accordingly, under section 501of the Public Utility Code, 66 Pa. C.S. § 501, and the Commonwealth Documents Law, 45 P.S. §§ 1201 *et seq.*, and regulations promulgated thereunder at 1 Pa. Code §§ 7.1, 7.2 and 7.5, we amend our regulations as set forth in Annex A; **THEREFORE,**

**IT IS ORDERED:**

1. That the Secretary shall submit this order and Annex A to the Office of Attorney General for preliminary review as to form and legality.

2. That the Secretary shall submit this order and Annex A, to the Governor’s Budget Office for review of fiscal impact.

3. That the Secretary shall submit this order and Annex A for review and comment by the designated standing committees of both Houses of the General Assembly, and for review and comment by the Independent Regulatory Review Commission.

4. That the Secretary shall duly certify this order and Annex A and deposit them with the Legislative Reference Bureau for publication in the Pennsylvania Bulletin.

5. That, within thirty (30) days of this order’s publication in the Pennsylvania Bulletin, an original of any comments concerning this order should be submitted to the Office of the Secretary of the Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA, 17105-3265. Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau at (717) 772‑4597 or through the AT&T Relay Center at 1‑800‑654‑5988. The contact person is John Herzog, Assistant Counsel, Law Bureau, (717) 783‑3714.

**BY THE COMMISSION**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 20, 2015

ORDER ENTERED: August 20, 2015

**ANNEX A**

**TITLE 52. PUBLIC UTILITIES**

**PART I. PUBLIC UTILITY COMMISSION**

**Subpart A. GENERAL PROVISIONS**

**CHAPTER 3. SPECIAL PROVISIONS**

**Subchapter E. MOTOR TRANSPORTATION PROCEEDINGS**

#### § 3.381. Applications for transportation of property, household goods in use and persons.

\* \* \* \* \*

(c)  *Protests*

   (1)  *Applications for passenger or household goods in use authority.*

     (i)   *Content and effect.*

       (A)   A person objecting to the approval of an application shall file with the Secretary and serve upon the applicant and the applicant’s attorney, if any, a written protest which shall contain the following:

\* \* \* \* \*

         (VI)   A statement of any restrictions to the application which would protect the protestant’s interest, including a concise statement of any amendment which would result in a withdrawal of the protest. This provision is not applicable to applications for household goods in use, scheduled route and airport transfer authority.

(VII) A protest to a household goods in use, airport transfer or a scheduled route application is limited to challenging the fitness of the applicant, including whether the applicant possesses the technical and financial ability to provide the proposed service and whether the applicant lacks a propensity to operate safely and legally.

\* \* \* \* \*

     (iii)   *Failure to file protests.* If no protest is filed with the Commission on or before the date specified in the *Pennsylvania Bulletin* or if all protests have been withdrawn at or prior to the hearing, the Commission may take either of the following actions:

       (A)   Consider the application without holding an oral hearing if it deems the facts are sufficient as in the application or as determined from additional information as the Commission may require of the applicant. An application processed under this section, without oral hearing, will be determined on the basis of verified statements submitted by the applicant and other interested parties.

\* \* \* \* \*

(V) Verified statements of supporting parties are not required for applications for household goods in use, airport transfer or scheduled route authority.

\* \* \* \* \*

(d)  *Hearings on protested applications and applications for motor carrier of property authority when safety issues are raised*.

   (1)  *Applications for passenger or household goods in use authority.*

     (i)   *Scheduling hearings.*

(A) *Applications for passenger authority*. The applications to which timely protests were filed will not be acted on by the Commission for 20 days after the closing date for filing of protests, to permit the applicant to make restrictive amendments leading to the withdrawal of protests. If all protests are withdrawn upon amendment, the Commission may dispose of the application in accordance with subsection (c). If the application is still subject to protest, then after the expiration of the 20-day waiting period, the Commission will set the application for hearing and will notify all parties thereof. Absent good cause shown, no further amendments to the application will be considered after expiration of the 20-day period or the commencement of hearings. This provision is not applicable to applications for airport transfer or scheduled route authority.

(B) *Applications for household goods in use, airport transfer and scheduled route authority*. Applications for household goods in use authority to which timely protests were filed will be set for hearing with notice to the parties.

\* \* \* \* \*

#### § 3.382. Evidentiary guidelines for applications for passenger and household goods in use authority.

 (a)  *Service request evidence.* Evidence of requests received by an applicant for passenger service may be offered by the applicant in a transportation application proceeding relevant to the existence of public necessity for the proposed service. The credibility and demeanor of a witness offering evidence will be considered in evaluating the evidence. The weight which will be attributed to the evidence will depend upon the extent to which the alleged requests are substantiated by evidence such as the following:

\* \* \*

(b) *Applicability*. This provision is not applicable to applications for airport transfer or scheduled route authority.

[(b)] (c) \* \* \*

#### § 3.383. Applications for temporary authority and emergency temporary authority.

#### \* \* \* \* \*

 (b)  *Definitions and applicability.*

(1)  The following words and terms, when used in relation to applications for temporary authority and emergency temporary authority, have the following meanings:   
  
\* \* \* \* \*

   (2)  ETA and TA are not available to motor common carriers of property, [and] household goods in use, airport transfer and scheduled route service.

\* \* \* \* \*

# CHAPTER 5. FORMAL PROCEEDINGS

**Subchapter B. HEARINGS**

**SETTLEMENT AND STIPULATIONS**

#### § 5.235. Restrictive amendments to applications for motor carrier of passenger authority.

 (a)  Parties to motor carrier applications for passenger authority may stipulate as to restrictions or modifications to proposed motor carrier rights. Stipulations in the form of restrictive amendments or modifications must:

\* \* \* \* \*

(c) This provision is not applicable to applications for airport transfer or scheduled route authority.

**Subpart B. CARRIERS OF PASSENGERS OR PROPERTY**

**CHAPTER 23. TARIFFS FOR COMMON CARRIERS**

**NOTICE OF CHANGES IN FARES**

#### § 23.68. Filing requirements for small passenger carriers, airport transfer carriers and scheduled route carriers.

Small passenger carriers with gross annual intrastate revenue of less than $500,000, airport transfer carriers and scheduled route carriers do not need to file the substantiating data required under § 23.64 (relating to data required in filing increases in operating revenues) when requesting an increase in rates. Small passenger carriers, airport transfer carriers and scheduled route carriers shall submit a statement with the tariff or tariff supplement stating the following:

(1) The information required under § 23.63 (relating to data required in filing proposed rate changes).

(2) The total gross annual intrastate revenue for the most recent fiscal year.

(3) The dollar amount of increased annual revenue that the rate increase is expected to produce.

(4) The total projected operating revenue after the revenue increase.

(5) The total projected operating expenses.

(6) The projected operating ratio.

1. There are 47 scheduled route carriers and 60 airport transfer carriers operating in Pennsylvania. [↑](#footnote-ref-1)
2. #### 52 Pa. Code § 23.68. provides:

   #### § 23.68 Filing requirements for small passenger carriers.

   Small passenger carriers with gross annual intrastate revenue of less than $500,000 do not need to file the substantiating data required under § 23.64 (relating to data required in filing increases in operating revenues) when requesting an increase in rates. Small passenger carriers shall submit a statement with the tariff or tariff supplement stating the following:

   (1) The information required under § 23.63 (relating to data required in filing proposed rate changes).

   (2) The total gross annual intrastate revenue for the most recent fiscal year.

   (3) The dollar amount of increased annual revenue that the rate increase is expected to produce.

   (4) The total projected operating revenue after the revenue increase.

   (5) The total projected operating expenses.

   (6) The projected operating ratio. [↑](#footnote-ref-2)
3. A carrier may wish to limit its operating territory due to operational concerns, insurance costs, etc. [↑](#footnote-ref-3)
4. Of course, each trip must originate or terminate at an airport. [↑](#footnote-ref-4)
5. Protests to scheduled route and airport transfer applications would be limited to these criteria. 52 Pa. Code § 3.381(c). Given the limited scope of any protests, the provisions providing for restrictive amendments to applications for motor carrier authority would be no longer applicable to applications for scheduled route and airport transfer authority. *See* 52 Pa. Code § 5.235. [↑](#footnote-ref-5)