**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

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|  | Public Meeting held August 3, 2017 |
| Commissioners Present:  Gladys M. Brown, Chairman  Andrew G. Place, Vice Chairman, dissenting  Robert F. Powelson  David W. Sweet  John F. Coleman, Jr. | |
| Pennsylvania Public Utility Commission  Bureau of Investigation & Enforcement | C-2015-2464291 |
| v. |  |
| Capital City Cab Service |  |

**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition are the Exceptions of the Commission’s Bureau of Investigation & Enforcement (I&E) filed on August 25, 2016, to the Initial Decision (I.D.) of Administrative Law Judge Steven K. Haas (ALJ), which was issued on August 5, 2016, in the above-captioned proceeding. Capital City Cab Service Inc. (Capital City or Respondent) filed Replies to Exceptions on September 6, 2016.

**Background**

This Complaint arose from an incident at the Harrisburg Transportation Center, Harrisburg, PA, on the night of January 25, 2015, at approximately 11:35 p.m. At that time, Mr. David DeKok and his daughter arrived at the Amtrak Station from New York City and approached the last cab in the queue of the cab area, claiming that it was the only cab that did not already have another passenger waiting to get in. Mr. DeKok requested a ride to his home in the Shipoke neighborhood of Harrisburg but claimed that the taxi cab driver, Mr. Saleh Elazouni, refused to transport him that short of a distance and ultimately accepted other passengers instead. Mr. DeKok then took two photographs of the taxi as he believed that Mr. Elazouni had broken the law as he understood it and later filed a complaint with the Commission. The Complaint states that the Respondent, by refusing to provide service, violated Pa. C.S. § 29.313(a) in that it failed to furnish and maintain adequate, efficient, safe and reasonable service. Complaint at 1.

**History of the Proceeding**

On or about April 2, 2015, I&E filed a Formal Complaint (Complaint) against Capital City in which it alleged that a Capital City driver refused to provide taxi service to a potential customer due to the short distance of the requested trip. I&E is seeking, by way of relief, that its Complaint be sustained and a civil penalty in the amount of $500 be imposed on Capital City.

On April 20, 2015, the Respondent filed an Answer to I&E’s Complaint denying that it refused to provide the requested service. In its Answer, the Respondent claimed that its driver merely directed the customer to the front of the taxi line, as is customary at the Harrisburg Transportation Center.

The ALJ conducted a hearing in this matter on March 28, 2016, as scheduled. I&E was represented by counsel and presented the testimony of two witnesses and sponsored seven exhibits, all of which were admitted into the record. Capital City, which was represented by counsel, presented the testimony of one witness. The record consists of a fifty-one page transcript and the seven I&E Exhibits. The record was closed on April 25, 2016.

In his Initial Decision, issued on August 5, 2016, ALJ Haas dismissed the Complaint for failure by I&E to satisfy its burden of proof. As previously noted, Exceptions were filed by I&E on August 25, 2016. Replies to Exceptions were filed by Capital City on September 6, 2016.

**Discussion**

**Legal Standards**

As the proponent of a rule or order, a Complainant bears the burden of proof pursuant to Section 332(a) of the Public Utility Code (Code), 66 Pa. C.S. § 332(a). To establish a sufficient case and satisfy the burden of proof, the Complainant 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 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, the Complainant’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 a Complainant of evidence sufficient to initially satisfy the burden of proof, the burden of going forward with the evidence, sometimes called the burden of persuasion, to rebut the evidence of the Complainant shifts to the Respondent. If the evidence presented by the Respondent is of co-equal value or “weight,” the burden of proof has not been satisfied. The Complainant now has to provide some additional evidence to rebut that of the Respondent. [*Burleson v. Pa. PUC,* 443 A.2d 1373 (Pa. Cmwlth. 1982), *aff’d,* 501 Pa. 433, 461 A.2d 1234 (1983).](http://www.lexis.com/research/buttonTFLink?_m=0d7e78528297490763e78babd487bc42&_xfercite=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b2006%20Pa.%20PUC%20LEXIS%20102%5d%5d%3e%3c%2fcite%3e&_butType=3&_butStat=2&_butNum=16&_butInline=1&_butinfo=%3ccite%20cc%3d%22USA%22%3e%3c%21%5bCDATA%5b66%20Pa.%20Commw.%20282%5d%5d%3e%3c%2fcite%3e&_fmtstr=FULL&docnum=9&_startdoc=1&wchp=dGLzVzz-zSkAz&_md5=44d0f4cf51bc1159652e85695542a09d) 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).

Before addressing the Exceptions, we note that any issue 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);](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=5&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b625%20A.2d%20741%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=ad2b02d95c2a9216e83b92a3570d4785) *also* see, generally, [University of Pennsylvania v. Pa. PUC, 485 A.2d 1217 (Pa. Cmwlth. 1984).](file://C:\research\buttonTFLink?_m=69761b6202cb4178e2a6e6fe02f5751b&_xfercite=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b2000%20Pa.%20PUC%20LEXIS%2067%20%5d%5d%3e%3c\cite%3e&_butType=3&_butStat=242&_butNum=6&_butInline=1&_butinfo=%3ccite%20cc=%22USA%22%3e%3c!%5bCDATA%5b485%20A.2d%201217%5d%5d%3e%3c\cite%3e&_fmtstr=FULL&docnum=5&_startdoc=1&_startchk=1&wchp=dGLSzS-lSlbz&_md5=9b1cc8319afd12440738bb82d74455ef)

**ALJ’s Initial Decision**

In his Initial Decision, ALJ Haas made nineteen Findings of Fact and reached eight Conclusions of Law. I.D. at 2-4, 7-8. 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.

The ALJ first stated that the Parties to this proceeding have made inconsistent claims as to what happened when Mr. DeKok approached the cab being driven that evening by Mr. Elazouni. While the ALJ noted that it was undisputed that Mr. Elazouni did not take Mr. DeKok to his home that evening, the reason for the non-service is in dispute. The ALJ stated that Mr. DeKok claimed that the taxi driver refused to transport him because the trip was too short of a distance. I.D. at 5 (citing Tr. at 9). However, the ALJ noted that Mr. Elazouni testified instead that he had loaded another passenger into his vehicle at that time and ultimately offered to drop Mr. DeKok off at his house on his way to the other passenger’s destination, but that this offer was refused. I.D. at 5-6 (citing Tr. at 10). The ALJ noted that Mr. DeKok testified that another passenger was loaded into Mr. Elazouni’s taxi when he was talking to him and taking pictures. The ALJ stated that he believed this may support Mr. Elazouni’s claim that he already had been engaged by another passenger when Mr. DeKok approached. I.D. at 6.

Based upon this finding, the ALJ found the testimony of Mr. Elazouni on behalf of Capital City provided sufficient evidence to exceed the evidence presented by I&E. The ALJ noted neither Party presented any rebuttal evidence to counter or rebut the other Party’s direct evidence. The ALJ stated that absent any such additional rebuttal evidence, he could not conclude that I&E proved, by a preponderance of the evidence, that Mr. Elazouni illegally refused to provide service. As such, the ALJ denied I&E’s Complaint. I.D. at 6-7, 9.

**Exceptions and Replies**

In its Exception No. 1, I&E asserts that the ALJ erred in determining that it failed to prove by a preponderance of the evidence that the Respondent unlawfully refused to provide service to Mr. DeKok. Specifically, I&E avers that the ALJ reached inconsistent conclusions relating to the Party who has the responsibility of bearing the burden of proof. I&E notes that on one hand, the ALJ determined in Conclusion of Law No. 2 that the burden of proof belongs to the Respondent to show that it did not violate Section 29.313(a) of the Commission’s Regulations, which provides, “[a] driver of a call or demand vehicle shall, at all times when on duty and not engaged, furnish trip service to an orderly person for lawful purposes.” I&E Exc. at 6-7 (citing 52 Pa. Code § 29.313(a); I.D. at 4-5; and Conclusion of Law No. 2). I&E points out that the ALJ also stated that “the burden of proof in this proceeding is upon the Respondent to prove its case by a preponderance of the evidence.” I&E Exc. at 7 (citing I.D. at 5).

Next, I&E states that, on the other hand, the ALJ inexplicably shifted the burden of proof to I&E in his Conclusion of Law No. 8 which provides that “[t]he Complainant failed to prove, by a preponderance of the evidence, that the Complainant illegally refused to provide service to a passenger who requested service.” I&E Exc. at 7 (citing I.D. at 8 and Conclusion of Law No. 8). Additionally, I&E notes that the ALJ stated that “. . . I cannot conclude that I&E proved, by a preponderance of the evidence that Mr. Elazouni illegally refused to provide service.” I&E Exc. at 7 (citing I.D. at 6). I&E notes that the ALJ further states, “For these reasons, I do not believe the Complainant proved, by a preponderance of the evidence, that the Respondent illegally refused to provide service.” I&E Exc. at 7-8 (citing I.D. at 7). As such, I&E maintains that the Initial Decision is clearly erroneous due to its inconsistent application regarding the burden of proof. I&E Exc. at 8.

In either case, I&E asserts that it should be found to prevail as the substantial evidence it submitted makes it far more probable that Mr. Elazouni was not engaged by another passenger and refused to provide service to Mr. DeKok without a legitimate reason. I&E asserts that it presented the testimony of two witnesses and seven exhibits, compared to the testimony of Respondent’s sole witness which is riddled with inconsistencies. I&E maintains that while the testimony of Mr. DeKok and Mr. Elazouni conflicted, the photographic and documentary evidence submitted by I&E simply demonstrates that Mr. DeKok’s version of the events was truthful and tips the scales in I&E’s favor. I&E opines that its Exhibit No. 1 consists of photographs taken by Mr. DeKok right after he was refused service and they do not depict another passenger loading or entering Mr. Elazouni’s taxicab. Also, I&E opines that its Exhibit No. 2 constitutes the applicable trip log sheet, which shows that Mr. Elazouni accepted a fare with a destination of New Cumberland approximately five minutes after Mr. DeKok was refused service. As such, I&E posits that this evidence tips the scales heavily in its direction and compels a determination in I&E’s favor. In conclusion, I&E states that its testimonial, documentary and photographic evidence are far more substantial than the Respondent’s unsupported claim that its driver was engaged by another passenger, a claim which appears to have been created spontaneously by the Respondent’s witness on the stand during the hearing. I&E Exc. at 8-9.

In its Exception No. 2, I&E states that the ALJ disregarded substantial record evidence I&E submitted and misconstrued the testimony of I&E’s witness. I&E avers that if the Respondent maintained the burden of proof, then it failed to meet that burden when weighed against the case presented by I&E. I&E notes the conflicting testimony at the hearing claiming that Mr. Elazouni raised for the first time at the hearing that Mr. DeKok was angry when he approached Mr. Elazouni for a ride. I&E Exc. at 9-10 (citing Tr. at 33). However, I&E points out that its enforcement officer testified that when he interviewed Mr. Elazouni about the incident, Mr. Elazouni made no such claim. I&E Exc. at 10 (citing Tr. at 20). I&E points out that the Respondent’s Answer to I&E’s Complaint fails to raise any defense that Mr. DeKok did not behave in an orderly manner. According to I&E, Mr. DeKok testified that he was cordial when he approached Mr. Elazouni and only became understandably upset after he was refused service. I&E Exc. at 10 (citing Tr. at 13).

Additionally, I&E points out that Respondent’s own version of the events contains inherent defects since in its Answer to the Complaint, the Respondent initially defended against the allegations by asserting that Mr. Elazouni refused to serve Mr. DeKok because taxicabs appearing in the front of the queue were unoccupied and were required to be loaded first. However, I&E asserts that the Respondent then changed its entire defense at the hearing by claiming that another passenger had already been engaged by Mr. Elazouni when Mr. DeKok approached, and asserted that the unoccupied taxicabs appearing in the front of the queue had refused to serve Mr. DeKok. I&E Exc. at 10 (citing Tr. at 33). I&E opines that if the taxi cabs appearing at the front of the queue were unoccupied, then Mr. Elazouni would not have been loading a passenger into his taxi cab according to the Respondent’s own interpretation of the taxi policy at the Harrisburg Transportation Center (first in line receives the business). I&E Exc. at 10.

I&E avers that despite the diametrically opposed testimony and the inconsistencies of the Respondent’s multiple defenses, the ALJ made no credible finding to resolve the conflicts and did not focus on any factual issue other than Mr. Elazouni’s unsubstantiated claim that he was engaged by another passenger. I&E further avers that the ALJ then erred by misconstruing Mr. DeKok’s testimony to lend support to Mr. Elazouni’s testimony. According to I&E, the ALJ’s interpretation of Mr. DeKok’s testimony is simply not true and the record does not support the ALJ’s finding. I&E maintains that Mr. DeKok’s testimony is clear that Mr. Elazouni accepted another passenger after he refused to serve Mr. DeKok. I&E asserts that its Exhibits Nos. 1 and 2 constitute substantial evidence that corroborate Mr. DeKok’s testimony and should have adequately resolved the conflicting testimony in I&E’s favor. I&E opines that Mr. DeKok’s testimony, as well as I&E Exhibits Nos. 1 and 2 were capriciously disregarded. I&E contends that a capricious disregard occurs when the fact-finder deliberately ignores relevant, competent evidence. I&E Exc. at 11-12 (citing *Capasso v. Workers’ Comp. Appeal Bd.* 851 A.2d 997 (Pa. Cmwlth. 2004). According to I&E. the ALJ erred by accepting the Respondent’s completely unsupported and inconsistent claim that another passenger had engaged Mr. Elazouni. I&E Exc. at 12.

In its Replies to Exceptions, Capital City first avers that the Complainant’s Exceptions, which were filed on August 25, 2016, are late-filed and should be struck in their entirety as untimely. Capital City submits that the Initial Decision was issued on July 11, 2016, and Section 5.533(a) of the Commission’s Regulations, 52 Pa. Code § 5.533(a), provides that exceptions must be served within twenty days after a decision is issued. According to Capital City, I&E filed its Exceptions forty-five days after the Initial Decision but never filed a *nunc pro tunc* Petition or anything else explaining the lateness of the filing. Capital City R. Exc. at 2- 3.

Next, Capital City asserts that I&E filed two Exceptions which essentially make the same claim that the ALJ failed to give proper weight to the testimony and Exhibits presented at the hearing. Capital City avers that I&E relies heavily on photographic evidence, taken at near point-blank range, that alleges that Mr. Elazouni was not, as he stated during the hearing, loading a passenger on the other side of his vehicle. Capital City asserts that Mr. DeKok admits in his own testimony that immediately after said photographs were taken, Mr. Elazouni’s taxicab was boarded by other passengers. Capital City R. Exc. at 6 (citing Tr. at 10). Also, Capital City asserts that Mr. DeKok further admitted that regardless of “who was first,” Mr. Elazouni attempted to accommodate him anyway, but he refused. Capital City opines that the passenger Mr. Elazouni ultimately carried could have been approaching or in conversation with Mr. Elazouni prior to Mr. DeKok’s approach and that none of this can be either proven or disproven by the close range photographs the Complainant attempts to use to make its case. Capital City R. Exc. at 5- 6.

Next, Capital City asserts that I&E’s Exceptions also make much of the ALJ’s attempts to shift the burden away from the Respondent. Capital City states that if the ALJ did so in his Initial Decision, such a finding is *de minimis* to the result here as the matter simply devolves into whom the ALJ found more credible. According to Capital City, the photographs introduced by the Complainant show nothing but the identities of the taxi cab, the company, and driver which all have been freely admitted by the Respondent. Capital City opines that the Complainant’s citation to Mr. Elazouni’s log sheet, which alleges a five-minute discrepancy between the alleged 11:35 p.m. incident time and Mr. Elazouni’s recording of his pickup at the Transportation Center, is also *de minimis*. Capital City alleges that the incident between Mr. DeKok and Mr. Elazouni likely required several minutes by itself, watches/clocks may be marginally inaccurate, and Mr. Elazouni himself may simply be estimating times. Capital City notes that given the opportunity to proffer such an argument by cross-examining Mr. Elazouni at the March 28 hearing, I&E, for whatever reason, chose not to do so. Likewise, Capital City notes that I&E also chose not to confront Mr. Elazouni with what it alleges are “probative” photographs. Capital City R. Exc. at 6-7.

Next, Capital City asserts that by attempting to circumvent the ALJ’s ruling in this proceeding, as well as by introducing arguments after a hearing process where it failed to do so, I&E is also attempting to circumvent the procedural due process rights of Capital City. Capital City notes that while this is limited in Commission cases, it does attach when a property or liberty right is compromised. Capital City R. Exc. at 7 (citing *Davenport v. Reed*, 785 A.2d 1058, 1062 (Pa. Cmwlth. 2001)). Capital City further notes that certificates of public convenience have attributes of pecuniary value and transferability and therefore constitute property or a right to property. Capital City R. Exc. at 7 (citing *Loma, Inc. v. Pa. PUC*, 682 A.2d 424 (Cmwlth. 1996)). According to Capital City, I&E is attempting to compromise the value of its Certificate by fining the Respondent $500. Capital City opines that Mr. Elazouni’s testimony showed that he behaved in excess of 52 Pa. Code § 29.313(a), by offering to transport Mr. DeKok to his destination despite already having loaded another passenger. Capital City R. Exc. at 7 (citing Tr. at 10 and 35).

**Disposition**

Based upon our review of the evidence of record, first we determine that the Exceptions filed by I&E were timely and will be considered on the merits. Capital City’s allegation in its Replies to Exceptions is in error as the ALJ’s Initial Decision was actually issued on August 5, 2016, not July 11, 2016, as alleged by the Respondent. The Respondent mistakenly referred to the date on which that ALJ Haas signed the last page of his Initial Decision as the issuance date instead of the correct issuance date that is included on the top of the Secretarial Letter that accompanied the Initial Decision. Therefore, I&E’s Exceptions, which were filed on August 25, 2016 were, in fact, timely filed within the requisite twenty-day period set forth in 52 Pa. Code § 5.533(a).

Next, we also determine that I&E is incorrect that the burden of proof in this proceeding is upon Capital City, not I&E. We note that I&E’s Exceptions point out that there are two sections of the Code regarding the burden of proof, both of which were cited by the ALJ. Section 315 states that, “In any case involving any alleged violation by a public utility, contract carrier by motor vehicle, or broker of any lawful determination or order of the commission, the burden of proof shall be upon the public utility, contract carrier by motor vehicle, or broker complained against, to show that the determination or order of the commission has been complied with.” 66 Pa. C.S. § 315(b). Section 332 provides that “Except as may be otherwise provided in section 315 (relating to burden of proof) or other provisions of this part or other relevant statute, the proponent of a rule or order has the burden of proof.” 66 Pa. C.S. § 332(a). We note that Section 332 is the section used in the majority of complaints, with the exception of those brought under Section 315 and complaints against a base rate filing, where the utility has the burden of proof. *See* 66 Pa. C.S. § 1308.

In the circumstances of the instant Complaint before us, it is clear that the Complaint cites the alleged offense as a violation of a Commission Regulation, 52 Pa. Code § 29.313(a), failure to furnish and maintain adequate, efficient, safe and reasonable service. Accordingly, we conclude that the proper section to apply in this proceeding is Section 332, which places the burden of proof squarely on the complaining party. As such, we shall deny I&E’s Exception on this matter and modify the ALJ’s contradictory statements within the Initial Decision to make it clear that it is the Complainant in this proceeding who bears the burden of proof.

Furthermore, we are not persuaded by the argument of I&E that Capital City has failed to comply with Section 29.313(a) of our Regulations, 52 Pa. Code § 29.313(a), in connection with the trip requested by Mr. DeKok on January 25, 2015. We note that when responding to the Complaint filed against it, Capital City stated in its Answer that its driver did not refuse to provide service but merely directed the customer to the front of the taxi line, as is customary at the Harrisburg Transportation Center. It is also significant to note that at the evidentiary hearing held on this matter on March 28, 2016, both Mr. Elazouni and Mr. DeKok agreed that Mr. Elazouni, after boarding another passenger, did offer to transport Mr. DeKok to his destination, but that Mr. DeKok refused. We further note that the Complainant’s photographic exhibits presented on the record fail to establish his assertion that Mr. Elazouni boarded another passenger after he had refused him service. Under these circumstances, we find that I&E has failed to establish its burden of proving that Capital City violated our Regulations. Accordingly, we shall deny I&E’s Exceptions and affirm the ALJ’s Initial Decision, as previously modified.

**Conclusion**

Based upon the foregoing discussion, we shall affirm the ALJ’s Initial Decision, as modified, deny the Exceptions filed by I&E, and deny the Complaint, consistent with this Opinion and Order; **THEREFORE,**

**IT IS ORDERED:**

1. That the Exceptions of the Commission’s Bureau of Investigation and Enforcement, filed on August 25, 2016, to the Initial Decision of Administrative Law Judge Stephen K. Haas are denied.

2.That the Initial Decision of Administrative Law Judge Stephen K. Haas, issued August 5, 2016, is affirmed, as modified, consistent with this Opinion and Order.

3. That the Complaint filed at Docket No. C-2015-2464291 is denied.

4. That the proceeding at this docket be marked closed.

 **BY THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: August 3, 2017

ORDER ENTERED: September 8, 2017