

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Keystone Cab Service, Inc., :  
Petitioner :  
v. : No. 146 C.D. 2009  
Pennsylvania Public Utility :  
Commission, :  
Respondent :

Capital City Cab Service, Inc., :  
Petitioner :  
v. : No. 161 C.D. 2009  
Argued: December 7, 2009  
Pennsylvania Public Utility :  
Commission, :  
Respondent :

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge  
HONORABLE MARY HANNAH LEAVITT, Judge  
HONORABLE KEITH B. QUIGLEY, Senior Judge

*OPINION NOT REPORTED*

MEMORANDUM OPINION  
BY SENIOR JUDGE QUIGLEY

FILED: December 31, 2009

Keystone Cab Service, Inc. (Keystone Cab) and Capital City Cab Service, Inc. (Capital City Cab) petition for review of the January 2, 2009 order of the Pennsylvania Public Utility Commission (PUC) denying their exceptions to the decision of an administrative law judge (ALJ), which dismissed their protests to the Certificate of Public Convenience application filed by RISK-CO-ZANN Foods Corporation t/a International Food Mart's (RISK-CO-ZANN). We reverse and remand.

On September 10, 2007, RISK-CO-ZANN filed an application for a Certificate of Public Convenience with the PUC seeking to transport, as a common carrier, by motor vehicle, persons upon call or demand in Dauphin County. Notice of RISK-CO-ZANN's application was published in the Pennsylvania Bulletin on October 13, 2007, which stated that protests were to be filed on or before November 5, 2007. Protests to RISK-CO-ZANN's application were timely filed by Keystone Cab and Capital City Cab. A prehearing conference was scheduled for October 2, 2008.

At the prehearing conference, the ALJ stated that Keystone Cab and Capital City Cab had failed to attach a copy of their operating authority, as required by the regulation at 52 Pa. Code §3.381(c)(1)(i)(A)(V).<sup>1</sup> Induced by the ALJ's statement, RISK-CO-ZANN made an oral motion to dismiss the protests, which the ALJ granted. The PUC issued the ALJ's initial decision on October 31, 2008, and Keystone Cab and Capital City Cab both filed exceptions. By opinion and order dated January 2, 2009, the PUC denied the exceptions. This appeal followed.<sup>2</sup>

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<sup>1</sup> The regulation at 52 Pa. Code §3.381(c)(1)(i)(A)(V) provides:

(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:

....

(V) A list of all Commission docket numbers under which the protestant operates, accompanied by a copy of any portion of the protestant's authority upon which its protest is predicated.

52 Pa.Code §3.381(c)(1)(i)(A)(V).

<sup>2</sup> "Appellate review of a PUC order is limited to determining whether a constitutional violation, an error of law or a violation of PUC procedure has occurred and whether the

Keystone Cab and Capital City Cab argue that the PUC erred by failing to adhere to its own regulations in dismissing their protests. We agree.

In ruling on RISK-CO-ZANN's motion and dismissing the protests of Keystone Cab and Capital City Cab, the ALJ apparently relied on the regulation at 52 Pa. Code §5.103(d).<sup>3</sup> However, under 52 Pa. Code §5.103(a),<sup>4</sup> the regulation does not apply if an alternative procedure is expressly provided for in Chapters 1, 3 or 5 of the PUC regulations.

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necessary findings of fact are supported by substantial evidence.” *Elite Industries, Inc. v. Pennsylvania Public Utility Commission*, 574 Pa. 476, 481, 832 A.2d 428, 431 (2003) (quoting *Rohrbaugh v. Pennsylvania Public Utility Commission*, 556 Pa. 199, 205, 727 A.2d 1080, 1084 (1999)).

<sup>3</sup> The regulation at 52 Pa. Code §5.103(d) states in pertinent part:

(2) A motion made during the course of hearing, which if granted would otherwise dispose of parties' rights, should be acted upon by the presiding officer prior to taking further testimony if, in the opinion of the presiding officer, the action is warranted.

(3) If a motion involves a question of jurisdiction, the establishment of a prima facie case or standing, the presiding officer may render a final determination with regard to a motion prior to the termination of hearings by issuing an initial or recommended decision.

52 Pa. Code §5.103(d)(2)-(3).

<sup>4</sup> The regulation at 52 Pa. Code §5.103(a) provides in pertinent part:

(a) Scope and content. A request may be made by motion for relief desired, except as may be otherwise expressly provided in this chapter and Chapters 1 and 3 (relating to rules of administrative practice and procedure; and special provisions).

52 Pa. Code § 5.103(a).

Chapter 3 of the PUC regulations provides specific procedures to be employed in motor carrier cases where an applicant seeks to challenge a protest as defective. The regulation at 52 Pa. Code §3.381(c)(1)(i)(C) provides:

(C) A protest shall be treated as a pleading and the applicant may, within 20 days after the closing date for the filing of protests, file motions to strike, to dismiss, or for amplification as provided in § 5.101 (relating to preliminary motion).

52 Pa. Code §3.381(c)(1)(i)(C). Accordingly, in order to properly challenge a protest, an applicant must file timely preliminary objections in accordance with 52 Pa. Code §§3.381(c)(1)(i)(C) and 5.101.<sup>5</sup>

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<sup>5</sup> The regulation at 52 Pa. Code §5.101 provides in pertinent part:

(a) Grounds. Preliminary objections are available to parties and may be filed in response to a pleading except motions and prior preliminary objections. Preliminary objections must be accompanied by a notice to plead, must state specifically the legal and factual grounds relied upon and be limited to the following:

(1) Lack of Commission jurisdiction or improper service of the pleading initiating the proceeding.

(2) Failure of a pleading to conform to this chapter or the inclusion of scandalous or impertinent matter.

(3) Insufficient specificity of a pleading.

(4) Legal insufficiency of a pleading.

(5) Lack of capacity to sue, nonjoinder of a necessary party or misjoinder of a cause of action.

(6) Pendency of a prior proceeding or agreement for alternative dispute resolution.

52 Pa. Code §5.101(a).

Here, protests to RISK-CO-ZANN's application were due November 5, 2007. Thus, under 52 Pa. Code §3.381(c)(1)(i)(C), RISK-CO-ZANN had until November 26, 2007, to file preliminary objections to the protests of Keystone Cab and Capital City Cab. RISK-CO-ZANN's motion to dismiss was not presented to the ALJ until October 2, 2008, over ten months after the time limit had expired. As this Court has stated, "the issue of standing is not jurisdictional and failure to raise it in preliminary objections waives the issue in future proceedings." *Bullock v. County of Lycoming*, 859 A.2d 518, 523 (Pa. Cmwlth. 2004). Therefore, because RISK-CO-ZANN failed to file timely preliminary objections challenging Keystone Cab's and Capital City Cab's standing, the PUC erred in dismissing their protests on the basis of 52 Pa. Code §3.381(c)(1)(i)(A)(V).

Moreover, had RISK-CO-ZANN filed timely preliminary objections, Keystone Cab and Capital City Cab would have had the opportunity to amend their protests. This would be the case even if RISK-CO-ZANN's preliminary objections were granted. Under 52 Pa. Code §5.91(b),<sup>6</sup> a party has the right to file an amended pleading within twenty days after service of preliminary objections. Under 52 Pa. Code §5.101(h),<sup>7</sup> if preliminary objections are granted, a party has

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<sup>6</sup> The regulation at 52 Pa. Code §5.91(b) provides:

(b) Amendments in response to preliminary objections. A party may file an amended pleading as of course within 20 days after service of a copy of a preliminary objection filed under § 5.101 (referring to preliminary objections). If a party has filed an amended pleading as of course, the preliminary objections to the original pleading shall be deemed moot.

52 Pa. Code §5.91(b).

<sup>7</sup> The regulation at 52 Pa. Code §5.101(h) states:

the right to file an amended pleading within ten days after service of the order. In the present case, not only were Keystone Cab's and Capital City Cab's protests dismissed without timely preliminary objections having been filed by RISK-CO-ZANN, Keystone Cab and Capital City Cab were deprived of the opportunity to file amended protests.

Accordingly, we reverse and remand for further proceedings.<sup>8</sup>

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KEITH B. QUIGLEY, Senior Judge

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(h) Amended pleading. If a preliminary objection is granted, the party who submitted the stricken pleading has the right to file an amended pleading within 10 days of service of the order.

52 Pa. Code §5.101(h).

<sup>8</sup> Because we hold that the PUC erred as a matter of law by failing to adhere to its own regulations in dismissing the protests of Keystone Cab and Capital City Cab, we need not address the other issues raised by Keystone Cab and Capital City Cab on appeal.

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Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	
	:	
Capital City Cab Service, Inc.,	:	
Petitioner	:	
	:	
v.	:	No. 161 C.D. 2009
	:	
Pennsylvania Public Utility	:	
Commission,	:	
Respondent	:	

***ORDER***

AND NOW, this 31st day of December, 2009, the order of the Pennsylvania Public Utility Commission, dated January 2, 2009, is hereby reversed and the matter remanded for further proceedings.

Jurisdiction relinquished.

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KEITH B. QUIGLEY, Senior Judge