

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Capital City Cab Service, Inc., :  
Petitioner :  
 :  
v. : No. 516 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

Capital City Cab Service, Inc. (Capital City Cab) petitions for review of the March 2, 2009, order of the Pennsylvania Public Utility Commission (PUC) denying its exceptions to the November 7, 2008, initial decision of an administrative law judge (ALJ), which dismissed Capital City Cab's protest to New Yellow Cab LLC's (New Yellow Cab) application for a Certificate of Public Convenience. We reverse and remand.

On February 21, 2008, New Yellow Cab 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, Cumberland and York counties. Notice of New Yellow Cab's application was published in the Pennsylvania Bulletin on April 19, 2008, which stated that protests were to be filed on or before May 5, 2008. On May 5, 2008, Capital City Cab filed a timely protest

to New Yellow Cab's application. A hearing was scheduled for September 4, 2008.

At the hearing, the ALJ dismissed *sua sponte* the protest of Capital City Cab for failure 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> Upon the objection of New Yellow Cab, the ALJ denied Capital City Cab's request to obtain a copy of its operating authority from the PUC's Secretary's Bureau during a recess. On November 7, 2008, the PUC issued the ALJ's initial decision, which granted New Yellow Cab's application. The ALJ concluded that Capital City Cab failed to present *prima facie* evidence of its standing to protest by failing to attach a copy of its operating authority, and further held that Capital City Cab did not offer a valid reason for allowance of a last-minute amendment to its protest.

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

(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:

....

(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).

Capital City Cab filed exceptions to the ALJ's initial decision on November 26, 2008. By opinion and order dated March 2, 2009, the PUC denied Capital City Cab's exceptions. This appeal followed.<sup>2</sup>

Capital City Cab argues that the PUC erred as a matter of law by failing to adhere to its own regulations in dismissing Capital City Cab's protest. We agree.

The Pennsylvania Code 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 52 Pa. Code §5.101.<sup>3</sup>

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<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 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 §5.101 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:

Here, protests to New Yellow Cab’s application were due May 5, 2008. Thus, under 52 Pa. Code §3.381(c)(1)(i)(C), New Yellow Cab had until May 26, 2008, to file preliminary objections to Capital City Cab’s protest. New Yellow Cab failed to file any preliminary objections with the PUC, much less within the time limit prescribed by the regulation. 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 New Yellow Cab failed to file preliminary objections challenging Capital City Cab’s standing, the PUC erred in dismissing Capital City Cab’s protest on the basis of 52 Pa. Code §3.381(c)(1)(i)(A)(V).

Moreover, had New Yellow Cab filed preliminary objections, Capital City Cab would have had the opportunity to amend its protest. This would be the case even if New Yellow Cab’s preliminary objections were granted. Under 52 Pa. Code §5.91(b),<sup>4</sup> a party has the right to file an amended pleading within twenty

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- (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).

<sup>4</sup> The regulation at 52 Pa. Code §5.91(b) provides:

days after service of preliminary objections. Under 52 Pa. Code §5.101(h),<sup>5</sup> if preliminary objections are granted, a party has the right to file an amended pleading within ten days after service of the order. In the present case, not only was Capital City Cab’s protest dismissed without any preliminary objections having been filed by New Yellow Cab, Capital City Cab was deprived of the opportunity to file an amended protest.

Furthermore, the PUC erred in upholding the ALJ’s *sua sponte* dismissal of Capital City Cab’s protest. Our supreme court has consistently held that “a court is prohibited from raising the issue of standing *sua sponte*.” *In re Nomination Petition of deYoung*, 588 Pa. 194, 201, 903 A.2d 1164, 1168 (2006). Here, not only was the issue of standing raised solely by the ALJ, the protest of Capital City Cab was dismissed without any motion having been made by New Yellow Cab.

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(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>5</sup> The regulation at 52 Pa. Code §5.101(h) states:

(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).

Accordingly, we reverse and remand for further proceedings.<sup>6</sup>

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KEITH B. QUIGLEY, Senior Judge

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<sup>6</sup> Because we hold that the PUC erred as a matter of law by failing to adhere to its own regulations in dismissing Capital City Cab's protest, we need not address the other issues raised by Capital City Cab on appeal.

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Commission,	:	
Respondent	:	

***ORDER***

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

Jurisdiction relinquished.

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KEITH B. QUIGLEY, Senior Judge