IN THE SUPREME COURT OF APPEALS FOR WEST VIRGINIA

PETITION FOR APPEAL FROM A DECISION
BY THE WEST VIRGINIA PUBLIC SERVICE COMMISSION
IN CASES CONSOLIDATED AS SET FORTH BELOW

METRO TRISTATE, INC.,

Petitioner,

DOCKET NO. 20-0766

v.

THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA and COMMUNITY PASTOR CARE, LLC,

Respondents.

PETITIONER, METRO TRISTATE, INC.'S BRIEF

ON APPEAL FROM THE PUBLIC SERVICE COMMISSION OF WEST VIRGINIA'S SEPTEMBER 4, 2020, ORDER IN CASE NO. 18-1315-MC-FC, AND CASE NO. 19-0006-MC-CC, WITH COMMISSION CHAIRMAN LANE DISSENTING BY DISSENTING OPINION ISSUED SEPTEMBER 14, 2020

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COMES NOW the Petitioner Metro Tristate, Inc. ("Metro" or "Petitioner"), a corporation, the Complainant/Protestant in the above-referenced consolidated matters, and hereby files its appeal of a Commissioner Order entered on September 4, 2020 ("Majority Opinion") by the majority of Commissioners on behalf of the Public Service Commission ("Commission"), with Chairman Charlotte Lane dissenting in a Dissenting Opinion filed September 14, 2020.

I. ASSIGNMENTS OF ERROR

1. **The Majority erred in determining that state regulation of market entry of Veteran-Owned Small Businesses ("VOSB") or Service Disabled Veteran-Owned Small Businesses ("SDVOSB") seeking to contract with the VA to provide NEMT for veterans would stand as an obstacle and interfere with the accomplishment of the objectives of the Veterans Benefits Act. Majority Opinion, *Conclusion of Law No. 2.***

2. **The Majority erred in determining that Commission permitting requirements for CPC's operation as a SDVOSB are preempted by federal law. Majority Opinion, *Conclusion of Law No. 4.***

3. **The Majority erred in determining that Commission state contract carrier permitting requirement to protect existing common carrier services interferes with federal contracting goals by applying state regulatory requirements that could leave the VA with no VOSBs or SDVOSBs to choose in West Virginia. Majority Opinion, *Conclusion of Law No. 5.***

4. **The Majority erred in determining that the Commission does not have jurisdiction to regulate market entry of non-emergency medical transportation services for veterans provided exclusively for the VA by a VOSB or SDVOSB under contract with the VA because implied preemption applies. Majority Opinion, *Conclusion of Law No. 6.***

5. **The Majority erred in determining that because it is the federal objective to increase contracting opportunities for VOSBs and SDVOSBs, implied conflict preemption does not apply in the case of a contract carrier that is not a qualified VOSB or SDVOSB. Majority Opinion, *Conclusion of Law No. 7.***

6. **The Majority erred in determining that the Exceptions filed by Metro Tri-State, Inc. should be denied and the Recommended Decision, as modified and supplemented by the Majority Opinion, should be adopted as the Final Order of the Commission. Majority Opinion, *Conclusion of Law No. 8.***

Metro requests that the Court reverse the Commission Majority's Order determining that the Commission permitting requirements for CPC's operations as a SDVOSB are preempted by federal law and are preempted as they apply to CPC – a SDVOSB that is currently providing intrastate transportation of passengers for hire services in West Virginia. Metro further requests that the Court find that CPC is subject to the jurisdiction of the Commission and order the Commission to deny CPC's permit application and immediately direct CPC to cease and desist providing transportation services to the Huntington VA and other West Virginia veteran facilities until it obtains authority from the Commission

II. STATEMENT OF THE CASE

Case No. 18-1315-MC-FC, Metro v. CPC (Complaint Case)

On October 1, 2018, Metro, a company authorized to do business in West Virginia and a common carrier by motor vehicle holding authority from the Commission to transport passengers by taxi and limousine service in Cabell County and parts of Wayne County, West Virginia, under P.S.C. M.C. Certificate Nos. 7537 and 7546, filed a formal complaint with the Commission alleging that CPC was unlawfully providing regulated intrastate transportation services without authority from this Commission by transporting West Virginia veterans pursuant to a contract with the Huntington VA

Medical Center ("HVAMC"). Metro previously held this contract with the HVAMC. Metro requested that the Commission direct CPC to cease and desist from providing transportation services without authority from the Commission on an interim and permanent basis. Metro asserted that CPC is subject to the provisions of Chapter 24A of the West Virginia Code, 1931, as amended, and is required to have proper authority from the Commission prior to engaging in the transportation of veterans in West Virginia pursuant to its contract with the VA.

On October 12, 2018, CPC filed an answer denying wrongdoing and asserting that the Commission has no jurisdiction to regulate the service it was providing to the HVAMC.

On November 5, 2018, Commission Staff filed an initial memorandum recommending that the Commission refer this matter to its Division of Administrative Law Judges for a Recommended Decision. Staff also recommended that the Commission prohibit CPC from providing intrastate transportation services on an interim basis. On December 28, 2018, Staff filed a final memorandum recommending that the Commission direct CPC to cease and desist from providing intrastate transportation services without Commission authority. Staff stated that the West Virginia Legislature exempted certain motor carriers from Commission jurisdiction as set forth in W.Va. Code § 24A-1-3 but determined that no exemption was applicable to CPC.

Case No. 19-0006-MC-CC – CPC Application for Contract Carrier Permit

On January 4, 2019, CPC applied to the Commission for a contract carrier permit to engage in the non-emergency medical transportation of military veterans under

contract with the U.S. Department of Veterans Affairs. CPC initially sought statewide authority from the Commission. It also attached a letter from George Sherrin, Contracting Officer with the Department of Veterans Affairs, where Mr. Sherrin states that "[b]efore making the award, I personally contacted the WVPSC to inquire about the prior allegation and was assured that CPC was in compliance with WV law and would be able to perform under the VA contract." Applicant Hearing Exh. No. 4.[1]

On January 9, 2019, Metro protested the CPC permit application, petitioned to intervene and moved for an order directing CPC to cease operations without proper authority from this Commission.

On January 11, 2019, the presiding ALJ scheduled the permit application for an evidentiary hearing on May 9, 2019, directed CPC to publish notice of its application statewide and granted a request from Metro to intervene. On January 18, 2019, the Commission issued an order consolidating Case No. 18-1315-MC-FC with Case No. 19-0006-MC-CC and referred the consolidated matter to the ALJ Division for a Recommended Decision on or before August 2, 2019.

On January 24, 2019, Metro renewed its request for a cease and desist order pending the outcome of this matter, which request was denied by the ALJ's Order Regarding Interim Relief issued February 4, 2019. On February 8, 2019, Staff issued the Initial Joint Staff Memorandum recommending that CPC comply with the January 11, 2019, Procedural Order requiring it to provide notice of the matter and the

1 All citations and references to Exhibits in this Brief are hearing exhibits that were admitted into evidence at the hearing of this case held on July 9, 2019, before an Administrative Law Judge at the Commission and are attached to the Hearing Transcript, which will be part of the record transmitted from the Commission to this Court.

scheduled evidentiary hearing by publishing a copy of the Notice of Filing and Hearing in 19 cities statewide.

On February 19, 2019, C&H Company filed a Protest and Motion to Intervene. On February 22, 2019, the ALJ issued a Procedural Order granting C&H's Motion to Intervene. On March 14, 2019, D&L Limousine, Inc. filed a Protest and Motion to Intervene. On March 15, 2019, the ALJ issued a Procedural Order granting D&L's Motion to Intervene.

On April 4, 2019, Staff issued its Final Staff Memorandum Case No. 19-0006-MC-CC (determining that the case is ripe for hearing) and Third Final Staff Memorandum Case No. 18-1315-MC-FC reiterating that Staff previously recommended that an order be entered requiring CPC to cease and desist from providing VA transportation until such time as it obtains a certificate of convenience and necessity from the Commission.

On April 12, 2019, R&R Transit, L.L.C. filed a Protest and Motion to Intervene. On April 16, 2019, the ALJ issued a Procedural Order granting R&R's Motion to Intervene.

On April 22, 2019, Motown Taxi, LLC filed a Protest and Motion to Intervene. On April 23, 2019, the ALJ issued a Procedural Order granting Motown's Motion to Intervene.

On July 8, 2019, Melissa Mack, Attorney for the Office of Chief Counsel of the Department of Veterans Affairs, sent an e-mail to counsel for Applicant stating that "[i]t appears that testimony from VA employees is not needed for the WV Public Service

Commission to decide whether under WV law if a permit should be granted to CPC." See Metro Exhibit No. 1 and Applicant Exhibit No. 8. Metro Exhibit No. 1. Troy Knight, a retired employee of the VA, and George Sherrin, a current employee of the VA, were under subpoena by the Commission to testify in the case. On behalf of the United States Department of Veterans Affairs, Ms. Mack denied permission for Mr. Knight to testify and withdrew permission for Mr. Sherrin to testify and the hearing went forward without their testimony.

On July 9, 2019, the hearing was held in this case in Charleston, West Virginia. Following the hearing, the parties submitted post-hearing briefs to the ALJ.

On September 4, 2019, the ALJ issued a Recommended Decision determining that the Commission has no jurisdiction to regulate intrastate transportation services procured exclusively by VA for its use and must dismiss these cases because the state regulatory mechanism conflicts with federal contracting goals, citing United States v. Virginia, 139 F.3d 984 (4th Cir. 1998). See Recommended Decision, Conclusions of Law Nos. 3 and 4.

On September 19, 2019, Metro filed Exceptions to the ALJ's Recommended Decision asserting that Conclusions of Law No. 3 and No. 4 were erroneous. Metro argued that (i) the Recommended Decision did not cite to any evidence of congressional intent to preempt state law, (ii) the cases relied upon in the Recommended Decision do not support federal preemption because those cases involved rate regulation, (iii) the actions of the VA and CPC confirm that they intended to be in compliance with state law, and (iv) the ALJ erroneously concluded that the federal

scheme is designed to employ veterans. CPC responded by referring to its Initial and Reply Post-Hearing Briefs. CPC asserted that Commission jurisdiction is preempted by the Supremacy Clause and the principle of implied conflict preemption.

On September 4, 2020, the Commission issued an Order ("Majority Opinion") denying the Exceptions filed by Metro and adopted the ALJ's Recommended Decision with modification, with Chairman Charlotte R. Lane dissenting.

On September 14, 2020, Chairman Charlotte R. Lane issued her Dissenting Opinion disagreeing with the Majority Opinion that implied conflict preemption applies in this case.

III. SUMMARY OF THE ARGUMENT

The Majority erred in concluding that there is a conflict between the West Virginia state contract carrier regulatory system to protect existing common carrier services and the federal contracting mechanism to promote federal contracting with service-disabled veteran-owned small businesses. The federal regulations regarding licensing requirements of SDVOSB firms explicitly state that "[a] firm must obtain and keep current any and all required permits, licenses, and charters, required to operate the business." 13 C.F.R. § 125.13(g). Moreover, CPC's contract with the VA under paragraph 12. a. Qualifications of Bidders states that the "[s]uccessful bidder shall meet all requirements of Federal, State or City codes regarding operation of vehicles required for this contract." In West Virginia, a contract carrier is required to have a permit issued by the Commission. Furthermore, the actions of the USDVA with respect to this case are also quite telling as the USDVA never asserted that West Virginia law is preempted

in favor of awarding the contract to a service-disabled veteran-owned business – they left it up to the Commission. The USDVA also explicitly prohibited any of its employees from testifying before the Commission. Accordingly, not only is there no implied preemption in this matter, federal regulations and the VA's own bidding documents explicitly require compliance with all State permitting requirements.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Oral argument in this matter under Rule 19 is appropriate as it will aid this Court in its decision process. This case involves issues of settled law that are narrow in scope. W. Va. R. App. P. 19(a)(1) and (4). Further, this is a case in which a hearing is required by law. W.Va. R. App. P. 19(a)(5); see W.Va. Code § 24-5-1

V. ARGUMENT

A. Standard of review.

This Court has established the following standard of review of final orders of the Commission:

> "In reviewing a Public Service Commission order, we will first determine whether the Commission's order, viewed in light of the relevant facts and of the Commission's broad regulatory duties, abused or exceeded its authority. We will examine the manner in which the Commission has employed the methods of regulation which it has itself selected, and must decide whether each of the order's essential elements is supported by substantial evidence. Finally, we will determine whether the order may reasonably be expected to maintain financial integrity, attract necessary capital, and fairly compensate investors for the risks they have assumed, and yet provide appropriate protection to the relevant public interests, both existing and foreseeable. The court's responsibility is not to supplant the Commission's balance of these interests with one more nearly to its liking, but instead to assure itself that the Commission has given reasoned consideration to each of the pertinent factors." Syl. Pt. 2, Monongahela

Power Co. v. Pub. Serv. Comm'n, 166 W.Va. 423, 276 S.E.2d 179 (1981).

The Court has refined the foregoing standard as follows:

"The detailed standard for our review of an order of the Public Service Commission contained in Syllabus Point 2 of Monongahela Power Co. v. Public Service Commission, 166 W.Va. 423, 276 S.E.2d 179 (1981), may be summarized as follows: (1) whether the Commission exceeded its statutory jurisdiction and powers; (2) whether there is adequate evidence to support the Commission's findings; and, (3) whether the substantive result of the Commission's order is proper." Syl. Pt. 1, Central W.Va. Refuse, Inc. v. Pub. Serv. Comm'n of W.Va., 190 W.Va. 416, 438 S.E.2d 596 (1993).

This this Court has held that:

"[a]n order of the public service commission based upon its finding of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles." United Fuel Gas Company v. The Public Service Commission, 143 W.Va. 33, 99 S.E.2d 1 (1957). Syllabus Point 5, in part, Boggs v. Public Service Comm'n, 154 W.Va. 146, 174 S.E.2d 331 (1970). Syllabus Point 1, Broadmoor/Timberline Apartments v. Public Service Commission, 180 W.Va. 387, 376 S.E.2d 593 (1988). Syl. pt. 1, Sexton v. Public Service Commission, 188 W.Va. 305,423 S.E.2d 914 (1992).

B. The Majority Opinion's inferences and conclusions are contrary to the plain reading of the federal regulations regarding licensing requirements of SDVOSB's and the VA's own bidding documents.

As Chairman Lane stated in her Dissenting Opinion, "[i]n the case at hand we have no Congressional or agency requirements that would be frustrated by state regulation of contract carriers." App'x, 23. The Majority Opinion states that the Congressional objective is to increase contracting opportunities by setting goals each year for SDVOSB participation in VA contracts. Chairman Lane's analysis rightly

concludes that "[t]he fact that a certain contract carrier may or may not be granted a permit does not, in and of itself, interfere with or frustrate the Congressional objective that the VA increase contracting opportunities for SDVOSBs." App'x., 23. In fact, as Chairman Lane recognizes, the priority list at 38 U.S.C. §8127(h) indicates that Congress anticipated that qualified SDVOSBs may not be available for certain contract opportunities and the "Rule of Two" requires that a SDVOSB only be given preference in circumstances where there are two or more qualified SDVOSB bidders. There is no mandate to grant a certain number of contracts to SDVOSBs.

The Majority Opinion acknowledges that ". . . the record in this case does not reflect any federal agency pronouncement, (2) or statements of express intent of Congress, or the VA, to preempt state law." App'x., 10. In the present case, not only does the Majority Opinion fail to cite to any legitimate Congressional intent to preclude application of state motor carrier laws or any other state laws to SDVOSB, the federal regulations regarding licensing requirements of SDVOSB firms explicitly state that "[a] firm must obtain and keep current any and all required permits, licenses, and charters, required to operate the business." 13 C.F.R. § 125.13(g). Further, the federal regulations expressly require SDVOSBs to adhere to state laws. See 13 C.F.R. § 125.12(e)(1)(iii) and (f). The Majority erroneously discounted the express language of these regulations, stating "there is no indication that this amendment to the regulation was directed at requiring VOSBs and SDVOSBs to obtain authority from a state to operate as contract carriers." Chairman Lane disagreed and correctly concludes that "[a] plain reading of the regulation is that the SDVOSB must comply with all state

requirements regarding operations. There are no comments in the Federal Register about limiting the application of 13 C.F.R. § 125.13(g) to only some permits that are required to operate the business in a state." App'x, 4. Chairman Lane is right. The Majority's inferences and conclusions are contrary to the plain reading of the regulations.

The Supreme Court of Appeals of West Virginia has found that "our law has a bias against preemption." Morgan v. Ford Motor Co., 680 S.E.2d 77, 83, 224 W.Va. 62 (2009). Preemption of topics traditionally regulated by the states is greatly disfavored in the absence of convincing evidence that Congress intended for a federal law to displace a state law. Id. The Majority Opinion admits that the field of motor carrier regulation is traditionally occupied by the states. App'x., 16. The Court in Morgan concluded that "[p]ut succinctly, preemption is disfavored in the absence of exceptionally persuasive reasons warranting its application." Morgan at 83. The Court went on to state that "[w]hen it is argued that a state law is preempted by a federal law, the focus of analysis is upon congressional intent." Id. at 84.

The Majority correctly found that implied conflict preemption is the only standard for determining whether state law is preempted in this case. There is no preemption clause or any other explicit language in the Veterans Benefits Act, and no explicit agency regulation or pronouncement that state law governing contract carriers should be preempted. "Implied conflict preemption occurs when compliance with both federal and state regulations is physically impossible, or where the state regulation is an obstacle to the accomplishment or execution of congressional objectives." Morgan at

84. "To prevail on a claim of implied preemption, 'evidence of a congressional intent to pre-empt the specific field covered by state law' must be pinpointed." Morgan at 85, quoting Wardair Canada, Inc. v. Florida Dep't of Revenue, 477 U.S. 1, 6, 106 S.Ct. 2369, 91 L.Ed.2d 1 (1986).

The Majority Opinion references generally 38 U.S.C. § 8127 regarding preferences to service-disabled veteran-owned small businesses; however, the Majority provides no meaningful analysis of this law or any supporting regulations or evidence of congressional intent that would suggest that federal law exempts SDVOSBs from West Virginia state motor carrier laws simply because the federal government is contracting for services. Kingdomware Techs., Inc. v. United States, 136 S. Ct. 1969, 195 L.Ed.2d 334 (2016), provides that the federal government set aside certain contracts for service-disabled veteran-owned small businesses. While the federal government may be required to give preferential treatment in awarding certain contracts to service disabled veteran-owned small businesses, such preference does not expressly or impliedly exempt such businesses in complying with state licensing requirements in the states they do business simply because they are owned by service disabled veterans. Moreover, as Chairman Lane recognizes in her Dissenting Opinion, the priority list at 38 U.S.C. §8127(h) indicates that Congress anticipated that qualified SDVOSBs may not be available for certain contract opportunities and the "Rule of Two" requires that a SDVOSB only be given preference in circumstances where there are two or more qualified SDVOSB bidders. There is no mandate to grant a certain number of contracts to SDVOSBs.

C. The Majority Opinion cites to no caselaw where federal preemption has been applied to the intrastate regulation of motor carriers – except with respect to the rates that can be charged to the federal government, which is an important distinction the Majority carelessly disregards.

There is no implied exception to the Commission's jurisdiction over intrastate service provided to the VA. The Majority Opinion cites to no caselaw where federal preemption has been applied to the intrastate regulation of motor carriers, except with respect to the rates that can be charged to the federal government – an important distinction glossed over by the Majority.

The Majority cites to a U. S. Supreme Court case, United States v. Carter, 121 So.2d 433 (1960). The Carter case relies on Public Utilities Commission of State of California v. United States of America, 355 U.S. 534, 78 S. Ct. 446, 2 L.Ed. 2d 470 (1958), where the court held that the State Commission was precluded from regulating the intrastate rates and services of common carriers transporting property for the United States government. The issue in the Carter case was whether the Florida Public Utilities Commission has jurisdiction over rates charged by a common carrier for the Florida intrastate transportation of property for the United States government without the necessity of adhering to the rate structure approved by the Florida Commission and reflected by the carrier's tariff on file with the Florida Commission. Rates are not the issue in this case. The common carriers in the Carter case and the progeny of cases cited by the Majority and the ALJ in his Recommended Decision all had common carrier authority from their respective State Commissions. The Majority Opinion fails to acknowledge the significance that all the carriers in those cases had authority from their respective states.

In the case of United States v. Commonwealth of Virginia, 139 F.3d 984 (4th Cir. 1998) at issue was whether the State of Virginia could subject independent contractors of the FBI who perform federal background checks for the FBI to state licensing and/or registration requirements for private security services business in Virginia. The FBI commenced the lawsuit requesting declaratory and injunction relief to prevent Virginia from enforcing its registration and licensing provisions against the special investigators based on their work for the FBI. The 4th Circuit upheld the district court's decision that the challenged provisions of Virginia law were preempted because they imposed additional requirements on individual contractors who have already been judged qualified by the FBI. The court noted that in a letter to the FBI the Virginia Attorney General's Office emphasized that Virginia wants to enforce its requirements against the investigators so that it can ensure their continued competence, thus implying that the FBI's assessment of its investigators' competence is inadequate because it does not ensure their continuing competence and confirming that the state intends to substitute its competency judgment for the FBI's. The court determined that this rationale clearly runs afoul of the Supreme Court's holding that federal contractors cannot be required to satisfy state qualifications in addition to those that the federal government has pronounced sufficient. There are no similarities to draw from the Virginia case with the case at hand. Although the PSC has qualifications for motor carriers to meet in approving applications for contract carrier permits, enforcement of those qualifications is not at issue in this case as it was in the Virginia case. Further, the FBI commenced the lawsuit against the State of Virginia. By contrast, the VA chose not to get involved in

this case and specifically restricted a former and current employee of the VA from testifying in the case.

Another important distinction between the case law cited in the Majority Opinion and the case at bar is that in our case the federal government has refrained from any involvement in the case and even went so far as to restrict current and former employees from testifying in the case. In all cases relied upon by the Majority or the ALJ, except the Lafferty[2] case in Kentucky, the federal government was a party to the case arguing for and asserting federal preemption. See North Dakota et al., v. United States, 495 U.S. 423, 110 S.Ct. 1986, 109 L.Ed.2d 420 (1990); United States v. Virginia, 139 F.3d 984 (4th Cir. 1998); Paul v. United States, 371 U.S. 245, 83 S.Ct. 426, 9 L.Ed.2d 292 (1963); and United States v. Georgia Public Service Commission, 371 U.S. 285, 83 S.Ct. 397, 9 L.Ed.2d 317 (1963). The overriding theme in the cases cited by the Majority and the ALJ's Recommended Decision involved price and how the state regulations are going to interfere with the Federal Government from obtaining low cost competitive bids. Also, those cases involve the Federal Government as a party. That is not the case here.

2 The Majority references a decision coming out of an intermediate appellate court in Kentucky (Court of Appeals of Kentucky), Lafferty Enters. v. Commonwealth, 572 S.W.3d 85 (Ct. Ap. Ky. 2019). An important distinction between Lafferty and the case at bar is that Lafferty involved Kentucky certificate of need laws in relation to ambulance services to the VA; whereas, in the instant case, it is West Virginia motor carrier law and the West Virginia PSC jurisdiction being challenged by CPC. Further, in Lafferty, Jan-Care (the ambulance provider at issue) actually had ambulance authority in West Virginia where a majority of its contract was presumably being performed. By contrast, CPC admittedly has no authority in any of the states it is providing transportation services. Reese Testimony, Hearing Tr., p. 64. Kentucky law is not relevant to this case as, according to Jamie Marlowe, President of Metro, approximately 90% of the contract with the Huntington VA consists of intrastate trips in Cabell and Wayne Counties, West Virginia, to and from the Huntington VA facility. Hearing Tr., 126.

D. The actions of both CPC and the VA confirm that they intended to be in compliance with all state rules and licensing requirements.

The Recommended Decision affirmed by the Majority Opinion erroneously concluded (footnote 2) that the actions of the VA contracting officer are not compatible with the argument that the VA required CPC to obtain a contract carrier permit as a condition of the contract. However, the evidence from the hearing is contrary to the Majority's affirmation of the Recommended Decision's conclusion as the contracting officer admittedly checked with the Commission to ensure that CPC was in compliance with all state laws and licensing requirements. Applicant Exh. No. 4; Metro Exh. No. 6. If the contract was exempt from State regulation, then the VA contracting officer would not need to check with the State regarding licensing requirements.

CPC and the United States Department of Veterans' Affairs have acknowledged in their filings and/or testimony that CPC must be in compliance with all state rules and licensing requirements, including Commission requirements, in order to be qualified to be awarded the contract by the VA. In the December 11, 2018, Memorandum by George Sherrin of the Department of Veterans Affairs, attached to CPC's Application for permit as a contract carrier, filed January 4, 2019, Case No. 19-0006-MC-CC, Mr. Sherrin states that "[b]efore making the award, I personally contacted the WVPSC to inquire about the prior allegation and was assured that CPC was in compliance with WV law and would be able to perform under the VA contract. With this assurance, I awarded the new contract to CPC." Applicant Exh. 4; See also Metro Exhibit 6 (9/28/18 e-mail from George Sherrin to Jamie Marlowe notifying Mr. Marlowe of the expiration of Metro's contract and stating that "I [Mr. Sherrin] have personally contacted the

commission and have been assured that under our federal contract CPC is in compliance with state law.")

Moreover, Hilliard Reese, President of CPC, testified as follows: "What happened is I got in touch with Mr. Sherrin and verified when he actually gave me the contract, I called him up and he said, I have already called the PSC, verified that you guys do not need anything else. And that was the only reason why he awarded the contract." Hearing Tr., p. 41. Mr. Reese further testified that it was Mr. Sherrin who advised him to apply to the Commission for the contract carrier permit. Tr., p. 43. CPC also thought it was necessary to comply with other state and local licensing requirements as it has registered with the West Virginia Secretary of State's Office and has obtained a business license from the City of Huntington, West Virginia. Reese Testimony, Hearing Tr. p. 40.

Further, the United States Department of Veterans' Affairs ("USDVA") explicitly chose not to get involved in this proceeding and restricted its current and former employees from testifying at the hearing in this case determining that their testimony is not relevant as to whether CPC should be granted a permit under West Virginia law. See Metro Exhibit No. 1 and Applicant Exhibit No. 8. Metro Exhibit No. 1 is an e-mail from Melissa Mack, Attorney for the Office of Chief Counsel of the Department of Veterans' Affairs to counsel for Applicant dated July 8, 2019, stating that "[i]t appears that testimony from VA employees is not needed for the WV Public Service Commission to decide whether under WV law if a permit should be granted to CPC." The USDVA never asserted that West Virginia law is preempted in favor of awarding the contract to

a service-disabled veteran-owned business – they are leaving it up to the Commission. Moreover, CPC's contract with the VA under paragraph 12. a. Qualifications of Bidders states that the "[s]uccessful bidder shall meet all requirements of Federal, State or City codes regarding operation of vehicles required for this contract." Applicant Exh. No. 3, p. 6 of 31. Accordingly, CPC's assertion of preemption is contrary to its actions and testimony and the actions of and communications from the USDVA.

E. CPC's permit application should be denied because it has failed to meet its burden of proof to obtain a contract carrier permit. Specifically, CPC has failed to establish that the granting of the permit would not impair the efficient public service of Metro – an authorized common carrier adequately serving the same territory.

In order to obtain a contract carrier permit, the applicant must meet its burden of proof to show the following:

1. A need for the service in question. The Commission has defined "need" in common carrier certificate cases as a desired or new or different kind of service from that being offered or an unfulfilled reasonable transportation requirement. W.Va. Code §24A-2-5(a); L.J. Navy Inc., M.C. Case No. 5605 (1983).

2. That granting the permit will not endanger public safety, unduly interfere with using public highways, unduly increase the cost of maintaining public highways or impair the efficient public service of any authorized common carrier adequately serving the same territory. W.Va. Code §24A-3-3(a);

3. That no unfair competition or discrimination will result. W.Va. Code §24A-3-5; and

4. That its proposed rates are not lower than the lowest active authorized common carrier for substantially the same service in the area of application. W.Va. Code §24A-3-6.

Before a shipper can establish a need for a new carrier service, it must be shown

that the shipper contacted existing carriers and has legitimately been unable to secure adequate service. Webb Trucking, M.C. Case No. 21703-CC (April 27, 1984); Bernice K. Ross d.b.a Patsy Ross/Ross Trucking Company, M.C. Case No. 21729 (1983); Garland Harless, M.C. Case No. 22246 (1984). The Commission clearly has an obligation to protect common carriers from unreasonable competition by contract carriers. The showing required to obtain a permit to operate as a contract carrier is significantly greater than that required to obtain a certificate to operate as a common carrier. W.Va. Code §24A-3-3(a); 24A-3-5 and 24A-3-6; Weirton Ice and Coal Co. v. Public Service Commission, 240 S.E.2d 686, 161 W.Va. 141 (1977); Mountain Trucking Co. v. Public Service Commission, 216 S.E.2d 566, 158 W.Va. 958 (1975); Webb Trucking, M.C. 21703-CC (April 27, 1984).

The Taxi case illustrates the broadness and responsibilities to the general public of common carrier authority versus the limited and narrow nature of contract carrier authority. Taxi Service, Inc. v. The Public Service Commission of W.Va., and Brown's Limousine Crew Car, Inc., 356 S.E.2d 470, 177 W.Va. 716 (1987). In the Taxi case, a number of taxi companies with common carrier authority that provided transportation to railroad personnel appealed a ruling of the PSC which awarded Brown's Limousine Crew Car, Inc. a limited contract carrier permit to transport railroad personnel in fifteen counties. The Court in Taxi recognizes the statutory distinction between a common carrier and a contract carrier and states that one of the most significant differences is the elements of proof that need to be shown to obtain a permit. The Court goes on to explain that an applicant for contract carrier authority has more elements to prove than

an applicant for common carrier authority under W.Va. Code § 24A-3-3 in order to obtain a permit. The primary focus is not on the public convenience and necessity, but on whether the contract carrier's activities will impair the efficient public service of any authorized common carrier adequately serving the same territory, which is especially applicable when a protest to the application is received by the PSC from a common carrier serving the same territory. Taxi at 475. The Court goes through the analysis of Brown's application for contract carrier authority and explains how Brown's purported service would impair the efficient public service of a common carrier serving the same territory if a permit were issued to Brown's. Id. at 476. The Court further explains how many of the various taxi companies involved were economically dependent upon the C&O Railroad's business to enable them to perform their needed public service of transporting the elderly and the ill and those who lack a private vehicle. Id. The Court further stated the following:

> To permit a contract carrier to skim off this lucrative area of business may well sound the death knell to some of these taxi companies as their owners testified. Thus, a vital public service would be terminated in a number of the fifteen counties served by these taxi companies.
>
> Id.

CPC failed to establish that the granting of the permit would not impair the efficient public service of Metro – an authorized common carrier adequately serving the same territory. Metro, however, presented substantial evidence on the impairment to its service as a result of CPC being awarded the contract, confirming that the granting of CPC's permit application would have a drastic negative impact on Metro and the public

it serves. Marlowe Testimony, Hearing Tr., pp. 128-131; 139. Prior to CPC, Metro provided transportation services for the VA for over thirty years. Hearing Tr., 118. From 2015 - 2018, Metro averaged nearly half of a million dollars in annual revenue from serving the VA, which represents more than 50% of Metro's total annual gross revenue. Metro Exh. 7, annual financial reports of Metro for the years 2015-2018 showing gross annual income compared with annual income from the VA. Mr. Marlowe testified as follows:

> Most businesses operate on economies of scale. Any loss of volume translates into loss of income and loss of operating profits. In this case, CPC's operation under the contract with the VA will result in Metro losing nearly half of a million dollars per year in revenue on average, which represents more than 50 percent of Metro's annual gross revenue. Metro has relied upon its income from the VA over the year in order to efficiently serve the public as a common carrier. The loss of income has already resulted in the loss of specialty vehicles and drivers, which would otherwise be available to Metro to better serve the general public. For example, Metro provides accessible wheelchair lift services to other commercial customers, as well as the general public. The volume of orders without the VA as a customer is too low to cover the fixed cost of insurance and labor for Metro's current fleet of accessible vehicles. Metro has reduced its number of vehicles and suspended accessible transportation to outlying areas, as well as stopping the service for several days.
>
> Hearing Tr., 128-129.

Accordingly, the evidence presented by Metro proves that the granting of CPC's permit application would have a negative impact on Metro – a common carrier presently serving the proposed territory – much to the detriment of the general public. CPC presented no evidence to the contrary.

Mr. Marlowe further testified that serving the Huntington VA under the contract

has allowed Metro to not only better serve the general public but to also provide transportation to veterans that do not qualify for the program paid for under the contract with the VA. Tr., 139. Metro has been able to provide wheelchair transportation to the general public including veterans, but without the VA contract, Metro cannot sustain the vehicles to provide the wheelchair transportation to the general public. Tr., 139.

The only party that benefits from the ALJ decision is CPC – an unauthorized carrier from South Carolina. The federal government receives no added benefit from awarding the VA contract to CPC as opposed to Metro. The transportation needs of the West Virginia veterans under the contract with the Huntington VA were already being met by Metro prior to CPC being awarded the contract with the VA. Ironically, however, the Majority Opinion will result in harming transportation services available to disabled West Virginians, including West Virginia veterans who either do not qualify for transportation from CPC under the federal contract with the VA or who require wheelchair transportation to places other than appointments at the VA. Further, the Majority Opinion could result in veterans employed by Metro to lose their jobs.

The Majority erroneously concludes that the "impairment" test of W.Va. Code § 24A-3-3(a) "can be a difficult requirement to meet" and, therefore, must make compliance with both the federal objective to establish goals for SDVOSB participation in VA contracts and West Virginia contract carrier law physically impossible or an obstacle to the accomplishment or execution of congressional objectives. First, CPC's permit application has not yet even been denied by the Commission. Second, as Chairman Lane opines in her Dissenting Opinion, " . . . a 'difficult requirement to meet'

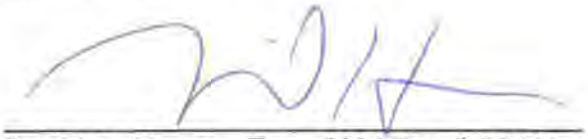
does not present an absolute obstacle to the accomplishment or execution of congressional objectives that justifies the majority decision of conflict preemption." App'x., 22. Accordingly, the West Virginia statutory requirements for a contract carrier permit do not interfere with the federal objective of establishing goals for SDVOSB participation in VA contracts which must have all permits, licenses and charters required to operate in a state.

VI. CONCLUSION

For the above reasons, Metro respectfully requests that this Petition be granted and that the Court reverse the Majority Opinion and determine that CPC's transportation of passengers for hire services under contract with the VA in Cabell and Wayne Counties, West Virginia, is subject to the jurisdiction of the Commission ordering CPC to cease and desist from providing VA transportation until it obtains authority from the Commission. Further, the Court should order the Commission to deny CPC's application because it failed to prove that granting the permit will not impair the efficient public service of Metro. CPC presented no evidence suggesting that Metro's service to the VA was inadequate.

Dated this 2nd day of October 2020.

METRO TRISTATE, INC.
Petitioner,
By Counsel



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CERTIFICATE OF SERVICE

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