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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 21-0233

SRC HOLDINGS, LLC (f/k/a WILLIAMS HOLDINGS, LLC),
d/b/a WILLIAMS TRANSPORT

Petitioner/Appellant,

FILE COPY

v.

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
DONALD R. ABNER, dba AMBASSADOR
LIMOUSINE AND TAXI SERVICE, and CLASSIC
LIMOUSINE SERVICE, INC.

Respondents/Appellees.

PETITIONER'S BRIEF

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ASSIGNMENTS OF ERROR

This is an appeal from an Order of the Public Service Commission (“PSC”) allowing the transfer of Motor Carrier Certificate No. 7508 (“Certificate 7508”) over Petitioner William Transport’s objections that the certificate had become dormant and that the transferee’s operations under the certificate would differ radically from those of the transferor. The PSC erred as follows:

1. The PSC erred in ruling that Certificate 7508 is not geographically dormant as to counties other than Raleigh even though the transferor’s operations elsewhere were minimal and sporadic if they occurred at all.

2. The PSC erred in ruling that Certificate 7508 is not geographically dormant as to counties other than Raleigh even though the transferor produced no documentary evidence nor independent witness testimony that it conducted *any* operations outside of Raleigh County, and could not provide any details of even a single trip outside of Raleigh County.

3. The PSC erred in ruling that Certificate 7508 is not operationally dormant as to the transportation of railroad workers for railroad-work-related purposes even though the transferor never performed this niche of service and was not prepared to do so.

4. The PSC erred in approving the transfer of Certificate 7508 from (a) a restaurateur who was not engaged in the motor carrier business full-time and never competed with Williams Transport, to (b) the owner of a full-time motor carrier conglomerate who will use Certificate 7508 to drive Williams Transport out of business.

STATEMENT OF THE CASE

Petitioner Williams Transport has been serving the people of West Virginia for over three decades.¹ It has authority from the PSC to operate in several southern West Virginia counties, including Boone County, which is one of its most important sources of business. Although Williams Transport can and does serve all types of passengers, the vast majority of its business is transporting railroad workers for railroad-work-related purposes. Like many regulated motor carriers, Williams Transport operates on razor thin margins and relies on the protections from competition that are built into the PSC statute.

Donald Abner, owner of several motor carrier businesses, has been attempting to invade Williams Transport's territories for years. In 2018, Mr. Abner applied for a certificate to provide specialized service to railroad workers in Williams Transport's territories, including but not limited to Boone County. Williams Transport and others intervened, and served discovery requests upon Mr. Abner asking what evidence, if any, he had to prove that existing service in these territories was inadequate (which he must do to obtain a certificate to operate there). Mr. Abner apparently had none, because he never answered Williams Transport's discovery requests, and his application was eventually dismissed due to his failure to comply with discovery. *See Donald R. Abner, M.C. Case No. 18-0252-MC-C, Recommended Decision at 4 (Sept. 14, 2018)(Final as of Oct. 4, 2018).*

How then to raid Williams Transport's territory and siphon away its business? In January 2020, Mr. Abner found a way to accomplish through the back door what he could not through the front: if he could not obtain a new certificate to operate in Williams Transport's territory due

¹ Williams Transport began as Mountain State Limousine Service in the 1980s. In or about 1991, its owners at that time, Teddi and Perry Williams, changed their trade name to Williams Transport. Teddi Williams became the sole owner in or about 2007. Ms. Williams passed away in February 2020, and Williams Transport is now owned by her three children, Stephen Cox, Randall Cox, and Cindy Cox.

to his inability to show that Williams Transport's service is inadequate, then he would seek the transfer of an existing certificate, Certificate 7508, from Classic Limousine Service, Inc. ("Classic"). As discussed below, Certificate 7508 covers nine counties, but Classic rarely if ever operated in any county other than Raleigh, and never transported railroad workers. In fact, Classic was a small, unprofitable venture that primarily existed to transport patrons to and from its owners' restaurants in Beckley. Mr. Abner's operations will be far more robust, essentially replacing an ancillary hobby with a full-time commercial enterprise that will drive Williams Transport out of business.

A. Classic, the transferor of Certificate 7508, was a small-scale side-venture that never made a profit, and what little work it performed was concentrated in Raleigh County.

Prior to the underlying transfer proceeding, Classic was the holder of Certificate 7508, which provides limousine authority for nine West Virginia counties: Boone, Fayette, McDowell, Mercer, Monroe, Nicholas, Raleigh, Summers, and Wyoming.

Donna and Brian Williams (no relation to Williams Transport) have owned Classic since late 2014 or early 2015. (App. 35-36, 70-71.) During this time, Classic has used four vehicles to transport passengers: a 2002 Lincoln Town Car, a 2006 Lincoln Town Car, a 2007 Lincoln Town Car, and a 2006 Ford F-550. (App. 39-40, 147.) The 2006 and 2007 Lincoln Town Cars were stretch limousines; the 2002 Lincoln Town Car was a five-passenger sedan; and the 2006 Ford F-550 was a "party bus." (App. 44-45.) Classic has not owned all four of these vehicles for the entire five-year period. Only the 2007 Lincoln has been in Classic's possession from the beginning, and it was out of service for about a year. (App. 40, 81-82.) Classic acquired the 2002 Lincoln and the 2006 Lincoln at some point after January 2015, though Classic's

representatives could not recall when. (App. 40, 76-77.) Classic acquired the F-550 “party bus” in 2019. (App. 77.)

Classic was headquartered in Beckley, West Virginia, and all of its vehicles were based there. (App. 50-51.) It mostly transported people to and from restaurants that Brian Williams owned in Beckley. (App. 71, 77-78.) Classic does not have any records to prove where it has operated (App. 79), but Brian Williams, who handled Classic’s day-to-day business (App. 35), estimates that 80% of its operations were in Raleigh County (App. 73, 196). He further estimates that Classic operated in Boone County only four times per year, in Fayette County five or six times per year, in McDowell County four times per year, in Mercer County three to five times per year, in Monroe County four to six times per year, in Nicholas County four to six times per year, in Summers County four to six times per year, and in Wyoming County six to eight times per year. (App. 74-75, 80-81.) Notwithstanding those claims, Classic could not identify a single specific instance when it transported a passenger to or from Boone County, or any of the other counties listed in Certificate 7508. (App. 81.)

Classic has never transported railroad workers for railroad-work-related purposes. (App. 62-63, 160-161.) Further, Classic admits that it has never made any efforts to enter the business of transporting railroad workers for railroad-work-related purposes. (App. 63-64, 163-164.)

In the approximately five years that Donna and Brian Williams have owned Classic, it has never made a profit. (App. 59.) Moreover, it averaged less than \$24,000 in gross annual sales, and never generated more than \$31,120 in gross annual sales. (App. 51-58, 168-192.)² According to Classic, the reason it conducted so little business, and so few operations outside of

² In 2015, Classic generated \$21,153.88 in gross sales. In 2016, Classic generated \$18,878.78 in gross sales. In 2017, Classic generated \$25,395.81 in gross sales. In 2018, Classic generated \$31,120 in gross sales. In 2019, Classic generated \$21,690 in gross sales.

Raleigh County, is that its owners were not involved in the motor carrier business full-time, and did not devote the time and effort to running the business to its full potential. (App. 379-380.)

On January 8, 2020, Classic sold its four vehicles, along with Certificate 7508, to Mr. Abner for a total of only \$16,000. The entire \$16,000 price was attributed to the vehicles. Classic attributed no value to Certificate 7508, which, if valid, provides limousine authority for trips beginning or ending in *nine* West Virginia counties. (App. 65-67, 200-203.)

B. Mr. Abner, the transferee of Certificate 7508, is the head of a full-time, dedicated transportation conglomerate, and will substantially expand the scope and type of operations under the certificate.

Mr. Abner owns, or does business as, three transportation companies: Ambassador Limousines, Ambassador Limousine Taxi Service, and New River Taxi, Inc. (App. 92-93, 249-251.) Each company (or dba) has its own motor carrier certificate. Donald Abner dba Ambassador Limousines has limousine authority for trips beginning or ending in Fayette and Summers Counties (excluding service between Pipestem State Park and the City of Beckley or the Raleigh County Airport). Donald Abner dba Ambassador Limousine Taxi Service has taxicab authority for trips beginning or ending in Raleigh County (excluding multi-passenger van service to and from medical facilities). New River Taxi, Inc. has taxicab authority for trips beginning or ending in Raleigh, Fayette, and Greenbrier Counties. (App. 96, 249-251.)

Prior to his acquisition of Classic's vehicles, Mr. Abner owned a fleet of 14 vehicles, including eight large sport utility vehicles. (App. 252-254.) With the addition of Classic's vehicles, Mr. Abner now commands a fleet of 18 vehicles.³ There is nothing preventing Mr. Abner from transferring some or all of these vehicles for use under Certificate 7508 (App. 97),

³ Although the ALJ's recommended decision states that Mr. Abner owns 10 vehicles (App. 407, 411), the record is clear that Mr. Abner owned a total of 14 vehicles prior to his acquisition of Classic's vehicles (App. 252-254), and now owns 18 vehicles. To the extent that ALJ meant that Mr. Abner owns 10 vehicles under his dba Ambassador Limousines, the ALJ was correct.

which covers far more territory than any of Mr. Abner's other motor carrier certificates (App. 105).

While Classic never used Certificate 7508 to transport railroad workers, the transportation of railroad workers is a substantial part of Mr. Abner's business. (App. 99-100.) If the transfer of Certificate 7508 is affirmed, Mr. Abner will use that certificate to transport railroad workers in the six new counties that will be added to his territory, including Boone County. (App. 100-101.) As Mr. Abner admits, the motor carrier certificates he currently holds cover a much smaller territory than Certificate 7508, and he wants Certificate 7508 so that he can expand the territory in which he can operate. (App. 105.) And since Mr. Abner already has authority to operate in Raleigh County, the benefit of acquiring Certificate 7508 is the ability to operate in *other* counties – counties where Classic operated only a few times per year, if at all.

Further, Mr. Abner intends to use Certificate 7508 to conduct far more business in general than Classic ever did. (App. 102-105.) He has no intention of limiting his operations under Certificate 7508 to the meager level previously conducted by Classic. In fact, he expects to generate over three times more in gross annual sales than Classic Limo generated in its best year. (App. 102-103.) As such, it is undisputed that Mr. Abner intends to replace Classic – an unprofitable side-gig that conducted little if any business outside of Raleigh County – with a vigorous and powerful new competitor that conducts substantial operations outside of Raleigh County.

C. Williams Transport and others have been operating in territories covered by Certificate 7508 without competition from Classic, and will be driven out of business if a new competitor enters the market.

As alluded to above, Williams Transport is a motor carrier service that primarily transports railroad workers for railroad-work-related purposes. It has authority from the PSC to

transport passengers to or from locations in Boone, Lincoln, Logan, Raleigh, Summers, Fayette, and Wayne Counties, although its authority in Fayette and Wayne Counties is limited to luxury limousines. (App. 115-116, 255-258.) Boone and Logan Counties are the largest sources of Williams Transport's business. (App. 117.)

Williams Transport has approximately 22 employees, including six dispatchers and 16 drivers. It has 32 vehicles, most of which are full-sized vans and sport utility vehicles.⁴ (App. 117.) The railroad workers require these types of vehicles because they want leg room and need space for their luggage (referred to in the industry as their "grips"). (App. 117-118, 127-128, 134.) Most trips involve transporting two or three railroad workers, each with three pieces of luggage. (App. 127.) Further, the business of transporting railroad workers for railroad-work-related purposes involves driving around railroad yards. (App. 118-119.) The rough roads at the railroad yards, which have large holes and coarse gravel, require vans and sport utility vehicles due to their higher ground clearance. (App. 119, 127-129.) Ronnie Ellis, a driver who has been transporting railroad workers for Williams Transport for approximately 20 years, testified that a Lincoln Town Car (such as those owned by Classic) would not be suitable for the rough roads at the railroad yards due to its low ground clearance. (App. 129.)

Mr. Ellis further testified that, in his 20 years of driving for Williams Transport, he has never heard of Classic. (App. 130.) Similarly, Patricia Ball, who has worked as a dispatcher for Williams Transport for 23 years, also testified that prior to her involvement in this case, she had never heard of Classic. (App. 119.) In addition, Darrell Duncan, who owns a transportation company that operates in Boone County (among others) and has been in business since 1992,

⁴ As used in the PSC's motor carrier regulations and the certificates of authority discussed in this case, the term "limousine" has a different and far broader meaning than it does in common parlance, and can include vans and sport utility vehicles. For the PSC definitions of "limousine" and "specialized limousine," see W. Va. C.S.R. §§ 150-9-1.8.m and 150-9-1.8.v.

also testified that he had never heard of Classic prior to his involvement in this case. (App. 134.)

Steve Cox, one of the owners of Williams Transport, testified that there is not enough work available in Williams Transport's territory to share with a new competitor. (App. 121-124.) In fact, Mr. Cox has been running Williams Transport with his brother and sister since February (when their mother, Teddi Williams, passed away), and none of them have drawn a paycheck. (App. 121-122.) Mr. Cox further testified that Williams Transport cannot afford to lose any customers, and that if Mr. Abner starts using Certificate 7508 to transport railroad workers in Williams Transport's territory (something that Classic never did), then that will likely put Williams Transport out of business. (App. 123-124.) Williams Transport already has vehicles that are not in use due to competition from Mr. Abner in Hinton (Summers County), West Virginia. (App. 122.) Darrell Duncan, owner of Duncan's Motel, Inc. d/b/a Duncan's Carrier Service, also testified that the amount of work available to go around in his territory (which includes Boone County) was "awful slim," and that he cannot afford to lose any business to a new competing motor carrier. (App. 135.) As a result, if Certificate 7508 is transferred to Mr. Abner – who intends to conduct substantial operations in Boone and other counties where Classic rarely if ever operated and, unlike Classic, compete for railroad work – then Williams Transport and Duncan's Carrier Service are doomed.

D. The PSC nonetheless approved the transfer of Certificate 7508 to Mr. Abner.

The foregoing facts were established at a telephonic hearing that took place on August 3, 2020, and in the parties' post-hearing briefs. Williams Transport argued to the Administrative Law Judge ("ALJ") that the transfer of Certificate 7508 should be denied because (1) the certificate is geographically dormant as to every county except Raleigh; (2) the certificate is operationally dormant as to the transportation of railroad workers for railroad-work-related

purposes; and (3) Mr. Abner's operations will differ radically from those of Classic, effectively creating a new service without a showing of public need. (App. 356-372, 383-390, 398-401.)

On September 24, 2020, the ALJ issued a recommended decision ruling that Certificate 7508 was not operationally dormant as to the transportation of railroad workers in Raleigh County, but did not rule on the merits Williams Transport's other arguments, including but not limited to geographical dormancy. (App. 403-413.) Instead, the ALJ ruled that the application to transfer Certificate 7508 should be denied as to all counties other than Raleigh because Mr. Abner did not publish proper notice of his application in those counties. (App. 409, 412.) It appears, however, that Mr. Abner did publish notice in the other counties. Accordingly, all parties filed exceptions to the ALJ's recommended decision. On February 17, 2021, the PSC entered a final order modifying the ALJ's decision and approving the transfer of Certificate 7508 in its entirety. (App. 7-14.) Williams Transport now appeals that order.

SUMMARY OF ARGUMENT

In establishing the PSC, the Legislature created a trade-off for public utilities and motor carriers: regulated rates that limit profitability in exchange for protection from competition. The statutory framework and PSC jurisprudence protect regulated entities in two ways: (1) an applicant seeking authority to operate a new competitive service in a given territory must first prove that the existing service in that territory is inadequate, and (2) certificate-holders who do not conduct substantial operations in a given territory (while others ramp up their operations in reliance on the lack of competition) cannot subsequently transfer their dormant certificate.

In this case, the PSC has stripped Williams Transport of that protection by allowing Mr. Abner to acquire a largely dormant motor carrier certificate from Classic and use it to effectively create a new competitive service in Williams Transport's territory. Classic was not a competing

motor carrier in any sense. Nobody at Williams Transport nor Duncan's Carrier Service (another carrier that operates in Williams Transport's territory) had ever even heard of Classic. It primarily existed to transport patrons to and from its owners' restaurants in Beckley. It could not produce any independent evidence that it ever operated outside of Raleigh County, nor could it even offer the faintest detail of any activity it allegedly conducted outside of Raleigh County. It never transported railroad workers (the bulk of Williams Transport's business). It did very little business *period*, and never made a profit. In fact, it thought so little of its motor carrier authority that it gave its certificate to Mr. Abner at no charge.

Unlike Classic's owners, who were restaurateurs first and motor carriers second, Mr. Abner is in the motor carrier business full-time, and owns several profitable transportation companies. Mr. Abner will use Classic's certificate to operate a motor carrier business that differs radically from Classic in every way. He will compete with Williams Transport in Boone County, which Classic did not. He will compete with Williams Transport for railroad work, which Classic did not. He will replace a small, unprofitable avocation with a full-time, dedicated commercial enterprise that does exponentially more business. Throughout Classic's entire existence, it never posed a threat to Williams Transport, but Williams Transport cannot survive if a voracious new competitor like Mr. Abner is allowed to operate in its territory.

If Mr. Abner wants to raid Williams Transport's territory, then he should be required to prove that Williams Transport's service is inadequate. That is the system that the Legislature put in place. It is clearly wrong to allow Mr. Abner to game the system by acquiring Classic's certificate and using it to conduct substantial operations in territories where Classic cannot prove that it ever operated. The PSC's order allowing Mr. Abner to do through the back door what he cannot do through the front, based on the unsupported testimony of a lone witness who could not

even identify a single specific instance when Classic operated outside of Raleigh County, must be reversed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Williams Transport respectfully requests a Rule 20 argument, as this case involves issues of first impression and fundamental public importance.

ARGUMENT

I. A PSC MOTOR CARRIER CERTIFICATE CANNOT BE TRANSFERRED WHERE IT HAS BECOME DORMANT OR WOULD EFFECTIVELY CREATE A NEW SERVICE WITHOUT PROOF OF PUBLIC NEED.

As this Court has recognized, an integral part of our State's motor carrier regulatory scheme is "the protection of a certificate holder against unnecessary duplication or competition." *Stowers & Sons Trucking Co. v. Pub. Serv. Comm'n of W. Virginia*, 182 W. Va. 374, 378, 387 S.E.2d 841, 845 (1989); *see also Charleston Transit Co. v. Pub. Serv. Comm'n*, 142 W. Va. 750, 759, 98 S.E.2d 437, 443 (1957) ("The policy of the state as evidenced by the road law and of the statutes relating to the public service commission, its powers and duties, is not to invite or encourage ruinous competition between public carriers[.]"). Accordingly, the Legislature has mandated that (a) it is unlawful for a common carrier to operate without first obtaining a certificate of convenience and necessity from the PSC, and (b) that the PSC shall not grant a certificate if the service provided by existing carriers is reasonably efficient and adequate. *See* W. Va. Code § 24A-2-5; *see also Stowers*, 182 W. Va. at 381, 397 S.E.2d at 848.

It is true that when an applicant seeks to transfer an existing certificate, there is no automatic threshold requirement to show that the public convenience and necessity require the proposed service. But this is because an existing certificate carries with it the presumption that the public convenience and necessity are being served since that was the basis on which the

certificate was originally issued. In other words, it is presumed that the transferee will simply meet the public necessity that the transferor has been meeting. See *Chabut v. Pub. Serv. Comm'n of W. Virginia*, 179 W. Va. 111, 113, 365 S.E.2d 391, 393 (1987).

Importantly, however, the rationale behind this presumption evaporates where the certificate is dormant, or where the service that the transferee proposes would differ radically from the service previously provided by the transferor. As the PSC has explained on multiple occasions, dormancy is an important issue in a transfer proceeding because the transfer of a dormant certificate would constitute the creation of a new service without demonstrating a public need, and could adversely affect protesting carriers. See e.g. *William P. Hopson*, M.C. Case No. 16280, Comm'n Order at 3 (Apr. 17, 1978); *Mary F. Clark*, M.C. Case Nos. 01532-TC and 01534-TC-TP, at 6 (Jan. 18, 1991).⁵ Similarly, this Court has held that where an action by the PSC is tantamount to authorizing a new applicant to compete with an existing carrier, it cannot be done absent a finding that the service furnished by the existing carrier is inadequate. *Charleston Transit*, 142 W. Va. at 758, 98 S.E.2d at 442 (reversing PSC order lifting restrictions on motor carrier certificate).

A. Dormancy exists where, as here, the certificate holder failed to conduct substantial operations.

The premise underlying the dormancy rule is that where the transferor's activity has become minimal or nonexistent, it is presumed that adequate service is being provided by other carriers who will have adjusted their own operations (necessitating the commitment of capital, equipment, and manpower) to meet the public need. *William T. Elliott*, M. C. Case No. 4047, Hearing Examiner's Decision at 9 (Oct. 29, 1981)(adopted by the PSC on April 6, 1982)(citing

⁵ For the Court's convenience, Williams Transport has included copies of all cited PSC decisions (which are not readily accessible via commonly-used legal research tools) in the appendix.

Carroll Trucking Company, M. C. Case Nos. 132, 1902, and 3821, Comm'n Order at 4-5 (July 13, 1976)); accord *Mullins Garbage Co. v. Bebe Enterprise, Inc.*, Case No. 06-1778-MC-FC at 22 (Aug. 26, 2008). In other words, to allow the resurgence of dormant operating rights would result in harm to the carriers who conducted substantial operations during the period that the would-be transferor did not.

Dormancy can be geographical or operational in nature. The PSC's longstanding standard for evaluating dormancy is whether substantial operations have been performed under the certificate. *Elliott, supra*, at 9; *Mullins Garbage, supra*, at 22; *Clark, supra*, at 6. Dormancy does *not* require a finding that the carrier has completely abandoned and discontinued service. *Carroll Trucking, supra*, at 5. One of the main dormancy determinants is whether reactivating dormant operating rights would create a new, competitive service for which the public convenience and necessity have not been established. *Pro Moving Systems LTD*, Case Nos. 11-0727-MC-TC and 11-0728-MC-TC at 8 (May 17, 2012)(citing *Elk Valley Sanitation, Inc. v. Snodgrass*, M. C. Case No. 21268, Comm'n Order at 5 (June 22, 1982)).

Here, Mr. Abner seeks to acquire Certificate 7508 from Classic and use it to conduct substantial operations in counties where Classic's activity was minimal or nonexistent, and where other carriers have adjusted their operations based on the absence of competition from Classic. This would plainly result in a new competitive service that will harm existing carriers and is paradigmatic of the importance of the rule against the transfer of dormant certificates. Thus, the PSC should have rejected Mr. Abner's transparent attempt to expand his territory without demonstrating public need or inadequacy of existing service. Instead, the PSC has given Mr. Abner's gamesmanship its blessing.

B. Standard of Review.

This Court applies the following standard of review to the PSC's decision on an application to transfer a certificate of authority:

In a proceeding for a certificate to operate as a common carrier an order of the Public Service Commission will not be disturbed on appeal unless its findings are contrary to the evidence, are without evidence to support them, are arbitrary or result from a misapplication of legal principles.

Syl. Pt. 1, *Solid Waste Servs. of W. Virginia v. Pub. Serv. Comm'n*, 188 W. Va. 117, 422 S.E.2d 839 (1992). This standard is no mere rubber stamp; the Court has made clear that it *will* reverse the PSC where its order is contrary to the evidence, unsupported by the evidence, arbitrary, or based upon a mistake of law. See *United Fuel Gas Co. v. Pub. Serv. Comm'n*, 143 W. Va. 33, 46, 99 S.E.2d 1, 9 (1957); see also *Stowers*, 182 W. Va. at 381, 387 S.E.2d at 848 (“Because of this misapplication of the law, the PSC's decision must be reversed[.]”); *Charleston Transit*, 142 W. Va. at 760, 98 S.E.2d at 443 (“The final order of the Commission, not being supported by the evidence and based upon a mistake of law, must be reversed.”); *Browning-Ferris Indus. of S. Atl., Inc. v. Pub. Serv. Comm'n*, 175 W. Va. 52, 54, 330 S.E.2d 862, 864 (1985) (“After a close examination of the evidence adduced at the hearing on this matter in December, 1982, we hold that the decision made by the PSC is patently contrary to the weight of the evidence presented.”).

As discussed herein, the PSC's finding that Classic conducted substantial operations in all nine counties covered by Certificate 7508 is contrary to and unsupported by the evidence. In fact, *the only evidence* that Classic conducted *any* operations outside of Raleigh County is the unspecific and uncorroborated testimony of one of Classic's owners, *who could not provide any details* of Classic's alleged operations in the other counties *nor any supporting documentation*. Furthermore, the PSC's order is tantamount to authorizing a new applicant to engage in direct competition with an existing carrier, which, by statute, cannot be done absent a finding that the

service furnished by the existing carrier is not reasonably efficient and adequate. The PSC made no such finding, and its decision must be reversed.

II. CERTIFICATE 7508 IS GEOGRAPHICALLY DORMANT AS TO COUNTIES OTHER THAN RALEIGH BECAUSE THE RECORD CONTAINS NO EVIDENCE OF SUBSTANTIAL OPERATIONS IN THOSE COUNTIES.

Geographical dormancy occurs where the transferor has failed to perform substantial operations with respect to a representative number of points within its authorized territory. *See Elliott, supra*, at 9; *see also Cox v. Pub. Serv. Comm'n of W. Virginia*, 188 W. Va. 736, 742-743, 426 S.E.2d 528, 534-535 (1992). For example, in *Cox*, this Court affirmed the PSC's finding that most of a waste-hauler's certificated authority was dormant where the company engaged in substantial operations only at Meadowbrook Mall and certain nearby shopping plazas, and its operations elsewhere were "minimal, irregular, and virtually non-existent." 188 W. Va. at 742-743, 426 S.E.2d at 534-535. Similarly, in *Elliott*, the PSC found that a motor carrier's certificate was geographically dormant as to Brooke and Ohio Counties where the carrier's operations there were minimal, if they occurred at all. *Elliott, supra*, at 10.

As Williams Transport argued to the PSC (App. 363-365, 385-388, 398-400, 465-469), the evidence in this case shows, at best, that Classic's operations outside of Raleigh County were minimal. And even if the minimal activity that Classic claims to have conducted elsewhere could somehow be considered "substantial operations," Classic failed to produce sufficient proof of that activity.

A. Classic did not conduct substantial operations anywhere except Raleigh County.

Both this Court and the PSC have recognized that minimal operations are not sufficient to prevent a certificate from becoming dormant. *See Cox*, 188 W. Va. at 742-743, 426 S.E.2d at 534-535; *see also Elliott, supra*, at 10. In *Cox*, Harris Transfer Company had authority to

provide trash service within a ten-mile radius of the City of Clarksburg. *See Bridgeport Disposal, Inc. v. Marshall Cox*, M.C. Case No. 24309-FC, Comm'n Order at 22 (Aug. 20, 1991). From 1988 to 1990, however, Harris Transfer's residential service consisted of on-call service to only 16 customers, and its only substantial commercial service occurred at Meadowbrook Mall and nearby shopping plazas. *Id.* at 22-23. Under these circumstances, the PSC held that Harris Transfer's operations "have been minimal, irregular, and virtually non-existent *resulting in dormancy of most of the authority* under P.S.C. M.C. Certificate No. F-4740, *except for Gabriel Plaza and Hills Plaza*, where Harris Transfer Company has engaged in *substantial* lawful commercial operations under its certificate." *Id.* at 28 (emphasis added).

This Court affirmed. *See Cox*, 188 W. Va. at 743, 426 S.E.2d at 535. In doing so, the Court specifically observed that "Harris Transfer's *residential* service, *although existent*, has been limited to 'on call' trash service for *just sixteen customers*." *Id.* (emphasis added). Despite Harris Transfer's service to these 16 residential customers, the Court nonetheless affirmed the PSC's finding that Harris Transfer's authority was dormant except for commercial service to Gabriel and Hills plazas. *Id.* In other words, Harris Transfer's on-call service to 16 residential customers did not constitute "substantial operations" sufficient to keep Harris Transfer's authority outside of Gabriel and Hills plazas from becoming dormant. *Id.* Rather, Harris Transfer's operations outside of Hills and Gabriel plazas were "minimal, irregular, and virtually nonexistent," resulting in dormancy. *Id.* at 742-743, 426 S.E.2d at 534-535.

If service to 16 customers per year was not considered "substantial operations" in *Cox*, then certainly Classic's alleged service to four customers per year (or even six to eight) in Boone and other counties is not sufficient to prevent dormancy in this case. Even if the unsupported testimony of Brian Williams (who managed Classic's operations) is accurate, Classic operated in

Boone County *only four times per year*. (App. 74, 80.) Further, it operated in Fayette, McDowell, Mercer, Monroe, Nicholas, and Summers Counties no more than six times per year, and in Wyoming County six to eight times per year. (App. 74-75.) This plainly does not constitute “substantial operations” in these territories. Rather, as in *Cox*, Classic’s operations in most of its territory have been minimal (if they occurred at all), resulting in geographical dormancy as to every county except Raleigh.

(1) The PSC’s ruling that sporadically transporting four to six passengers per year constitutes “substantial operations” is clearly wrong.

The PSC has attempted to distinguish *Cox* by stating that “substantial” operations” in an urban area are different from those in a rural area, and are different for a garbage hauler compared to a taxi/limo service. As to the latter point, the PSC offered no explanation as to why a taxi/limo service that fails to use its certificated authority should be given more leeway than a garbage hauler. If anything, the garbage hauler in *Cox*, which provided on-call trash service to 16 residential customers in Clarksburg and Bridgeport, operated in those areas with far greater regularity than Classic operated in Boone County, where Classic claims to have served only four random and unidentified customers per year.

Regardless, the PSC focused its rationale on “the largely rural nature” of the counties at issue, reasoning that the lack of a market in these rural territories makes a few trips each year constitute “substantial operations.” But this ignores Classic’s clear admission that the real reason it did not do more business in these territories was lack of interest and effort, not lack of a market. In attempting to rebut the notion that Mr. Abner will create profits by competing with Williams Transport in Boone County, Classic stated that “the authority under the certificate includes eight other counties of operation, in addition to Boone County, in which Mr. Abner can run his business and make money if the transfer is approved.” (App. 379.) This makes no sense

if there is little or no market in these counties. If there is enough work available in these counties for Mr. Abner to “run his business and make money,” then there was enough work available for Classic to have done the same. Plainly, Classic cannot simultaneously (1) blame its failure to conduct substantial operations in the counties at issue on lack of a market, and (2) take the position that there is enough work available in these counties for Mr. Abner to generate increased revenues and turn a profit (something Classic never did).

And this is not the extent of Classic’s admission. Classic went on to explicitly acknowledge that the reason for its lack of operations, which has nothing to do with the rural nature of the territory. According to Classic,

Mr. Abner is involved in the motor-transportation business full-time, *whereas the Williams’ [i.e. Classic’s owners] were not*. He can devote his *time and efforts* into running the business to its *full potential* . . .

(App. 380) (emphasis added). Thus, the admitted reason Classic’s operations outside of Raleigh County were *de minimis* (if they occurred at all) is that Brian and Donna Williams were not engaged in the motor-carrier business full-time, and were unwilling or unable to devote the time and effort necessary to conduct substantial operations outside of their home county. Accordingly, the PSC clearly erred in holding that the few trips Classic claims to have made in the counties at issue constitute “substantial operations” due to the rural nature of the territories.

- (2) **The PSC’s view that a motor carrier can avoid dormancy simply by “being prepared to serve” undermines the Legislature’s protection of regulated motor carriers from unnecessary competition.**

As further support for its ruling, the PSC stated that Classic did not refuse to provide service in any of the counties when called upon, and that the PSC does not require motor carriers to create customers or devote resources to advertising. Rather, according to the PSC, the only thing a carrier must do to avoid dormancy is “hold oneself out,” which the PSC defines as “being

prepared to serve the public if called upon by a customer to do so.” (App. 12.) This cannot be the standard. If it were, then a carrier could obtain a certificate that covers 20 counties, conduct business in only one small corner of one county, receive few if any requests from the other 19 counties (because people there do not know about the carrier), and then transfer authority as to all 20 counties because they never *refused* service. While a motor carrier may not be required to create customers when there is no market, surely a motor carrier must make a legitimate effort to gain business and conduct substantial operations throughout its territory, and must be prepared to demonstrate its efforts to operate in a given territory if it expects to transfer authority to operate in that territory.

In fact, the PSC recognized in *Carroll Trucking* – one of its seminal dormancy cases – that merely “holding oneself out” provides little evidence against dormancy, at least when the rights at issue involve general transportation services, as opposed to highly specialized service. *Carroll Trucking, supra*, at 2-3. In support of its application of the “hold oneself out” standard to the present case, the PSC cited *James Eugene Fletcher, dba Jim's Rubbish Removal*, Case No. 10-1799-MC-TC (April 20, 2012). Notably, however, *Fletcher* involved the alleged dormancy of the right to provide commercial roll-off garbage service (*see Fletcher, supra*, at 3-4) – a service far more specialized than the service at issue here, which the PSC described as “general in nature” (App. 11).

In addition, in *Elk Valley* – another of the PSC’s seminal and oft-cited dormancy cases – the PSC held that the defendant’s authority to provide residential garbage service within a certain area was dormant where the defendant rendered only “sporadic” service to “a handful of customers,” even though the defendant “always held itself to serve” and never refused to serve anyone in the area. *Elk Valley, supra*, at 2-3, 6. The PSC found it significant that the defendant

did not solicit customers in the area at issue, advertise that it serves customers in that area, nor otherwise try to gain customers in the area. *Id.* at 6. Thus, by allowing Classic to transfer its entire certificate absent any evidence that it made any effort to gain customers and conduct substantial operations in eight out of the nine counties covered by its certificate, the PSC misapplied dormancy law and arbitrarily ignored its own precedents.

Indeed, to allow a motor carrier to transfer its entire certificate after the carrier made little or no effort to conduct operations in the vast majority of its territory, while other carriers adjusted their operations in the unused territory to fill the void, would subvert the Legislature's protection of regulated carriers from competition. Again, this Court has recognized, an action that is tantamount to authorizing a new motor carrier service to enter a given territory requires proof that the existing service in that territory is inadequate. *See Charleston Transit*, 142 W. Va. at 758, 98 S.E.2d at 442. Where, as here, the transferee intends to devote time and resources to operating in territories where the transferor rarely if ever operated, and where the transferor made no effort to increase operations, the transferee is for all intents and purposes creating a new competitive service in those territories. "The policy of the state as evidenced by the road law and of the statutes relating to the public service commission, its powers and duties, is not to invite or encourage ruinous competition between public carriers; on the contrary its policy is to protect such public servants in the enjoyment of their rights, so that the public may be served most efficiently and economically, and by the best equipment reasonably necessary therein." *Id.* at 759, 98 S.E.2d at 443. The PSC's ruling in this case flouts that policy, invites and encourages ruinous competition, and must therefore be reversed.

B. Classic's only evidence that it conducted *any* operations outside of Raleigh County is the uncorroborated testimony of one witness who could not provide any details.

Under longstanding PSC precedent, Classic and Mr. Abner bear the burden of proving that Certificate 7508 is not dormant. *See Elliott, supra*, at 7 (“In an application to transfer an existing certificate, the burden of proof is also on the applicant.”); *Mullins Garbage, supra*, at 22 (“Once a party establishes a prima facie case of dormancy, the carrier against whom the dormancy issue is raised bears the burden to show that its authority is not dormant[.]”) In *Elliott*, the hearing examiner’s decision (which was adopted by the PSC) found that a motor carrier’s general, unsupported allegations that it provided service in certain counties were insufficient:

During the five years immediately preceding the date of the request of transfer, there are only general allegations that service was provided to a representative number of points in the Brooke and Ohio County area. The testimony of Mr. Elliott lacked the specifics necessary for the applicant to carry his burden of proof to show that his certificate has not been allowed to become dormant. Too often Mr. Elliott was unable to remember who he had served, and when. “When” does not refer to requiring him to name specific dates, it refers only to general years. Even so, he was unable to mention sufficient details.

Elliott, supra, at 10.

Here, Classic offered no records or independent witnesses to prove where it transported passengers. Instead, it relies entirely on the unsupported, general allegations of Brian Williams, who handled Classic’s day-to-day operations.⁶ And Mr. Williams was unable to remember who Classic had transported, where it had transported them, or when. The only remotely specific detail he could offer was that most of Classic’s business was transporting people to and from restaurants that he owned in Beckley (Raleigh County). He could not identify a single specific

⁶ Classic admitted both in its discovery responses (App. 165-166, 195) and at the hearing (App. 79, 81) that it has no documents to corroborate its alleged operations. And Classic failed to offer any corroborating testimony from its drivers or alleged passengers. It’s quite telling that, despite Classic’s knowledge that there would be a hearing on its transfer application and that dormancy would be an issue, Classic could not produce even a shred of corroborating evidence for its alleged operations.

instance when Classic transported a passenger to or from Boone County, or any of the other counties at issue. Thus, as in *Elliott*, Mr. Williams' testimony lacks the specifics necessary to carry Classic's burden of proof that it conducted substantial operations with respect to a representative number of points in Boone, Fayette, McDowell, Mercer, Monroe, Nicholas, Summers, and Wyoming Counties.

Nevertheless, the PSC apparently found that Mr. Williams' general allegations were sufficient to prove Classic conducted business in these counties. In doing so, the PSC has arbitrarily ignored its own precedent as to the level of proof required, and instead applied a burden so lax that it is no burden at all. Indeed, if a prospective transferor need only make general, unsupported assertions that it operated in each county covered by its certificate, then the rule against the transfer of geographically dormant certificates has been effectively eliminated. Accordingly, the PSC's ruling cannot stand.

III. CERTIFICATE 7508 IS OPERATIONALLY DORMANT AS TO THE TRANSPORTATION OF RAILROAD WORKERS BECAUSE CLASSIC NEVER PERFORMED THIS NICHE OF SERVICE AND WAS NOT PREPARED TO DO SO.

As Williams Transport argued to the PSC (App. 366-368, 469-472), operational dormancy occurs where the transferor has failed to provide all *or a portion of the types of services* that it was authorized to render. See *Elliott, supra*, at 9; *Mullins Garbage, supra*, at 22; *Clark, supra*, at 6. Here, Classic admits that it has never transported railroad workers for railroad-work-related purposes, nor made any efforts to enter the business of transporting railroad workers. (App. 62-64, 160-164.) The PSC ruled, however, that because the language of Certificate 7508 is general in nature, it cannot become operationally dormant as to specific types or classes of transportation services. (App. 11.)

A. The PSC's ruling defies both its own precedent and the fundamental rationale for the rule against transferring dormant certificates.

The PSC has recognized that a certificate can become dormant as to particular niches of service. *See Katrina E. Taylor*, Case No. 08-0769-MC-C at 23 (Feb. 9, 2009). In *Taylor*, a party argued that the PSC cannot find its authority to provide curbside recycling to be dormant because the PSC cannot divide the recyclable wastestream into categories. The hearing examiner (whose opinion was adopted by the PSC) found that this argument is “simply wrong,” and explained as follows:

The Commission has already divided the overall municipal solid wastestream into residential, commercial and industrial categories; has granted certificates for container service only and for hand pick-up service only; and has granted certificates limited to the collection and transportation of such items as construction and demolition debris and waste tires. All of these actions constitute dividing the solid waste stream. There is no reason, and certainly no law, rule or policy, that would prohibit the Commission from doing the same regarding recyclable materials. *The Commission has divided the on-call or appointment transportation of passengers into various categories, principally taxi service and limousine service, and has granted certificates for limousine authority for various sub-categories, such as luxury limousine services, using only stretch Cadillac or Lincoln Continental vehicles, and specialized multi-passenger van service to medical facilities. If it is possible to carve out a niche of service that can be appropriately defined for the purpose of a certificate, the Commission can grant it. . . . The Commission can grant a certificate to Ms. Taylor for the specific service she proposes and, likewise, can find dormant another motor carrier's authority to provide that same service.*

Id. at 23 (emphasis added).

The transportation of railroad workers for railroad-work-related purposes, like specialized multi-passenger van service to medical facilities, is a niche of service that the PSC has carved out in the past. *See e.g. BMG Transport LLC*, Case No. 18-1032-MC-C (Oct. 19, 2018); *Louis F. Ruffner, Sr.*, Case No. 04-0365-MC-C (Oct. 4, 2004); *Venture Transportation, LLC*, Case No. 17-0284-MC-C (Feb. 14, 2018); *Dinesh Lamichhane*, Case No. 16-1201-MC-AC (Jan. 24,

2017); *Luxury Transport, LLC*, Case No. 04-0615-MC-C (Sept. 8, 2004). Accordingly, there is no reason why a motor carrier's authority cannot be dormant as to that service.

Furthermore, the rationale underlying the concept of dormancy supports the conclusion that a certificate can be dormant as to a particular niche of service. Again, West Virginia's motor carrier laws exist, in part, to protect motor carriers from unnecessary competition. *See Stowers*, 182 W. Va. at 378, 387 S.E.2d at 845. The premise underlying the rule that dormant certificates may not be transferred is that where the selling carrier's activity has become minimal or nonexistent, it is presumed that other carriers in the area have adjusted their own operations (necessitating the commitment of capital, equipment, and manpower) to meet the needs of the customers in that territory. *Elliott, supra*, at 9; *Mullins Garbage Co., supra*, at 22.

Here, Williams Transport has spent years investing in a fleet of approximately 32 vehicles and a workforce of approximately 22 employees based on the existing level of work available, and competition present, in its territory. Both Williams Transport and Duncan's Carrier Service testified that there is not enough work in their territories to support an additional competitor, and that they may go out of business if Mr. Abner starts transporting railroad workers in their territories (something that Classic never did). It would be manifestly unjust to allow Mr. Abner to put two motor carriers in jeopardy by using the transfer of Certificate 7508 as a shortcut to creating a new competitor in their territories.

Indeed, if Mr. Abner had filed an application for a new certificate of authority in Williams Transport's territory, the PSC could not grant the certificate as to the transportation of railroad workers unless Mr. Abner could prove that Williams Transport's service is inadequate. *See W. Va. Code § 24A-2-5(a)*. Why should Mr. Abner be allowed to bypass this requirement by transferring a certificate from a carrier that never transported railroad workers? The result is

the same in both circumstances: Mr. Abner is creating a new competitor for this niche of service in Williams Transport's territory. If Classic had been competing with Williams Transport for railroad work, then it may make sense to allow Mr. Abner to simply step in and take over the market share controlled by Classic. But since Classic never transported railroad workers for railroad-work-related purposes, allowing Mr. Abner to use Classic's certificate to engage in this niche of service has the same effect as granting a new certificate. As a result, Mr. Abner should have to satisfy the requirements for obtaining a new certificate. Because he has not and cannot, the PSC should have denied his application for transfer of Certificate 7508 with respect to the transportation of railroad workers for railroad-work-related purposes.

B. The PSC's justifications for its ruling ignore the facts and misapply the law.

The PSC essentially offers two justifications for its ruling. First, it quotes Mr. Abner's testimony that he will run the company "exactly like [Brian] Williams would run it, except for a profit," and will serve any type of customer who calls him for a ride.⁷ (App. 12.) This ignores the undisputed, critical differences between Classic and Mr. Abner. Classic never made any effort to offer or advertise its services to railroad companies, and as a result, never received work from the railroad. (App. 62-64, 160-164.) Conversely, the transportation of railroad workers is a major part of Mr. Abner's business, and the area railroad companies are well aware of his services. As a result, if Mr. Abner is permitted to operate in Boone County (where Williams

⁷ Mr. Abner's statement that he will run the company "exactly like [Brian] Williams would run it, except for a profit," is nonsensical. Classic never made a profit under Mr. Williams' management. If Mr. Abner runs the company exactly like Brian Williams ran it, then it will not make a profit. And if it makes a profit, then Mr. Abner is not running it exactly like Brian Williams ran it. Indeed, Mr. Abner said he expects to generate over \$100,000 per year under Certificate 7508, but under Brian Williams' management, Classic generated less than \$24,000 per year on average. Plainly, Mr. Abner intends to do things *much* differently than Mr. Williams, and one critical change will be entering the market for transporting railroad workers.

Transport does much of its railroad work), then he *will* receive calls from the railroad – calls that would have gone to Williams Transport when Classic held Certificate 7508.

Second, the PSC states that it does not require motor carriers to create customers or devote resources to advertising, and that being prepared to serve if called upon is all that is necessary. As previously discussed, this contravenes the policy underlying West Virginia's motor carrier statutes by subjecting motor carriers to ruinous competition from new market entrants. The fact that a carrier is prepared to provide a given service means nothing if the carrier makes no effort to gain customers, and cedes the entire market for that service to other carriers. It is the failure to *actually conduct* substantial operations that induces other carriers to commit capital, time, and manpower to fill the void only to have the rug pulled out from under them years later when the non-competing carrier transfers its authority to someone far more active and ambitious.

Moreover, even if being prepared to serve were all that is required to avoid dormancy, there is un rebutted evidence in this case proving that Classic was *not* prepared to serve the railroads. Two longtime Williams Transport employees, as well as Darrell Duncan (owner of another motor carrier that serves the railroad), testified that railroad workers require large vans and sport-utility vehicles because they want leg room and need space for their "grips" (two or three pieces of luggage per railroad worker). (App. 117-118, 127-128, 134.) In addition, the rough roads at the railroad yards demand vans and sport-utility vehicles (as opposed to sedans) due to their higher ground clearance. (App. 118-119, 127-129.) The only vehicles Classic has ever owned are three Lincoln Town Cars (two of which are stretch limousines) and a "party bus." As Ronnie Ellis (a Williams Transport driver with 20 years of experience) testified, a Lincoln Town Car would not be suitable for the rough roads at the railroad yards. (App. 129.)

Further, it is highly unlikely that two or three-man railroad crews would want to book a twenty-two seat “party bus” to transport them to, from, and around the premises of the railroad yards. Thus, even under the PSC’s flawed standard, Certificate 7508 is dormant as to the transportation of railroad workers for railroad-work-related purposes because the record is clear that Classic never owned vehicles suitable for this type of work, and therefore was *not* prepared for this niche of service.

IV. CLASSIC CANNOT TRANSFER CERTIFICATE 7508 TO MR. ABNER BECAUSE HIS OPERATIONS WILL DIFFER RADICALLY FROM CLASSIC’S AND EFFECTIVELY CREATE A NEW COMPETITOR IN WILLIAMS TRANSPORT’S TERRITORY WITHOUT PROOF OF PUBLIC NEED.

As Williams Transport argued to the PSC (App. 369-372, 472-476), even if Certificate 7508 were not dormant, a concept related to dormancy is that the transfer of a certificate of authority should be denied where the service the transferee proposes would differ radically in scope or type from the service previously provided by the transferor. *See Hopson, supra*, at 3; *Elliott, supra*, at 6, 11. This is because when a transferee offers a service that is substantially different than the service previously provided by the transferor, the transferee is not simply meeting the public convenience and necessity that the transferor had been meeting. Instead, the transfer would have the effect of creating a new service, which cannot be done without proof that the service provided by other carriers in the territory is inadequate. *See Hopson, supra*, at 3.

For example, in *Hopson*, the PSC denied an application for the transfer of a certificate between waste management companies where the transferor had only been providing “on call” service for the past two to three years, while the transferee proposed to provide regularly scheduled pickup service. The PSC stated that “[t]he service that the transferee proposed would differ radically from the service previously provided under the certificate,” and that the transfer “would have the effect of creating a new service which requires a showing that public

convenience and necessity demands such service, a showing that is properly made in a certificate, not a transfer case.” *Hopson*, *supra*, at 3.

Similarly, in *Elliott*, the PSC denied transfer of a certificate where the transferor never operated more than one small truck, but the transferee intended to operate seven large trucks. The PSC stated:

[I]t is clear that the scope of operations under this certificate *could potentially increase dramatically* if the transfer is approved. While Mr. Elliott operated one small truck, the Taylors intend to operate seven large ones. . . . To allow a seven-fold increase in the extent of operations under the certificate now owned by Mr. Elliott would be improper. . . . *Even if not dormant*, to allow four tractor-trailer dump trucks and three tri-axle dump trucks to replace one one-ton truck would be *clearly wrong*. The transfer of the certificate should be denied.

Elliott, *supra*, at 6, 11 (emphasis added).

A. Mr. Abner’s operations will differ radically from Classic’s operations.

Here, as in *Hopson* and *Elliott*, the type and scope of operations by the transferee will differ radically from what was done by the transferor. Classic had, at most, three vehicles in service at any given time.⁸ By contrast, Mr. Abner will have a combined total of 18 vehicles. While many of these vehicles are currently being used under his other motor carrier certificates, there is nothing stopping him from transferring some or all of these vehicles for use under Certificate 7508 after the transfer.

The PSC says it is “speculative at best” that Mr. Abner will transfer his other vehicles to Certificate 7508 (App. 12), but this ignores both the evidence and reality. When asked if he intends to increase the level of activity under Certificate 7508, Mr. Abner testified: “I hope to

⁸ As previously discussed, Classic has owned four vehicles (three sedans and a party bus) in the past five years, but Classic did not own all four the entire time, nor were they all operational the entire time. While Classic’s witnesses could not say when Classic acquired each vehicle, they testified that the party bus was not acquired until 2019, and that one of the sedans was out of service for most if not all of 2019. (App. 77, 82.) Thus, Classic had no more than three vehicles in service at any given time.

increase it, yes. *Because I have limousines of my own.*" (App. 104)(emphasis added). Further, most of Mr. Abner's vehicles (and all his larger vehicles) are currently listed under his "Ambassador Limousines" certificate (App. 252-254), which covers only Fayette and Summers Counties (App. 249). Certificate 7508, on the other hand, covers Fayette, Summers, *and seven additional counties*. It is highly improbable that Mr. Abner will keep the bulk of his fleet dedicated to a certificate that covers only two counties once he acquires a certificate that covers the same two counties *and* a huge amount of additional territory. Indeed, Mr. Abner candidly admits that he wants Certificate 7508 so that he can expand the territory in which he can operate. (App. 105.)

In addition to increasing the number of vehicles operated under Certificate 7508, Mr. Abner will also dramatically increase the level of operations. Classic did relatively little business, generating less than \$24,000 in gross annual sales on average, and never generating more than \$31,120. Mr. Abner has much more in mind than that. As he admits, he expects to make more than \$100,000 in gross annual sales, and to build the business up as much as possible to pass on to his children. (App. 103, 105.)⁹ And again, the reason he expects to do so much more business than Classic ever did is that Classic's owners were not involved in the motor carrier business full-time, whereas Mr. Abner will be. (App. 103, 380.)

Moreover, what little regular business Classic *did* conduct was concentrated in Raleigh County; its operations elsewhere were minimal and sporadic at best. Mr. Abner, however, already has authority in Raleigh County under one of his existing certificates. He does not need Classic's certificate to operate in Raleigh County; he needs it to operate in *other counties*,

⁹ Mr. Abner did not say how much more than \$100,000 he expects to make, but even at \$100,000 in gross sales, Mr. Abner will be doing *more than four times as much business* as the Classic did in the average year, and more than three times as much business as Classic did in its best year.

including Boone County (where Williams Transport conducts much of its business). (App. 100-101.)

Finally, Classic never used Certificate 7508 to transport railroad workers, and was not equipped to do so. Mr. Abner, on the other hand, is already engaged in the business of transporting railroad workers, and is going to use Certificate 7508 to expand these operations into new territories.

B. The PSC violated West Virginia law by effectively creating a new competitor in Williams Transport's territory without a showing of public need.

Despite all the foregoing differences between the service provided by Classic and the service that will be provided by Mr. Abner, the PSC held that Mr. Abner's operations will not be so drastically different that they equate to a new service. The PSC offered two rationales in support of this position, but these rationales misapply the law and ignore the evidence.

First, rather than *requiring proof* that Williams Transport's service is inadequate *before* allowing a new competitor in its territory, the PSC *assumes* that if Mr. Abner is able to take business from Williams Transport, "it would be an indication that service in those areas was either lacking or inadequate." (App. 12.) This turns the motor carrier statute, and the public policy underlying it, on its head. As this Court has recognized, the Legislature unequivocally mandated that the PSC *shall not* issue a competing certificate for a given territory *unless* the existing service in that territory is not reasonably efficient and adequate. *Stowers*, 182 W. Va. at 381, 387 S.E.2d at 848 (*citing* W. Va. Code § 24A-2-5(a)).¹⁰ Further, in light of this State's clear

¹⁰ The referenced statute states, in relevant part, as follows: "Before granting a certificate to a common carrier by motor vehicle, the commission *shall take into consideration existing transportation facilities in the territory* for which a certificate is sought, and in case it finds from the evidence that the service furnished by existing transportation facilities is reasonably efficient and adequate, the commission *shall not* grant such certificate." W. Va. Code § 24A-2-5(a) (emphasis added).

policy of protecting public carriers against unnecessary competition, the PSC cannot take actions *tantamount to* authorizing a new competitive service unless the PSC's order is predicated upon a finding that the service furnished by existing transportation facilities is not reasonably efficient and adequate. *Charleston Transit*, 142 W. Va. at 758-579, 98 S.E.2d at 442-443.

The PSC's holding in this case – that what amounts to a new competitor should be allowed into Williams Transport's territory *absent any proof of inadequacy* because the new competitor will not divert any business unless Williams Transport's service is inadequate – guts these protections and must be rejected. Indeed, the PSC could say the same thing in any dormancy case, effectively eliminating dormancy as a consideration. The premise underlying the motor carrier statutes is that these carriers are not supposed to have to compete; the trade-off for PSC control is a local monopoly. *See Charleston Transit*, 142 W. Va. at 759, 98 S.E.2d at 443. The PSC's holding that Williams Transport simply needs to out-compete Mr. Abner is therefore patently flawed.

The PSC's holding also rests on a false premise. If Mr. Abner begins operating in Williams Transport's territory, the fact that a customer may call Mr. Abner on any given occasion does not mean that Williams Transport's service is inadequate; it simply reflects the existence of a new option.¹¹ Further, according to the uncontested testimony of one of Williams Transport's owners, there is not enough work in Williams Transport's territory to share with a new competitor, and Williams Transport is barely scraping by as it is. (App. 121-124.) Thus, if Mr. Abner manages to take even a small portion of Williams Transport's business, that could spell doom for Williams Transport.

¹¹ To illustrate, if Lyft begins operating in an area where Uber has been operating without competition, and some portion of the customers in the area begin giving some portion of their business to Lyft, that does not mean that Uber's service was inadequate.

Second, the PSC reasoned that “[t]aking Williams Transport’s argument to its logical conclusion, a certificate transfer from a small carrier to a larger carrier will always result in the creation of a new service.” (App. 13.) Setting aside for a moment the fact that the PSC has previously held that transfer from a small carrier to a much larger carrier was “clearly wrong” (*see Elliott, supra*), the dichotomy here is not just small vs. large. Rather, it is also part-time vs. full time; disinterested vs. motivated; complacent vs. ambitious; ancillary vs. primary; hobby vs. commercial enterprise.

Indeed, the service provided by Mr. Abner will bear utterly no resemblance to Classic. He will be replacing a small fleet of vehicles with a much larger fleet of (different types of) vehicles. He will be replacing a very limited, ancillary pursuit that never made a profit with a robust, committed transportation company that does exponentially more business. He will take a certificate that was previously used primarily (if not entirely) in Raleigh County and use it primarily to operate in *other counties*. And he will replace an entity that did not compete for railroad work with an entity that counts railroad work as a major part of its business. Thus, *every aspect* of Mr. Abner’s service – its number of vehicles, its total operations, its geographic focus, and its target customer base – will differ and increase dramatically from that of Classic. As such, transferring Certificate 7508 to Mr. Abner will have the effect of creating a new competitive service without demonstrating a public need, and as a result, is clearly wrong.

CONCLUSION

The inquiry demanded by the motor carrier statute and underlying public policy is quite simple: will granting the application effectively create new competition in the territory at issue? Where, as here, the answer is yes, the applicant must demonstrate that existing service is not reasonably efficient and adequate. To hold otherwise subjects motor carriers, like Williams

Transport, who adjusted their operations to meet the level of need in their territory, and consistently and diligently served the public in that territory under rates imposed by the PSC, to unnecessary and ruinous competition. Because the transfer of Certificate 7508 from Classic to Mr. Abner plainly amounts to creating a new competitive service in Williams Transport's territory, the PSC's decision to allow the transfer without any proof that Williams Transport's service is inadequate cannot stand and must be reversed.

Respectfully submitted,



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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. _____

**SRC HOLDINGS, LLC (f/k/a WILLIAMS HOLDINGS, LLC),
d/b/a WILLIAMS TRANSPORT**

Petitioner/Appellant,

v.

**PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
DONALD R. ABNER, dba AMBASSADOR
LIMOUSINE AND TAXI SERVICE, and CLASSIC
LIMOUSINE SERVICE, INC.**

Respondents/Appellees.

CERTIFICATE OF SERVICE

I, David R. Pogue, counsel for SRC Holdings, LLC, d/b/a Williams Transport, do hereby certify that on this 18th day of March, 2021, I have served a true and exact copy of the foregoing "Petitioner's Brief" via hand delivery upon the following counsel of record:


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