

**IN THE SUPREME COURT OF APPEALS  
OF WEST VIRGINIA  
CHARLESTON**



**SCR HOLDINGS, LLC,  
FKA WILLIAMS HOLDING, LLC,  
DBA WILLIAMS TRANSPORT,**

**Petitioner,**

**v.**

**No. 21-0233**

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

**Respondents.**

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**STATEMENT OF THE RESPONDENT  
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA  
OF ITS REASONS FOR THE ENTRY OF ITS ORDER  
OF FEBRUARY 17, 2021 IN CASE NO. 20-0020-MC-TC**

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OF WEST VIRGINIA  
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**TO THE HONORABLE JUSTICES OF THE SUPREME COURT  
OF APPEALS OF WEST VIRGINIA:**

The Respondent Public Service Commission of West Virginia (Commission) hereby tenders for filing its reasons for the entry of its Order of February 17, 2021 in Case No. 20-0020-MC-TC that is the subject of this appeal.

**STATEMENT OF THE CASE**

On January 13, 2020, Donald R. Abner (Mr. Abner) and Donna and Brian Williams, dba Classic Limousine Service (Classic Limousine), filed an application for the transfer of P.S.C. M.C. Certificate No. 7508 from Classic Limousine to Mr. Abner.



On April 10, 2020, Commission Staff filed its Final Joint Staff Memorandum recommending the applicant publish notice of the proposed certificate transfer in a qualified newspaper and provide proof of publication to the Commission. Commission Staff also recommended granting consent and approval of the transfer pursuant to W. Va. Code §24A-2-5(c) without hearing and without specifically approving the terms and conditions if there was no protest to the application. Staff stated it believed that Mr. Abner had the experience, necessary equipment and financial ability to continue operations under the certificate. (Staff. Fin. Memo 3, April 10, 2020).

On April 14, 2020, the Administrative Law Judge directed Mr. Abner to make proper publication of the application by publishing in a newspaper, published and generally circulated in each of the following counties: Boone, Fayette, McDowell, Monroe, Nicholas, Raleigh, Summers and Wyoming.

On May 8, 2020, Williams Holdings, LLC, dba Williams Transport (Williams Transport) filed a letter of protest.

On May 11, 2020, Williams Transport filed a motion to intervene and request for hearing. Williams Transport argued it had a legal interest in the transfer application because Williams Transport holds common carrier authority for Boone and Raleigh Counties. Williams Transport contended certain parts of the Classic Limousine certificate were dormant and requested a hearing. Williams Transport Filing (May 11, 2020 at 3-4).

The ALJ conducted a telephonic hearing on August 3, 2020. References in this Statement of Reasons to the hearing transcript are indicated by "Tr." followed by the applicable page number(s). Exhibits admitted into evidence are designated as "Ex" or

“Staff Ex.” followed by the exhibit number.

On September 24, 2020, the ALJ issued a Recommended Decision authorizing the transfer of the certificate only in Raleigh County because the ALJ incorrectly understood that Mr. Abner failed to publish notice of the proposed transfer in the remaining counties.

On September 28, 2020, Mr. Abner and Classic Limousine filed exceptions to the Recommended Decision objecting to the denial of the transfer and stating that Mr. Abner had published notice in all counties except Monroe and Summers. (Transferee Exceptions 2, September 28, 2020).<sup>1</sup>

On October 8, 2020, Williams Transport filed exceptions to the Recommended Decision. Williams Transport stated that MC Certificate 7508 covers nine counties, but Classic Limousine’s operations were minimal in all of those counties except Raleigh. Further, Williams Transport asserted that Classic Limousine did not transport railroad workers for railroad-related work and did not own vehicles for this purpose. Finally, Williams Transport argued that Classic Limousine’s primary purpose was to transport customers to and from its owner’s restaurants in Beckley and the proposed change in ownership would result in such different service from the current operation that it would effectively create a new service without the showing of a public need. (Williams Transport Exceptions 8-20, October 8, 2020).

On February 17, 2021, the Commission issued a Final Order that granted the exceptions filed by Mr. Abner and Classic Limousine pertaining to publication of notice,

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<sup>1</sup> The Commission Order issued February 17, 2021 concluded that Mr. Abner substantially complied with notice requirements because notice was published in the Bluefield Daily Telegraph and the Beckley Register-Herald, both of which are of general circulation in Summers and Monroe Counties.



denied the exceptions filed by Williams Transport, and modified the Recommended Decision to authorize the transfer and assignment of MC Certificate No. 7508 from Classic Limousine to Mr. Abner in all of the certificated counties. That Order of the Commission is the subject of this appeal.

### **SUMMARY OF ARGUMENT**

The Commission has jurisdiction over the transfer of common carrier certificates of convenience and necessity to provide limousine service under W. Va. Code §24A-2-5(c), which requires prior Commission approval of a certificate transfer.

In evaluating whether to grant or deny a transfer of a common carrier certificate, the Commission focuses only on the ability of the transferee to perform the duties required by the certificate unless a party to the cases raises a dormancy claim. Determination of dormancy with respect to a motor carrier certificate of convenience and necessity is a case-by-case, fact-based endeavor. In the case on appeal, the Commission properly authorized the transfer because Mr. Abner is capable of performing the duties required by the certificate and the certificate to be transferred in this case was neither geographically or operationally dormant.

Geographic dormancy occurs when substantial activities do not occur in geographic locations within a certificated territory. In deciding that Classic Limousine's activity under its certificate constituted substantial activity, the Commission reasonably considered the nature of the service provided and the nature of the certificated area and concluded that the Classic Limousine certificate was not geographically dormant.

Operational dormancy occurs when a carrier fails to provide a portion of the services

it is authorized to perform. The Commission determined that the certificate is not dormant for the transportation of railroad workers because the certificate was a general certificate, there was no evidence that Classic Limousine ever refused a request to provide service to railroad workers or any other class of customer, and Classic consistently held itself out to provide all types of limousine service.

The Commission decision concluded that transfer of this certificate did not effectively create a new service that required a showing of public convenience and necessity. Furthermore, in the counties where they overlap, Williams Transport and Classic Limousines have different authority with respect to common carriage of passengers. The two carriers, therefore, can provide distinguishable public services.

#### **STATEMENT REGARDING ORAL ARGUMENT AND DECISION**

The Court has issued a scheduling order setting this matter for Rule 19 argument on September 15, 2021.

#### **STANDARD OF REVIEW**

Review of a final order of the Commission by the Supreme Court of Appeals of West Virginia is provided in W. Va. Code §§24-5-1 and 24A-8-1. This Court applies a deferential standard of review to Commission decisions:

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, Weirton Ice & Coal Supply Co. v. Public Service Comm'n, 161 W.Va. 141, 240 S.E.2d 686 (1977); quoted in Solid Waste Servs. v. Public Serv. Comm'n, 188 W. Va. 117,

119, 422 S.E.2d 839, 841 (1992).

This Court has recognized the broad legislative powers of the Commission to address the interests of each party. W. Va. Citizens Action Group v. Pub. Serv. Comm'n, 233 W. Va. 327, 758 S.E.2d 254 (2014) (quoting W.Va. Code §24-1-1(a)-(b) (1986)).

The principle is well established by the decisions of this Court that an 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.

Syl. Pt. 1, Sierra Club v. Pub. Serv. Comm'n, 827 S.E.2d 224, 2019 W. Va. LEXIS 175, 2019 WL 1890250 (2019) (citing United Fuel Gas Co. v. Pub. Serv. Comm'n, 143 W. Va. 33, 99 S.E.2d 1 (1957); Syl. Pt. 5, Boggs v. Pub. Serv. Comm'n, 154 W. Va. 146, 174 S.E.2d 331 (1970)).

The detailed standard for our review of an order of the Public Service Commission . . . 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. 2, Pool v. Greater Harrison Cty. Pub. Serv. Dist., 821 S.E.2d 14, 2018 W. Va. LEXIS 695, 2018 WL 5913873 (2018) (referring to Syl. Pt. 2, Monongahela Power Co. v. Pub. Serv. Comm'n, 166 W. Va. 423, 276 S.E.2d 179 (1981); citing Syl. Pt. 1, Central W. Va. Refuse, Inc. v. Pub. Serv. Comm'n, 190 W. Va. 416, 438 S.E.2d 596 (1993)).

In W.Va. Citizens Action, the Court recognized that “on questions of expediency, or as to what would be best in the interest of the petitioner, or the public served...the Legislature intended that the judgment of the [Public Service] Commission should prevail.”

W.Va. Citizens Action, 233 W.Va. at 332, 758 S.E.2d at 259, citing, United Fuel Gas Co. v. Pub. Serv. Comm'n, 73 W.Va. 571, 591, 80 S.E. 931, 939 (1914).

In finding that the Commission carefully explained its decision in an order that contains findings of fact, conclusions of law and a reasoned analysis of the issues the Court stated,

As a result, under this Court's highly deferential standard of review, we find no reason to disturb the Commission's order.

W.Va. Citizens Action, 233 W.Va. at 338, 758 S.E.2d at 265.

### **ARGUMENT**

I. The Commission followed its standard policies and holdings of this Court for transfer applications.

West Virginia law provides that all common carriers by motor vehicle are affected with a public interest and are subject to the laws of West Virginia pertaining to public utilities and common carriers. W. Va. Code §24A-2-1. The law requires a common carrier by motor vehicle operating within the State to first obtain a certificate of convenience and necessity from the Commission. W. Va. Code §24A-2-5(a). Subsection (c) provides in part,

No certificate issued under this chapter shall be assigned or otherwise transferred without the approval of the commission.

Chapter 24A does not set a standard of review with respect to transfers. Through case decisions, the Commission and this Court have articulated three measures for deciding whether to approve a transfer:

(1) That the proposed transferee is a fit and proper person to hold the

- certificate to serve the public as a common carrier; and
- (2) That the proposed transferee has the financial ability to provide the service; and
  - (3) That the certificate is not dormant -- that the holder thereof (transferor) has actively engaged in operation under the certificate sought to be transferred.

Solid Waste Servs., 188 W. Va. At 119-120, 422 S.E.2d at 841-842. Public convenience and necessity is not an issue in a transfer proceeding because that burden of proof is presumed to have been met when the certificate was originally issued. Chabut v. Public Serv. Comm'n, 179 W.Va. 111, 113, 365 S.E.2d 391, 393 (1987); Bebe Enterprises v. Public Serv. Comm'n, 201 W.Va. 19, 23, 491 S.E.2d 19, 23 (1997).

When a party in a transfer case makes an allegation of dormancy, the Commission evaluates dormancy in light of all surrounding circumstances. Fletcher, dba Jim's Rubbish Removal, Case No. 10-1799-MC-TC, Recommended Decision July 29, 2011, 2011 W. Va. PUC LEXIS 1809, adopted by Comm'n Order April 20, 2012, 2012 W. Va. PUC LEXIS 751. Dormancy can be geographical or operational in nature and the standard applied by the Commission is whether substantial operations have been performed under the certificate. The Commission does not place strict reliance on the period of time in which a carrier does not operate, the current makeup of a motor carrier's customers, or lack of advertising to determine whether a certificate is dormant. Id. at Conclusions of Law 1 & 2. Infrequent customer requests for a particular service do not equate to dormancy of a service that is infrequently requested. Id. at 3-4; Jochum, Jr. et al, Case Nos. 17-0806-MC-TC and 17-0808-MC-TC, Comm'n Order July 11, 2018, 2018 W. Va. PUC LEXIS 1179, at Conclusion of Law 1.



The Commission processed the transfer at issue in this appeal in accordance with its normal practice which is that upon filing of a motor carrier certificate transfer application, Staff conducts an evaluation of fitness and financial ability of the transferee to provide the services authorized by the certificate. If Staff finds the transferee is fit and financially capable, Staff recommends approval of the transfer, subject to publication in the certificated counties of the notice of transfer. If Staff regards the transferee as not fit or financially capable, Staff recommends that the Commission deny the transfer, unless the transferee produces evidence to contradict the finding of Staff. The Commission considers the third measure, dormancy, if a competing authorized carrier that is a party to the case raises the issue. The Commission must then determine whether any portion of the certificate is dormant. The Commission will disallow the transfer of the certificate, or portion thereof, if the Commission finds dormancy.

The Commission process is consistent with the holdings of this Court. In Bebe Enterprises, Inc. v. Pub. Serv. Comm'n, 201 W.Va. 19, 23, 491 S.E.2d 19 (1997), this Court stated,

In Solid Waste Services of West Virginia v. Public Service Commission, 188 W. Va. 117, 422 S.E.2d 839 (1992), we reiterated that “the chief inquiry at a transfer hearing is the ability of the proposed new certificate holder to carry on the business.” Id. at 119, 422 S.E.2d at 841, quoting Syl. Pt. 2, Chabut v. Public Service Commission, 179 W. Va. 111, 365 S.E.2d 391 (1987). The rule governing the PSC's examination of applications for approval of transfer provides as follows:

Upon an application for approval of the transfer and assignment of a certificate or permit, the certificate or permit holder, i.e., transferor, and the transferee, i.e., the person seeking to acquire said certificate, shall appear at the hearing. The transferor should be prepared to testify as to the nature and extent of his operation under the certificate sought to be transferred that he



has actively been operating under the certificate and that the certificate is not otherwise dormant. The transferee should be prepared to show that he is financially able to provide the service, that he has the experience and the necessary equipment to provide the proposed service, that he is able to secure proper liability insurance on all motor vehicles to be operated, and should give a general description of his proposed operation.

In this matter, Staff found that Mr. Abner was a capable provider. (Tr. 84-85; Staff Ex. 1). No other party asserted or presented any evidence that Mr. Abner lacked the ability to operate the certificate. To the contrary, in its briefs filed with the Commission and this Court, Williams Transport has described Mr. Abner's significant experience providing common carriage of passengers. (Williams Transport Brief August 24, 2020 at 5-6; Petition for Appeal March 18, 2021, Case No. 21-0233). The Commission concluded that Mr. Abner is an experienced common carrier whose operation will fulfill the public need that justified the original grant of the certificate. (Recommended Decision September 24, 2020, at Findings of Fact 8, 9, 11, 13 and Conclusion of Law 1). The Commission also concluded that the specific facts in the record did not support a finding of geographic or operational dormancy. (Comm'n Order at Finding of Fact 3 and Conclusions of Law 2 and 3). This Court's practice is not to substitute its judgment for that of the Commission on factual inquiries. Chesapeake and Potomac Telephone Company v. Pub. Serv. Comm'n, 171 W. Va. 494, 488, 300 S.E.2d 607, 611 (1982). The transfer of the certificate from Classic Limousine to Mr. Abner satisfied the Commission standard of review and was properly authorized.

II. The Classic Limousine certificate was not geographically dormant.

A motor carrier certificate becomes geographically dormant when the certificate

holder fails to conduct substantial activity in portions of the certificated area. Cox. v. Pub. Serv. Comm'n, 188 W.Va. 736, 426 S.E.2d 528 (1992); William P. Hopson, M.C. Case No. 16280, Comm'n Order at 3 (April 17, 1978), William T. Elliott, M.C. Case No 4047, Hearing Examiner's Decision at 9 (Oct. 29, 1981). To determine whether the certificate in this case was geographically dormant, the Commission had to decide what constitutes substantial activity for limousine service in the certificated territory. That determination requires a review of the specific facts and circumstances of a certificate. Further, substantial activity for a limousine differs from that of garbage service.

PSC MC Certificate No. 7508 that is the subject of this appeal authorizes the holder:

to operate as a common carrier by motor vehicle in the transportation of passengers in limousine service between points and places in Boone, Fayette, McDowell, Mercer, Monroe, Nicholas, Raleigh, Summers and Wyoming Counties, on the one hand, and points and places in West Virginia, on the other hand.

(Ex. 1). Williams Transport asserts that Classic Limousine did not conduct substantial activity in all nine of those counties. The unrefuted, sworn testimony from the operator of Classic Limousine, however, is that Classic Limousine conducted approximately 80% of its business in Raleigh County, and every year provided limousine service several times in each of the other eight counties. (Tr. 47-51, 55-56).

This case involves a limousine certificate and public requests for limousine service. While garbage collection and hauling service is a public utility service that is needed on a regular and recurring basis, limousine service is not a service that the general public requires frequently or on a regular schedule. As compared to other types of common carriage, requests for limousine service are expected to be irregular and infrequent. It is

also relevant that the certificate at issue in this appeal covers a largely rural area of the state. Generally, limousine service is more robust in urban areas due to the larger population base and presence of airports, urban restaurants, special events, and performances that one associates with limousine service. It is not surprising, then, that the majority of the requests for limousine service under the Classic Limousine certificate occurred in Beckley, the largest urban area in the certificated counties. Given the nature of the service provided and the nature of the certificated area, the Commission used its statutory discretion to determine that the several service calls per county described in Mr. Charles Brian Williams' testimony constituted substantial service. (Tr. 47-50, 55; February 17, 2021 Comm'n Order at 5, Finding of Fact 3, Conclusion of Law 2). Based on facts in the record, the Commission reasonably concluded that Classic Limousine conducted substantial activity throughout the service territory and service was not dormant in any of the nine certificated counties. (Tr. 47-50; 55; Ex. 3, Supplemental Answer 10; Ex. 4, 2<sup>nd</sup> Supplement Answer 9).

Furthermore, the record is devoid of any evidence that Classic Limousine ever refused to provide service when called upon. The evidence showed instead that Classic Limousine was willing and able to provide service in all counties when called upon which is all the Commission looks to when determining dormancy. (Ex. 4, 2<sup>nd</sup> Supplemental Answer 10). The Commission does not require carriers to perform all types of services consistently, create customers or even advertise their service. As the Commission stated in a Final Order dated April 20, 2012 in Fletcher,

Although the Commission expects certificated motor carriers to fulfill

their obligations to provide the public with the service their certificates allow, the Commission does not require motor carriers to create customers. Similarly, the Commission does not require motor carriers to devote resources to advertising their services. The Commission can, however, rescind the right to provide certificated services if a motor carrier demonstrates an unwillingness or inability to provide them. To “hold oneself out,” therefore, does not entail promoting or providing every service all the time. It is instead being prepared to serve the public if called upon by a customer to do so. The ALJ correctly observed that there was no evidence presented that JRR refused service to prospective customers. Mr. Fletcher testified to that effect. Mr. Fletcher also testified that he would provide commercial service if asked. Neither Smallwood nor Walls produced witnesses or evidence to rebut that testimony.

Case No. 10-1799-MC-TC at 6 (emphasis added). Classic Limousine “held itself out” for service throughout the certificated area. (Ex. 4, 2<sup>nd</sup> Supplemental Answer 10).

The Classic Limousine operations are in stark contrast to limousine operations that the Commission has declared to be dormant. In I-79 Mobile Home Sales, Inc., dba Wilderness Plantation Limousine et al v. Fairmont Taxi, LTD, MC Case No. 30378-99-FC, Recommended Decision October 15, 1999, 1999 W. Va. PUC LEXIS 7158, adopted by Comm’n Order January 24, 2000, 2000 W. Va. PUC LEXIS 1350, the Commission concluded that a certificate was dormant when the evidence established that the certificate holder never obtained, registered or operated a limousine in the eight years it held the certificate. Similarly, in Williams dba Williams Transport v. Mack’s Transportation, Inc., MC Case No. 30020-97, Recommended Decision December 8, 1997, adopted Comm’n Order April 10, 1998, the Commission determined a certificate holder’s operations to be dormant when the Commission had suspended its certificate and the carrier failed to license vehicles or operate for four years. Classic Limousine’s continuous operations do not compare to the limousine certificates declared dormant by the Commission.



Williams Transport misapplies the Cox matter to this appeal. In Cox, this Court agreed with the Commission's finding that trash service for only sixteen "on call" customers and some limited commercial service in Clarksburg and Bridgeport was not substantial service. The circumstances in the current case are entirely different from those in Cox. The public convenience and necessity require garbage collection service for residences and commercial enterprises on a regular and recurring basis. The same is not true for limousine service. Furthermore, the Cox matter involved trash service in a more urbanized area. Limousine service, in a rural territory, however, is generally infrequent, non-recurring and irregular. Substantial activity under a limousine certificate for a rural territory, therefore, cannot be determined on the same criteria as substantial activity under a solid waste collection service certificate for an urban area. The Commission decision in this case, therefore, is not inconsistent with this Court's holding in Cox.

The Commission reasonably determined that Classic Limousine conducted substantial limousine service activity under its certificate and did not effectively abandon service to any portion of the certificated area. The Commission was therefore correct in refusing to conclude that the certificate was geographically dormant.

III. The certificate to be transferred is not operationally dormant as to the transportation of railroad workers.

The Commission authorized Classic to provide any and all types of limousine service requested by customers without restriction, including the ability to transport railroad workers by limousine. (Ex. 1) While Classic Limousine was not requested to provide, and therefore did not provide, service to railroad workers, the record contains no

evidence that Classic Limousine received a request for this service and refused to provide it. As the new holder of MC Certificate No. 7508, the Commission expects Mr. Abner, operating as Classic Limousine, to provide that service if called. Indeed, Mr. Abner testified that “[i]f brought to my attention that airplane pilots, bus drivers, janitors, anybody that needs a ride under my permit, I’ll offer.” (Tr. pg. 74).

As the Commission stated in Fletcher, the Commission does not rely on the current makeup of a carrier’s customers in evaluating dormancy. Fletcher at Concl. of Law 1. Further, the Commission does not require a carrier to create customers, but only to “hold oneself out” and be prepared to serve. Id. Just as the Commission declined to conclude that the certificate in Fletcher was dormant as to commercial customers when commercial entities did not request service from Fletcher for eight years, the Commission similarly found that a lack of requests for railroad worker transportation did not cause a portion of the Classic Limousine certificate to be dormant. A carrier that is willing and able to provide service when called upon is not a dormant carrier. Nothing in the record indicates that Classic Limousine was unwilling to provide service for railroad workers when requested.

The Commission has not always been as steadfast in the idea that a carrier need only “hold oneself out” in order to avoid dormancy. Williams Transport notes two cases from approximately forty years ago addressing dormancy in garbage hauling cases. Carroll Trucking Company, M. C. Case Nos. 132, 1902 and 3821, Comm’n Order July 13, 1976, and Elk Valley Sanitation, Inc. v. Snodgrass, M. C. Case No. 21268, Comm’n Order Reversing Hearing Examiner’s Decision June 22, 1982. In Carroll Trucking, the Commission noted “[t]he Public Service Commission has long held that the mere holding



oneself out to provide a service is sufficient rebuttal to an allegation of dormancy.” The Commission went on to say that “holding oneself out” may be sufficient when the certificate holder was engaged in a specialized service, but it may no longer be enough for general service. In Elk Valley, the Commission went further and found that “holding oneself out” was not enough to prevent dormancy when the issue involved residential garbage service. The Commission’s analysis and thinking regarding dormancy has evolved over time as reflected in Fletcher, Jochum, Jr. and the instant case.

Williams Transport incorrectly argues that Classic Limousine could not provide limousine service to railroad workers because its fleet vehicles were not appropriate for that type of work. There is, however, no statutory or Commission rule requirement specific to limousine service for railroad workers. The fact that railroad workers prefer to be transported in a large van or sport utility vehicle does not mean that Classic Limousine was unable to provide limousine service to railroad workers. A certificated common carrier providing limousine service must use a “limousine” defined in Commission rules as a “motor vehicle, equipped with at least three (3) doors and with seating capacity, and separate sets of working seatbelts, for at least five (5) passengers.” Rule 1.8.m of the Commission’s Rules Governing Motor Carrier, Private Commercial Carriers, and the Filing of Evidence of Insurance and Financial Responsibility by Motor Carriers, 150 C.S.R. 9 (Motor Carrier Rules). Classic Limousine owned limousines as defined by the Motor Carrier Rules. (Tr. 15; Exs. 2, 3, 5, 6). Although one witness testified that railroad workers refused service when the witness drove a small vehicle (Tr. 102-103), there is no evidence that they would have refused service from the Classic Limousine vehicles. Furthermore,

there is no evidence Classic Limousine was asked to use a certain type of vehicle to provide service to railroad workers and refused to provide that service.

Second, a certificated carrier may easily remedy any lack of a “preferred” vehicle when the need arises because large vans and sport utility vehicles are mass produced and widely sold. Once again, there is no evidence that railroad personnel requested that Classic Limousine provide limousine service and Classic Limousine refused to provide the service or refused a request to provide service with a certain type of vehicle.

The Motor Carrier Rules do not define the transportation of railroad workers as a subcategory of motor carrier service that should be the subject of independent common carrier certificates.<sup>2</sup> With respect to passenger service categories, the Motor Carrier Rules define only “Commercial vehicle”,<sup>3</sup> “Limousine”,<sup>4</sup> “Private commercial carrier”,<sup>5</sup>

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<sup>2</sup> On April 26, 2021, Governor Justice signed into law effective July 6, 2021, HB 2890 amending Chapter 24A of the W. Va. Code to add a definition of “luxury limousine service” to the Code and to exempt luxury limousine service from economic and market entry jurisdiction of the Commission. As revised, W. Va. Code §24A-1-2 will provide that newly defined luxury limousines may not provide service to railroad crews. Because revised W. Va. Code §24A-1-3(17) states that the Commission will continue to have safety and insurance jurisdiction over luxury limousines, the Commission will consider amendments to its Motor Carrier Rules. The statutory revisions in HB 2890 were not in effect when the Commission issued its February 17, 2021 Order.

<sup>3</sup> “Commercial vehicle means any motor vehicle operated over the public highways of West Virginia, for any commercial purpose, in interstate or intrastate commerce, if that motor vehicle is: (a) . . . ; (b) a motor vehicle designed to transport more than fifteen (15) passenger, including the driver; or (c) . . .” Motor Carrier Rule 1.8.f.

<sup>4</sup> “Limousine means a motor vehicle, equipped with at least three (3) doors and with seating capacity, and separate sets of working seatbelts, for at least five (5) passengers, including the driver, in which a passenger or set of passengers is transported at a rate not less than ten dollars (\$10.00) per vehicle trip or vehicle round trip, if that vehicle either (a) is used to transport passengers on a frequent basis between fixed points, such as airports and hotels; or (b) is used as a specialized limousine.” Motor Carrier Rule 1.8.m.

<sup>5</sup> “Private commercial carrier means any person who undertakes, whether directly or by lease or other arrangement, to transport . . . for himself or herself . . . over the public highways of West Virginia . . . for any commercial purpose, . . . more than fifteen (15) passengers, including the driver.” Motor Carrier Rule 1.8.q.

“Taxicab”,<sup>6</sup> “Specialized limousine”<sup>7</sup> and “Specialized multipassenger van service”<sup>8</sup> as subcategories. The Commission’s review of its records of current limousine and taxi certificates revealed a single common carrier certificate solely for the transportation of railroad workers.<sup>9</sup> The single certificate resulted from the carrier’s unprotested request that the Commission divide its authority into three separate categories. See Burns & Church Transportation Company, Inc., Case Nos. 11-0494-MC-AC, 11-0495-MC-AC and 11-0496-MC-AC, Recommended Decision July 29, 2011, 2011 W. Va. PUC LEXIS 1800, final order as of August 18, 2011.

The Commission has not declared a general authority limousine certificate dormant with respect to transportation of railroad workers in any fully litigated proceeding. Only as a result of settlement agreements do several existing common carrier certificates exclude the transportation of railroad workers. Williams Transport cited these examples: BMG Transport LLC, Case No. 18-1032-MC-C, Recommended Decision Oct. 19, 2018, 2018 W. Va. PUC LEXIS 1704, Comm’n Order October 25, 2020 adopting Recommended

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<sup>6</sup> “Taxicab means a motor vehicle, equipped with at least three (3) doors and having a seating capacity and separate sets of working seat belts for at least four (4) passengers, including the driver, that is used to transport a passenger or passengers.” Motor Carrier Rule 1.8.x.

<sup>7</sup> “Specialized limousine means a limousine that is either: (a) a luxury vehicle; (b) a vehicle that has seating capacity, and separate sets of working seatbelts, for at least eight (8) passengers; or (c) a vehicle that was operated, and properly registered with the Commission, under a “limousine” or “specialized limousine” certificate on or before January 1, 2002.” Motor Carrier Rule 1.8.v.

<sup>8</sup> “Specialized multipassenger van service means the transportation, in vans, to and from physicians’ offices, clinics, hospitals, and other health-care facilities, of passengers who neither (a) need assistance in entering or exiting the vans nor (b) are expected to require the presence of a trained emergency medical technician during transport.” Motor Carrier Rule 1.8.w.

<sup>9</sup> The Commission also found two contract carrier certificates solely for the transportation of railroad workers. Contract carriers do not have authority to hold themselves out to provide service to the general public. W.Va. Code §24A-3-1 et seq.

Decision effective October 30, 2018; Louis F. Ruffner, Sr., Case No. 04-0365-MC-C, Recommended Decision Oct. 4, 2004, 2004 W. Va. PUC LEXIS 4774, final as of October 24, 2004; Venture Transportation, LLC, Case No. 17-0284-MC-C Recommended Decision Feb. 14, 2018, 2018 W. Va. PUC LEXIS 172, final March 6, 2018; Dinesh Lamichhane, dba Beckley Green Cab, Case No. 16-1201-MC-AC, Recommended Decision Jan. 24, 2017, 2017 W. Va. PUC LEXIS 87, final February 13, 2017; Luxury Transport, LLC, Case No. 04-0615-MC-C, Recommended Decision Sept. 8, 2004, 2004 W. Va. PUC LEXIS 4280, final September 28, 2004. When the applicants applied for these certificates they did not ask to exclude railroad worker transportation. Rather, an applicant sought a new certificate to provide taxi or limousine service and an incumbent provider objected to the certificate. The incumbent provider agreed to withdraw the objection provided the applicant agreed to exclude the transportation of railroad workers. These exclusion certificates, therefore, were solely the result of litigation and settlement agreements. The instant case, however, was not a settled case and Mr. Abner and Williams Transport did not agree to exclude transportation of railroad workers from the certificate.

For the reasons discussed above, the record in the instant case did not support a finding of dormancy with respect to railroad worker transportation.

IV. The transfer of the certificate did not effectively create a new service.

Williams Transport argues incorrectly that transfer of MC Certificate No. 7508 will result in Mr. Abner providing new common carrier service without having to show public need. As previously discussed, the Classic Limousine certificate is general in nature and Classic Limousine was authorized and available to provide transportation to railroad



workers at any time if requested. Furthermore, public convenience and necessity is not an issue in a transfer proceeding because that burden of proof is presumed to have been met when the certificate was originally issued. Chabut, 179 W.Va. at 113, 365 S.E.2d at 393; Bebe Enterprises, 201 W.Va. at 23, 491 S.E.2d at 23. Whether Mr. Abner will succeed in conducting more activity under its general limousine certificate is unknown. If, however, Mr. Abner is able to generate more business, the increase could be attributed to an increase in demand after the transfer, or to service having been lacking or inadequate prior to the transfer. To accept Williams Transport's argument that any potential increase in business under the certificate should be prohibited would unfairly limit the ability of certificate holders with a small operation to transfer a certificate to a larger operator. Lastly, disallowance of a transfer on grounds that a transferee is a larger operator, or is more capable and competent than its predecessor would conflict with the primary Commission consideration in a transfer proceeding to ensure the fitness and financial capability of the transferee. Ideally, all authorized transfers result in improved public service to meet the public convenience and necessity that was the basis for the grant of the certificate.

1. Williams Transport and Classic Limousine do not have the same common carrier authority in the counties they both serve.

Williams Transport does not hold the same general authority as Classic Limousine. The Classic Limousine MC Certificate No. 7508 grants general limousine authority, meaning that Classic Limousine may use a wider range of vehicles to provide public service. (Williams Transport Ex. 1). Any vehicle equipped with at least three doors and with seating capacity, and separate sets of working seatbelts, for at least five passengers

will suffice. Motor Carrier Rule 1.8.m. With respect to the counties where Classic and Williams Transport both have authority, Williams Transport's authority is for "specialized limousine service" (Boone, Raleigh, and Summers counties) (PSC MC Certificate Nos. 6757 and 6922) or "luxury limousine service, such as that utilizing a Cadillac or Lincoln" (Summers and Fayette counties) (PSC MC Certificate Nos. 6928 and 7298). The difference in authority is important because Classic Limousine will be available and required to provide public service to a railroad customer, or any customer, that seeks transportation of passengers in a vehicle dissimilar to a Cadillac or a Lincoln and that holds fewer than eight passengers. Williams Transport, however, could not legally provide passenger service in a vehicle dissimilar to a Cadillac or a Lincoln and that holds fewer than eight passengers. Williams Transport's objections to the certificate transfer in this case should be considered in light of the fact that the operating authorities are distinguishable.

### **CONCLUSION**

The Commission focuses on the transferee's ability to provide the authorized service, consistent with the rulings of this Court. If a party challenges the transfer for dormancy reasons, the Commission must then determine what, if any, portion of the certificate is dormant. In this matter, it is uncontested that Mr. Abner is capable of providing the authorized service. Further, the Commission determined based upon the specific facts of this certificate that no portions of the certificate are dormant and that the transfer would not create a new public service for which a showing of public need was required. The Commission was therefore correct to authorize the transfer. The




Commission did not exceed its statutory jurisdiction and based its decision on the evidence to reach the substantively proper result.

Respectfully submitted this 3<sup>rd</sup> day of May, 2021.

THE PUBLIC SERVICE COMMISSION  
OF WEST VIRGINIA

By Counsel,


  
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CERTIFICATE OF SERVICE

I, Jessica M. Lane, Counsel for the Public Service Commission of West Virginia, do hereby certify that a copy of the foregoing "Statement of the Respondent, Public Service Commission, of its Reasons for the Entry of its Order of February 17, 2021 in Case No. 20-0020-MC-TC" has been served upon the following parties of record by First Class United States Mail, postage prepaid this 3<sup>rd</sup> day of May, 2021:

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