

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA in the City of Charleston on the 17th day of February 2021.

CASE NO. 20-0020-MC-TC

DONALD R. ABNER, dba
AMBASSADOR LIMOUSINE AND TAXI SERVICE

Application for the transfer of P.S.C. M.C. Certificate No. 7508 to Donald R. Abner, dba Ambassador Limousine and Taxi Service.

COMMISSION ORDER

The Commission modifies the Recommended Decision in this matter and approves the transfer of a certificate.

BACKGROUND

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

On January 13, 2020, the Commission referred this case to the Administrative Law Judges (ALJ) Division for entry of a decision on or before August 10, 2020.

On April 10, 2020, 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. 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 protest to the application.

On April 14, 2020, the ALJ directed Ambassador to make proper publication of its 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 April 23, 2020, Ambassador filed an affidavit of publication from The Register-Herald evidencing proper publication in Raleigh County.

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 Ambassador's application because it holds common carrier authority for Boone and Raleigh Counties. Williams Transport contended certain parts of Classic Limousine's certificate was dormant and requested a hearing in this matter.

On May 12, 2020, the ALJ granted Williams Transport's motion to intervene and scheduled a hearing for June 25, 2020.

On June 11, 2020, Williams Transport filed a motion to continue on grounds that it would not have sufficient time to review Ambassador's and Classic Limousine's response to its interrogatories and prepare for the hearing on June 25, 2020.

On June 15, 2020, the ALJ granted Williams Transport's motion to continue and rescheduled the hearing for July 31, 2020.

On July 22, 2020, the ALJ scheduled a telephonic hearing for August 3, 2020.

On September 24, 2020, the ALJ issued a Recommended Decision authorizing the transfer of the certificate, but only in Raleigh County due to failure to publish notice in the remaining counties.

On September 28, 2020, Ambassador and Classic Limousine filed exceptions to the Recommended Decision. Ambassador and Classic Limousine objected to the denial of the transfer on procedural grounds and requested the Commission allow the transfer in all counties. Despite not providing the affidavits of publication prior to the hearing, Ambassador stated that it published notice in Boone, Fayette, McDowell, Mercer, Nicholas and Wyoming Counties, as indicated in the affidavits attached to its exceptions. Publication did not occur in Monroe and Summers Counties. Ambassador continued that Williams Transport objected to the transfer in Boone County based on alleged dormancy and not based on lack of publication.

On October 1, 2020, Ambassador filed supplemental information to its exceptions. Ambassador noted the affidavits of publication were submitted at the hearing, showing publication occurred in all counties except Monroe and Summers.

On October 8, 2020, Williams Transport filed exceptions to the Recommended Decision. Williams Transport stated that 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, Classic Limousine's primary purpose was to transport customers to and from its owner's restaurants in Beckley. Williams Transport argued to the ALJ that the certificate was geographically dormant in all counties except Raleigh, operationally dormant as to the transportation of railroad workers and that 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 noted the ALJ ruled the certificate was not operationally dormant for railroad workers in Raleigh County, but did not address the rest of Williams Transport's arguments because of a failure to publish notice by Ambassador. Williams Transport acknowledged that notice actually did occur.

Williams Transport stated that Ambassador was trying to do through the back door that which it cannot do through the front door; Ambassador wants to create a new service on the back of a certificate Classic Limousine barely used in 8 of the 9 counties and never used to transport railroad workers. Williams Transport argued that as the Commission has explained, 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. William P. Hopson, M.C. Case No. 16280, Comm'n Order at 3 (Apr. 17, 1978); Mary E. Clark, M.C. Case Nos. 01532-TC and 01534-TC-TP, at 6 (Jan. 18, 1991). Further, if 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 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 Commission on April 6, 1982); Mullins Garbage Co. v. Bebe Enterprise, Inc., Case No. 06-1778-MC-FC at 22 (Aug. 26, 2008). The standard for evaluating dormancy is whether substantial operations have been performed. Id.

Williams Transport argued that the certificate was geographically dormant in all counties except Raleigh because Classic Limousine did not provide evidence of substantial activity in any county other than Raleigh. Williams Transport stated the Commission has held, and the Supreme Court upheld, that portions of a certificate become dormant when the operations in those areas are minimal and irregular. See Elliott; Cox v. Pub. Serv. Comm'n of West Virginia, 426 S.E.2d 528, 534 (W.Va.1992). Williams Transport stated the only evidence presented to show activity in other counties was the testimony by the owner of Classic Limousine who testified that Classic Limousine made trips to the remaining counties. That testimony contained no specifics, however, and merely referenced the possibility of a handful of yearly trips to the other counties. Initially, the ALJ correctly stated the carrier against whom assertions of

dormancy are raised bears the burden to show its authority is not dormant. Then, the ALJ incorrectly stated the Complainant bears the burden of proof as to dormancy. Williams Transport noted in Elliott, a certificate transfer case, the Commission stated that the burden of proof is on the applicant and in Mullins Garbage, the Commission found that once a party establishes a prima facie case of dormancy, the carrier against whom the dormancy assertion is raised bears the burden to show that its authority is not dormant. Williams Transport argued Ambassador did not meet that burden.

Williams Transport stated that the ALJ incorrectly found that because the certificate was general in nature it could not be dormant for certain types of transportation. Williams Transport stated that the Commission has recognized that a certificate can become dormant as to particular niches of service. Katrina E. Taylor, Case No. 08-0769-MC-C at 23 (Feb. 9, 2009). Further, the Commission has granted certificates for the transportation of railroad workers. If Ambassador had filed for a new certificate to transport railroad workers in these counties, Williams Transport argued that the Commission could not grant that certificate absent evidence of inadequate service to railroad workers by Williams Transport. No such evidence was presented in this matter.

Lastly, Williams Transport asserted that a transfer proceeding should not create a new service and that it is clear that Ambassador will expand on the services provided by Classic Limousine. Williams Transport stated that it has devoted a tremendous amount of time and resources in developing and maintaining its business without any sign of competition from Classic Limousine. To allow Ambassador to acquire Classic Limousine's certificate and use it to raid Williams Transport's territory would be severely unfair and prejudicial to Williams Transport.

DISCUSSION

Notice

The ALJ mistakenly found that Ambassador provided notice of this certificate transfer only in Raleigh County. Ambassador Exhibit B contained affidavits of publication for all the certificated counties, except Monroe and Summers. The ALJ's decision to allow only the transfer of the certificate in Raleigh due to lack of publication was incorrect and cannot stand.

Due to the COVID-19 pandemic, the only newspaper in Summers County, the Hinton News, has not been operating during most of the last year. Further, the Bluefield Daily Telegraph and the Beckley Register-Herald published notice of this transfer and both newspapers are of general circulation in Monroe and Summers Counties. The Commission has proposed new Rules for the Construction and Filing of Tariffs, 150 C.S.R. 2 (Tariff Rules) that will eliminate the need to publish in a newspaper that is published and that is of general circulation in each county and will require publication

only in a newspaper that is of general circulation in each of the counties served. The Commission finds the notice provided in this matter substantially complied with the publication requirements in all counties. The Commission will, therefore, grant the Ambassador and Classic Limousine exceptions related to publication.

Dormancy

Williams Transport argued in its exceptions that the certificate to be transferred is geographically dormant in all counties except Raleigh because it is the only county where Classic Limousine conducted "substantial operations." The specific facts and circumstances of this case are relevant to a determination of what constitutes "substantial operations." Substantial operations in an urban area are certainly different from those in a rural area and are different for a garbage hauler compared to a taxi/limo service provider. It is not as simple as Williams Transport's comparison of the number of customers involved in the Cox case (urban garbage hauler) and the number of customers served by Classic Limousine (mostly rural limousine service). In this circumstance, the operator of Classic Limousine testified that 80% of its business occurred in Beekley/Raleigh County, but when called upon it made a handful of trips each year into the eight other counties (Transcript dated August 3, 2020, pages 47-51, 55-56). Given the largely rural nature of the area covered by this certificate, it is not particularly surprising the majority of the calls for limousine service occurred in Beekley. The mostly rural nature of the territory coupled with the existence of competition from other carriers make the few trips each year constitute substantial operations. Further, Classic Limousine did not refuse to provide service in any of the counties when called upon. Based on the foregoing, the Commission does not find this certificate to be geographically dormant. The Commission concludes that Classic Limousine conducted substantial operations under its certificate in all counties.

Williams Transport next argued that the certificate is operationally dormant as it pertains to the transportation of railroad workers. The ALJ held that the certificate to be transferred is general in nature as it allows the transport of any class of customer by limousine. The ALJ determined that because Classic Limousine has been transporting customers by limousine, its certificate is not dormant. The Commission agrees. Classic Limousine operated as a common carrier providing limousine service. There is no evidence in the record that Classic Limousine refused to provide limousine service to railroad workers or to any other class of customer. Classic Limousine provided service to customers that requested service. If the new operator of the certificate receives a call to transport railroad workers, the Commission expects it to respond to that call. As the owner of Ambassador testified:

Q. You intend to use the authority under this certificate to transport railroad workers for railroad-related purposes; correct?

A. If needed, I mean, I'm --- I will run the company to start --- it's exactly like Mr. Williams would run it, except for a profit. If brought to my attention that airplane pilots, bus drivers, janitors, anybody that needs a ride under my permit, I'll offer. I don't have two restaurants, I just have a transportation service. So if you, as a lawyer, would call me, I would come down and pick you up, and I'd take you out and I'd do it in a professional manner. Transcript pg. 74.

Further, as the Commission stated in a Final Order dated April 20, 2012 in Case No. 10-1799-MC-TC, James Eugene Fletcher, dba Jim's Rubbish Removal:

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.

The Commission finds that the certificate is valid for the general transportation of customers by limousine, which could include the transportation of railroad workers.

Expansion of Service

Williams Transport also argued that the service provided by Ambassador will be so drastically different from the service provided by Classic Limousine that it creates a new service. Williams Transport argued that because Ambassador has a multitude of vehicles it could transfer to the Classic Limousine certificate, it may greatly expand upon the service provided under the certificate. This argument is speculative at best. While Ambassador is a larger operation than Classic Limousine, there is no guarantee that it will generate more business under the certificate than Classic Limousine. If Ambassador is able to expand upon the service provided under this certificate, it would be an indication that service in those areas was either lacking or inadequate. As the owner of Ambassador testified:

Q. Well, if your certificate is granted, I'm sorry, if this application to transfer Classic's certificate to you is granted, you'll be able to compete with Williams Transport for railroad work in Boone County; correct?

A. Correct. But there would be one disadvantage. He's been down there for years. And if he does a professional business, I shouldn't have a leg to stand on. Transcript pg. 76.

Taking 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. The Commission does not accept this premise and, instead, finds the transfer of this certificate does not create a new service.

The Commission will deny the exceptions filed by Williams Transport and will grant the transfer of Certificate No. F-7508 from Classic Limousine and Ambassador.

FINDINGS OF FACT

1. Ambassador published notice of this application transfer request in Boone, Fayette, McDowell, Mercer, Nicholas, Raleigh and Wyoming Counties. Ambassador Hearing Exhibit B.

2. Ambassador published notice in the Bluefield Daily Telegraph and the Beckley Register-Herald, both of which are of general circulation in Monroe and Summers Counties. Id.

3. The majority of Classic Limousine's business occurred in Raleigh County, but it conducted business in the other eight counties during its operation of this certificate. Transcript, pp. 47-51, 55-56.

CONCLUSIONS OF LAW

1. Ambassador substantially complied with the notice requirements in all of the counties that Classic Limousine was certificated to serve.

2. P.S.C. M.C. Certificate No. 7508 is not geographically dormant in any of the certificated counties because Classic Limousine conducted substantial operations in all nine certificated counties.

3. P.S.C. M.C. Certificate No. 7508 is not operationally dormant for the transportation of railroad workers.

4. The transfer of P.S.C. M.C. Certificate No. 7508 to Ambassador does not create a new service in the certificated territory.

5. The Commission should grant the application for the transfer and assignment of P.S.C. M.C. Certificate No. 7508 with respect to Boone, Fayette, McDowell, Mercer, Monroe, Nicholas, Raleigh, Summers and Wyoming Counties.

ORDER

IT IS THEREFORE ORDERED that the exceptions filed by Donald R. Abner, dba Ambassador Limousine and Taxi Service and Donna and Brian Williams, dba Classic Limousine Service, Inc. relating to publication are granted.

IT IS FURTHER ORDERED the exceptions filed by Williams Holdings, LLC, dba Williams Transport are denied and the Recommended Decision is modified to allow the transfer and assignment of P.S.C. M.C. Certificate No. 7508 from Donna and Brian Williams, dba Classic Limousine Service, Inc. to Donald R. Abner, dba Classic Limousine Service in all the certificated counties.

IT IS FURTHER ORDERED that this matter be, and hereby is, removed from the Commission's docket of open cases.

IT IS FURTHER ORDERED that the Executive Secretary of the Commission serve a copy of this Order by electronic service on all parties of record who have filed an e-service agreement, and by United States First Class Mail on all parties of record who have not filed an e-service agreement, and on Commission Staff by hand delivery.

A True Copy, Teste,



Connie Graley, Executive Secretary

JRA/s
200020c