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,

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 REPLY BRIEF

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ARGUMENT

It is the policy of this state to protect regulated motor carriers from unnecessary, potentially ruinous 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); *Charleston Transit Co. v. Pub. Serv. Comm'n*, 142 W. Va. 750, 759, 98 S.E.2d 437, 443 (1957). Accordingly, the Legislature and this Court have prohibited the PSC from granting motor carrier authority to new competitors – or taking actions tantamount to granting authority to new competitors – absent a finding that existing service is inadequate. *See* W. Va. Code § 24A-2-5(a); *Charleston Transit*, 142 W. Va. at 758-759, 98 S.E.2d at 442-443. Here, the PSC's order effectively creates a new competitor in Williams Transport's territory without any showing that Williams Transport's service is inadequate. The PSC's order must be reversed.

Williams Transport has authority from the PSC to operate "specialized limousine" service in several West Virginia counties.[1] The vast majority of Williams Transport's business is the transportation of railroad crews, and much of that business occurs in Boone County. Mr. Abner also transports railroad crews and would like to add Boone County to his territory. In 2018, Mr. Abner applied for permission to operate in Boone County, but could not prove that Williams Transport's service there was inadequate. He is now attempting to circumvent that burden of proof by acquiring Certificate 7508 – which covers nine West Virginia counties, including Boone – from Classic Limousine Service, Inc.

But Certificate 7508 is dormant as to Boone County because Classic did not conduct substantial operations there. Classic has no evidence, other than its own bald assertions, that it

[1] In PSC parlance, "specialized limousine" does not refer only to luxury vehicles that take people to weddings and the prom; it also includes full-size vans and sport utility vehicles used for any purpose, including the transportation of railroad crews.

ever operated in Boone County. And even if Classic's bald assertions were sufficient proof (which they are not), Classic operated in Boone County a mere four times per year. Further, Classic admits that it never competed with Williams Transport for work from the railroad. Classic existed mainly to transport patrons to and from its owners' restaurants in Raleigh County. It never made a profit, and it thought so little of its motor carrier authority that it gave Certificate 7508 to Mr. Abner free of charge.

Because Classic did not conduct substantial operations in Boone County, and because Mr. Abner's operations under Certificate 7508 will differ dramatically from Classic's, the transfer of Certificate 7508 from Classic to Mr. Abner is tantamount to the creation of a new competitor in Williams Transport's territory. As a result, the PSC should not have approved the transfer without proof that Williams Transport's service is inadequate.

The main argument that Mr. Abner and the PSC offer in defense of the PSC's order is that four trips per year should be considered "substantial operations" because Boone County is a rural area without much of a market for limousine service. This is directly contrary to the undisputed evidence that Boone County is one of the largest sources of Williams Transport's business. (App. 117.) Indeed, if there were little to no market for limousine service in Boone County, then the parties would not be litigating over authority to operate limousines there. Plainly, both parties recognize a substantial market for limousine service in Boone County and want to control it; the key difference is that Williams Transport is fighting to protect its livelihood, while Mr. Abner is fighting for a windfall. Williams Transport has built itself on the market for limousine service in Boone County, and that market is made up of railroaders. Classic never attempted to enter that market, and as a result, Mr. Abner should not be permitted to do so now without proof that Williams Transport's service is inadequate.

I. DORMANT MOTOR CARRIER CERTIFICATES CANNOT BE TRANSFERRED.

Although Mr. Abner initially acknowledges that dormant certificates cannot be transferred (Resp. Br. at 6), he later quotes *Solid Waste Servs. of W. Virginia v. Pub. Serv. Comm'n*, 188 W. Va. 117, 119, 422 S.E.2d 839, 841 (1992) for the notion that "[u]nless the PSC finds that the acquiring party cannot meet the current level of service, the PSC has no grounds to deny the permit transfer." But *Solid Waste Servs.* did not eliminate dormancy as an issue in transfer proceedings. In fact, the Court went on to recognize that one of the three measures for deciding whether to approve the transfer was "[t]hat the certificate is not dormant[.]" 188 W. Va. at 119, 422 S.E.2d at 841. Further, the PSC has recognized in multiple cases decided after *Solid Waste Servs.* that dormant certificates cannot be transferred because "[t]ransferring a dormant certificate would constitute a new service, without demonstrating a public need for such service, and could adversely affect existing common carriers authorized to operate within the same service territory." *Pro Moving Systems LTD*, Case Nos. 11-0727-MC-TC and 11-0728-MC-TC, Recommended Decision at 8 (May 17, 2012); *see also James Eugene Fletcher, dba Jim's Rubbish Removal*, Case No. 10-1799-MC-TC, Recommended Decision at 9 (July 29, 2011). Thus, the law is clear: if a certificate is dormant, then it cannot be transferred.

II. CERTIFICATE 7508 IS DORMANT.

A. The standard for evaluating dormancy is whether the transferor conducted "substantial operations."

In its Statement of Reasons, the PSC admits that the standard for determining dormancy "is whether substantial operations have been performed under the certificate." (PSC SOR at 8.) The PSC further admits that "[a] motor carrier certificate becomes geographically dormant when the certificate holder fails to conduct substantial activity in portions of the certificated area." (*Id.* at 10-11.) Classic and Mr. Abner impliedly concede that this is the standard by arguing that

Classic's operations in Boone County were "substantial" under the circumstances. (Resp. Br. at 10.) Thus, all parties agree that a transferor's operations in each portion the certificated territory must be "substantial" in order to avoid dormancy.

B. Operating four times per year in a region is not "substantial operations."

It is undisputed that Classic operated in Boone County no more than four times per year (and Classic has no independent evidence that it *ever* operated in Boone County). Mr. Abner and the PSC argue, however, that this should be considered "substantial" because Boone County is a rural area with no regular need for limousine service. This argument fails for at least three reasons.

First, Respondents' argument is unsupported by the evidence: neither Classic nor Mr. Abner offered any evidence as to the level of demand for limousine service in Boone County.

Second, Respondents' argument is contrary to the evidence: Williams Transport demonstrated that there is a significant market for limousine service in Boone County through uncontroverted testimony that Boone County is one of the two largest sources of Williams Transport's business. (App. 117.) Indeed, if there were not a substantial and valuable market for limousine service in Boone County, then the parties would not be litigating over access to that market. Perhaps there is no regular market in Boone County for limousine service *to persons other than railroad workers*, but it is Mr. Abner and the PSC who are arguing that service to railroad workers should not be viewed as a distinct subcategory. Mr. Abner and the PSC cannot have it both ways; they cannot simultaneously argue that (1) the transportation of railroad workers is not a distinct subcategory of motor carrier service for purposes of operational dormancy, but (2) service to railroad workers should be compartmentalized and ignored for purposes of determining whether there is regular demand for limousine service in Boone County.

Third, Classic admitted that the reason its operations in Boone County were *de minimis* is that its owners were restauranteurs who did not devote the time and effort necessary to conduct substantial operations outside of Raleigh County, where their restaurants were located. (App. 380.) Classic further admitted that it made no effort to make the railroad aware of its services. (App. 63-64, 163-164.) As such, the railroad likely had no idea that Classic existed. Indeed, neither Williams Transport nor Duncan's Carrier Service (another motor carrier who operates in Boone County) had ever heard of Classic prior to this transfer proceeding. (App. 119, 130, 134.) *That* is the reason Classic did not conduct substantial operations in Boone County: it made no effort to market itself to, or even make itself known to, the clientele there (i.e. the railroad). For all of these reasons, the PSC's conclusion that there is no regular market for limousine service in Boone County, and that this purported lack of a market transforms Classic's *de minimis* operations into *substantial* operations, is clearly wrong.

C. Classic failed to prove that it conducted *any* operations outside of Raleigh County.

Even if operating four times per year in Boone County constituted "substantial operations" (which it does not), Classic offered only general assertions that it operated four times per year in Boone County. This is not sufficient to carry Classic's burden of proof. *See William T. Elliott*, M. C. Case No. 4047, Hearing Examiner's Decision at 10 (Oct. 29, 1981)(holding that transferor's general assertions, without any details as to who he served and when, lacked the specifics necessary to carry the applicant's burden of proof that the certificate was not dormant).

Williams Transport made this argument in its opening brief (Pet. Br. at 21-22), yet none of the respondents offered any justification for PSC's arbitrary conclusion that Classic's general allegations were sufficient proof in this case. The PSC simply points to "the unrefuted, sworn testimony from the operator of Classic Limousine" that Classic operated several times per year in

Boone County. (PSC SOR at 11.) But this "sworn testimony" consists of nothing more than unsupported, general allegations from a witness who could not say who Classic had transported, where it had transported them, or when. And *of course* this testimony is "unrefuted" – how could Williams Transport possibly refute the generic assertion that Classic operated in Boone County four times per year? Williams Transport cannot be expected to prove a negative, especially when Classic has not even identified any of its alleged customers so that Williams Transport can attempt to contact them. Classic bears the burden to prove that it conducted substantial operations in Boone County.[2] As in *Elliott*, the general allegations of a witness who not could provide any details are insufficient to carry this burden.

D. Merely being prepared to serve is not enough.

As discussed in Williams Transport's opening brief (Pet. Br. at 19-20), the PSC has previously held that merely "holding oneself out" – or being prepared to serve if called upon – is *not* enough to avoid dormancy when the rights at issue involve general transportation services, as opposed to a highly specialized service. *See Carroll Trucking Company*, M. C. Case Nos. 132, 1902, and 3821, Comm'n Order at 2-3 (July 13, 1976). This makes sense because while a motor carrier cannot be expected to create customers for a *highly specialized* service for which there is no regular need, a motor carrier who wishes to avoid dormancy cannot simply sit on the sidelines and make no effort to gain customers for *general* transportation services. Thus, the PSC has held that a motor carrier's authority to provide general residential garbage service within a certain area

[2] Classic and Mr. Abner assert that "Rules 5.1 and 6.2.g of the Commission's Rules of Practice and Procedure require the Complainant to bear the burden of proving all facts alleged to constitute a violation of law," but this is not a complaint case and Williams Transport is not a complainant. *See* W. Va. C.S.R. § 150-1-6 (discussing formal and informal complaints to the PSC). Rather, this is an application to transfer a motor carrier certificate, and Commission precedent is clear that the applicants (here, Classic and Mr. Abner) bear the burden of proving that the certificate is not dormant. *See Elliott*, *supra*, at 7, 10 (holding that the burden of proof in a transfer proceeding is on the applicant, and that the applicant failed to carry his burden to prove that his certificate was not dormant).

was dormant, even though the carrier "always held itself to serve" and never refused service to anyone in the area, where the carrier had served only "a handful of customers" and failed to advertise or otherwise try to gain customers. *Elk Valley Sanitation, Inc. v. Snodgrass*, M. C. Case No. 21268, Comm'n Order at 2, 6 (June 22, 1982).

The PSC argues, however, that its position has "evolved over time" as reflected in *James Eugene Fletcher, dba Jim's Rubbish Removal*, Case No. 10-1799-MC-TC (April 20, 2012) and *Jacob F. Jochum, Jr.*, Case Nos. 17-0806-MC-TC and 17-0808-MC-TC (July 11, 2018). But *Fletcher* and *Jochum* did not overrule *Carroll Trucking* and *Elk Valley*; rather, the services at issue in *Fletcher* (commercial roll-off garbage service) and *Jochum* (compactor and roll-off services) were specialized services that fit within the exception to the rule established in *Carroll Trucking* and *Elk Valley*.

Further, *Fletcher* and *Jochum* stand in stark contrast to the case at bar. In *Fletcher*, the transferor had continuously provided general waste collection services to approximately 172 customers but had not provided commercial roll-off service for years because his commercial customers went out of business. *Fletcher*, Case No. 10-1799-MC-TC, Comm'n Order at 4, 7. Similarly, in *Jochum*, the transferor continuously provided general waste collection services throughout his authorized territories but subcontracted infrequent requests for compactor or roll-off services to a third party. *Jochum*, Case Nos. 17-0806-MC-TC and 17-0808-MC-TC, Recommended Decision at 7, Comm'n Order at 5-6.

By contrast, Classic has not performed substantial operations *of any kind* in Boone County. Further, Classic's failure to conduct substantial operations in Boone County cannot be attributed to infrequent demand for a specialized service. As Classic and Mr. Abner acknowledge, Classic's certificate was "general in nature" and allowed Classic to transport any class of passengers by

limousine. (Resp. Br. at 11.) And as previously discussed, there was a regular need for limousine service in Boone County; Classic simply made no effort to market itself to, or even make itself known to, the clientele there – particularly the railroad. Because Classic provided general transportation services in Boone County, at most, only four times per year, and made no effort to gain customers there, Classic's authority to operate in Boone County is dormant.

Moreover, to the extent the PSC's position has in fact "evolved" so that "holding oneself out" is enough to avoid dormancy even as to *general* transportation services for which there is regular demand, the PSC's new standard violates West Virginia law. It is the policy of this State to protect regulated motor carriers from unnecessary competition, and, accordingly, West Virginia law forbids the PSC from granting a certificate of convenience and necessity absent proof that existing service in the certificated area is not "reasonably efficient and adequate." *Stowers*, 182 W. Va. at 378, 381, 387 S.E.2d at 845, 848; *Charleston Transit*, 142 W. Va. at 759, 98 S.E.2d at 443; W. Va. Code § 24A-2-5(a). And as the PSC has repeatedly recognized, the transfer of a dormant certificate is the equivalent of impermissibly authorizing a new service without the requisite showing of public need. *See e.g. Pro Moving Systems*, Case Nos. 11-0727-MC-TC and 11-0728-MC-TC, Recommended Decision at 8; *Fletcher,* Case No. 10-1799-MC-TC, Recommended Decision at 9; *Mary F. Clark*, M.C. Case Nos. 01532-TC and 01534-TC-TP, at 6 (Jan. 18, 1991); *William P. Hopson*, M.C. Case No. 16280, Comm'n Order at 3 (Apr. 17, 1978).

This is because when a motor carrier's activity in a region becomes minimal or nonexistent, it is presumed that other carriers have adjusted their operations (necessitating the commitment of capital, equipment, and manpower) to meet the needs of the customers there. *See Elliott*, M. C. Case No. 4047, Hearing Examiner's Decision at 9 (*citing Carroll Trucking*, M. C. Case Nos. 132, 1902, and 3821, Comm'n Order at 4-5). Thus, the subsequent transfer of the inactive carrier's

authority would create a new competitive service where there is adequate service already being provided, and would punish the carriers who provided continuous, substantial operations in areas where the transferor made no effort to do so.

Importantly, it is the transferor's failure to *actually conduct* substantial operations that results in others stepping up to meet the public need. The fact that the transferor was prepared to serve if called upon makes no difference if the transferor made no effort to gain customers and stood idly by while others conducted substantial operations. Indeed, when the transferee enters the market and begins taking business away from those who had been diligently providing service without competition from the transferor, the same harm occurs regardless of whether the transferor had been "prepared to serve." Thus, the PSC's "evolved" view that a certificate may be transferred, even where the transferor both failed to actually conduct substantial operations and made no effort to gain customers, invites ruinous competition, punishes diligence while rewarding sloth, and effectively creates new motor carrier services without a showing of public need in violation of West Virginia law.

E. Classic was not prepared to serve the railroad industry.

Even if being prepared to serve were all that is required to avoid dormancy (which it is not), Williams Transport has demonstrated that Classic was not prepared to serve railroad workers because it did not own suitable vehicles. Williams Transport produced evidence that railroad workers require large vans and SUVs because (a) the railroad workers want leg room, (b) the railroad workers need room for their "grips" – two or three pieces of luggage per railroad worker in a two to three-person crew, and (c) the rough roads at the railroad yards demand vehicles with higher ground clearance. (App. 117-119, 127-129, 134.) Unlike Williams Transport and Duncan's

Carrier Service, Classic did not own full size vans or SUVs; it owned only three Lincoln Town Cars and a "party bus."[3]

The PSC argues that there is no statute or regulation requiring vans and SUVs for railroad workers, but the fact remains that there are practical requirements. And a carrier who does not own vehicles suitable to meet those practical requirements is not "prepared to serve" railroad workers. The PSC also argues that the fact that railroad workers "prefer" to be transported in a large van or SUV does not mean that Classic was unable to serve railroad workers. But the unrebutted evidence shows a practical necessity, not a mere preference: a driver with experience driving at the railroad yards testified that a Lincoln Town Car sits too low for the rough roads at the railroad yards. (App. 129.) Next, the PSC argues that Classic could have easily remedied its lack of suitable vehicles because large vans and SUVs are mass produced and widely sold. But this stretches the meaning of "prepared to serve" too far. A carrier who does not own suitable vehicles to perform a niche of service – and who must go out and purchase a new vehicle before serving customers within that niche – is not "prepared" for that niche.

Lastly, the PSC argues that the transportation of railroad workers is not a recognized subcategory of motor carrier service for purposes of operational dormancy. In doing so, the PSC ignores its own precedent holding that "[i]f 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 . . . and, likewise, *can find dormant another motor carrier's authority to provide that same service*." *Katrina E. Taylor*, Case No. 08-0769-MC-C at 23 (Feb. 9, 2009). Here, the PSC acknowledges that the transportation of railroad workers is a niche of service the PSC has carved out in the past. (PSC

[3] It is highly questionable whether the "party bus" is even a "limousine" that may properly be used under Certificate 7508. The PSC's regulations define "limousine," in relevant part, as a motor vehicle with "sets of working seatbelts, for at least five (5) passengers, including the driver[.]" W. Va. C.S.R. § 150-9-1.8.m. But Classic testified that its 22 seat "party bus" did not have seatbelts on each of the seats. (App. 45, 49.)

SOR at 18.) The fact that this niche has been carved out by agreement, or in cases in which there was no protest, is of no moment. The point is that it can be, and has been, carved out. As a result, under *Taylor*, a motor carrier's authority to provide this niche of service may become operationally dormant.

F. Dormancy is not limited to the extreme examples cited by the PSC.

The PSC argues that Classic's operations are in stark contrast to operations the PSC has declared dormant in the past, but it cites only two extreme examples involving operators who did not own or operate any vehicles for a number of years. (PSC SOR at 13.) While the certificates in those cases were undoubtedly dormant, dormancy is not limited to such extreme circumstances. *See Carroll Trucking Company*, M. C. Case Nos. 132, 1902, and 3821, Comm'n Order at 5 (observing that "dormancy has been found where the carrier had NOT completely abandoned and discontinued service."); *see also Cox v. Pub. Serv. Comm'n of W. Virginia*, 188 W. Va. 736, 743, 426 S.E.2d 528, 535 (1992) (affirming dormancy of residential trash service where service, "although existent," had been limited to just 16 customers); *Elk Valley Sanitation*, M. C. Case No. 21268, Comm'n Order at 5 (finding authority dormant where service had been provided to only a "handful" of customers); *Elliott*, M. C. Case No. 4047, Hearing Examiner's Decision at 10 (finding dormancy where transferor's operations were "minimal" and his testimony lacked specifics). Accordingly, this Court should reject the PSC's attempt to cherry-pick two extreme cases as emblematic of the facts necessary for dormancy.

In addition, the Court should reject the PSC's attempt to distinguish *Cox*. The PSC argues that *Cox* is distinguishable because while the public convenience and necessity require garbage collection to occur on a regular and recurring basis, the same is not true for limousine service. But this is simply false. As previously discussed, railroad crews in Boone County do require limousine

service on a regular and recurring basis, and providing that service is one of the major pillars of Williams Transport's business. Accordingly, *Cox* is directly on point and underscores what should already be obvious: Classic's purported activity in Boone County – consisting of a mere four trips per year – has been minimal, resulting in dormancy.

III. THE TRANSFER OF CERTIFICATE 7508 FROM CLASSIC TO MR. ABNER IS TANTAMOUNT TO AUTHORIZING A NEW COMPETITOR WITHOUT THE REQUIRED SHOWING THAT WILLIAMS TRANSPORT'S SERVICE IS INADEQUATE.

A. Abner's operations will differ drastically from Classic's in every way.

As set forth in greater detail in Williams Transport's opening brief, the transfer of a motor carrier certificate should be denied where, as here, the transferee's service will differ radically in scope or type from the transferor's service, because the transfer would have the effect of creating a new service. (Pet. Br. at 27-32.) To illustrate, in *Elliott*, the PSC held that replacing a transferor who operated only one small truck with a transferee who intended to operate seven large trucks would be "clearly wrong." *Elliott*, M. C. Case No. 4047, Hearing Examiner's Decision at 6, 11. Here, however, the PSC authorized the transfer of Certificate 7508 from Classic, which had no more than three vehicles in service at any given time, to Mr. Abner, who has approximately 50 vehicles.[4] And the differences don't stop there; in addition: (1) Classic's owners were restauranteurs who were not involved in the motor carrier business full time, whereas Mr. Abner runs a conglomerate of full-time transportation companies; (2) Classic never made a profit and averaged less than $24,000 in gross annual sales, whereas Mr. Abner intends and expects to generate *at least* $100,000 in gross annual sales; (3) what little regular business Classic conducted

[4] In Williams Transport's opening brief, Williams Transport argued that Mr. Abner had a fleet of 18 vehicles. In reaching this total, Williams Transport counted only those vehicles registered to Mr. Abner's transportation companies and did not count vehicles registered to his auto sale business. In Respondents' Brief, however, Mr. Abner boasts that he has "dozens of vehicles," or "approximately fifty vehicles," available for use under Certificate 7508. (Resp. Br. at 3, 12.)

was concentrated in Raleigh County, whereas Mr. Abner (who already has authority in Raleigh County) wants Certificate 7508 so that he can operate elsewhere; and (4) Classic never transported railroad workers, whereas serving the railroad is a substantial portion of Mr. Abner's business.

The PSC argues, however, that if Mr. Abner is able to increase operations, that "could be" attributable to an increase in demand or to the inadequacy of existing service. But this turns our State's motor carrier regulatory scheme on its head. As previously discussed, where an action is tantamount to creating a new motor carrier service in a given territory, it cannot be done absent proof that existing service there is "not reasonably efficient and adequate." *See Charleston Transit*, 142 W. Va. at 758, 98 S.E.2d at 442. And where, as here, the transferee's service will differ radically from the transferor's, the transfer is tantamount to creating a new motor carrier service. Thus, before the PSC can grant the transfer, the applicants must *prove* the existence of public need; the PSC cannot simply speculate about what "could be."

The PSC next argues that "[t]o accept Williams Transport's argument . . . would unfairly limit the ability of certificate holders with a small operation to transfer a certificate to a larger operation." Not so. Again, the difference here is more than just small vs. large; it is also part-time vs. full time; disinterested vs. motivated; complacent vs. ambitious; focused on Raleigh County vs. focused on other counties; ancillary hobby vs. competitive commercial enterprise. Moreover, even if it were simply a matter of small vs. large, denying the transfer is no more "unfair" to the small transferor than granting the transfer would be to the motor carriers who will be driven out of business by the much larger transferee.

Lastly, the PSC argues that disallowing a transfer to a much larger and more capable transferee would conflict with the "primary Commission consideration" of ensuring that the transferee is fit and capable, and that, ideally, all transfers should result in improved public service

to meet the public convenience and necessity. But this argument assumes that there is a public need for a much larger carrier in area. It also ignores this Court's pronouncement that more is not always better when it comes to public carriers: "[t]he policy of the state . . . 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." *Charleston Transit*, 142 W. Va. at 759, 98 S.E.2d at 443. Rather than protect Williams Transport from ruinous competition in Boone County, the PSC has thrown it to the wolves by replacing a virtually absent nonfactor with a voracious new competitor. Accordingly, the PSC's ruling should be reversed.

B. The PSC's attempt to distinguish Williams Transport's authority from Classic's is flawed.

The PSC argues that, in the counties where both Williams Transport and Classic have authority, Williams Transport can only provide service in vehicles similar to a Cadillac or Lincoln. This is simply wrong. Williams Transport has four motor carrier certificates: 6757, 6922, 6928, and 7298. (App. 255-258.) Of these, only 6928 and 7298 restrict Williams Transport to vehicles similar to a Cadillac or Lincoln, and only for Fayette and Wayne Counties.[5] Neither of those counties is at issue here, as Classic's certificate does not cover Wayne County and Mr. Abner already had authority to operate in Fayette County. Williams Transport's Boone County authority comes from Certificate Nos. 6757 and 6922. Neither of those certificates limits Williams Transport to vehicles similar to a Cadillac or Lincoln. (App. 255, 256.)

To the extent the PSC relies on the fact that Classic had "limousine" authority while Williams Transport has "specialized limousine" authority, this distinction is irrelevant. Again,

[5] Certificate 7298 also restricts Williams Transport to luxury limousines in Summers County, but Williams Transport has general specialized limousine authority in Summers County under Certificate 6922, so Williams Transport is not limited to luxury vehicles in Summers County.

Williams Transport derives most of its business from the railroad, and the railroad crews require full size vans and SUVs – vehicles that meet the definition of both "limousine" *and* "specialized limousine." *See* W. Va. C.S.R. § 150-9-1.8 (defining "limousine" as a motor vehicle with seating capacity for *at least* five passengers, and "specialized limousine" as a motor vehicle with seating capacity for at least eight passengers). Thus, Mr. Abner will be able to – and intends to – compete with Williams Transport for railroad work in Boone County, siphoning away customers that Classic never served nor attempted to serve, and that Williams Transport needs to survive. As such, transferring Classic's authority to Mr. Abner effectively creates a new competitive service in Williams Transport's territory without a showing of public need, thereby violating West Virginia law.

IV. THE STANDARD OF REVIEW IS NOT AS DEFERENTIAL AS RESPONDENTS SUGGEST.

The PSC emphasizes the "highly deferential" standard of review, but in the words of this Court, it is "well established" that "an order of the public service commission based upon a finding of facts which is contrary to the evidence, or is not supported by the evidence, or is arbitrary, or is based upon a mistake of law, *will be reversed and set aside by this Court upon review*." *United Fuel Gas Co. v. Pub. Serv. Comm'n*, 143 W. Va. 33, 46, 99 S.E.2d 1, 9 (1957) (emphasis added); *see also* Syl. Pt. 2, *Cox*, 188 W. Va. 736, 426 S.E.2d 528.[6] Indeed, this Court has overruled the PSC on numerous occasions. *See United Fuel*, *supra* (listing cases); *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

[6] The PSC also cites a different standard of review that summarizes Syl. Pt. 2 of *Monongahela Power Co. v. Pub. Serv. Comm'n of W. Virginia*, 166 W. Va. 423, 276 S.E.2d 179 (1981). But the standard of review in *Monongahela Power* is for rate-making cases, not the issuance or transfer of certificates of convenience and necessity. *See* 166 W. Va. at 425-429, 276 S.E.2d at 181-183.

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) ("[W]e hold that the decision made by the PSC is patently contrary to the weight of the evidence presented.").

Here, (1) the PSC's finding that Classic conducted "substantial operations" in Boone County is unsupported by, and contrary to, the evidence; (2) the PSC's speculation that there is no regular need for limousine service in Boone County is unsupported by, and contrary to, the evidence; (3) the PSC arbitrarily ignored and misapplied its own precedent as to what constitutes "substantial operations" and whether merely "holding oneself out" is sufficient to avoid dormancy; and (4) the PSC violated West Virginia law by effectively authorizing a new competitive motor carrier service in Williams Transport's territory without a showing a public need. Accordingly, this Court should not hesitate to reverse the PSC.

CONCLUSION

Because the transfer of Certificate 7508 from Classic to Mr. Abner is tantamount to creating a new competitive service in Williams Transport's territory, West Virginia law prohibits the transfer absent proof that Williams Transport's service is inadequate. There being none, the PSC's order approving the transfer must be reversed.

Respectfully submitted,

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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,

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 21st day of May, 2021, I have served a true and exact copy of the foregoing "Petitioner's Reply Brief" via United States mail upon the following counsel of record:

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