

# STATEMENTS OF POLICY

## Title 52—PUBLIC UTILITIES

### PENNSYLVANIA PUBLIC UTILITY COMMISSION

[ 52 PA. CODE CH. 41 ]

[ M-2011-2188361 ]

#### Scope of Commission Jurisdiction Over Passenger Transportation Services Provided or Administered by Municipal Corporations and Instrumentalities of the State

The Pennsylvania Public Utility Commission (Commission), on March 17, 2011, adopted a proposed policy statement which clarifies the exceptions to Commission jurisdiction for municipal corporation and instrumentalities of the State.

Public Meeting held  
March 17, 2011

*Commissioners Present:* Robert F. Powelson, Chairperson; John F. Coleman, Jr., Vice Chairperson; Tyrone J. Christy; Wayne E. Gardner; James H. Cawley

*Statement of Policy Regarding Scope of Commission Jurisdiction Over Passenger Transportation Services Provided or Administered by Municipal Corporations and Instrumentalities of the State; Doc. No. M-2011-2188361*

#### Proposed Policy Statement

*By the Commission:*

Any person or corporation transporting passengers as a common carrier is ordinarily considered a public utility, required to obtain a certificate of public convenience before offering service, and subject to Commission regulation. There are a number of exceptions to Commission jurisdiction enumerated in the Public Utility Code or recognized by common law. This policy statement addresses the exceptions to Commission jurisdiction for municipal corporations and instrumentalities of the state.

The scope of these exceptions has been the subject of litigation in a number of cases. The Commission intends to provide greater regulatory certainty on this question through the adoption of a statement of policy. In this Order, the Commission will propose guidelines to assist municipal corporations, common carriers, other state agencies and members of the public in determining when our jurisdiction is implicated. After a review of public comment filed in response to this Order, the Commission will adopt a final policy statement to provide guidance to municipal corporations, common carriers and other state agencies.

#### *Background*

A person or corporation that engages in the transportation of passengers as a common carrier normally meets the definition of "public utility." 66 Pa.C.S. § 102. However, the Commission's jurisdiction does not extend to utility service provided by municipalities or municipal authorities within their corporate limits. A municipal corporation must obtain a certificate of public convenience only if it intends to furnish service beyond its corporate limits. 66 Pa.C.S. § 1102(a)(5). The rates and character of this utility service will be subject to Commission jurisdiction if they are provided outside the corporate limits. 66 Pa.C.S. §§ 1301, 1501.

The Commission's jurisdiction also does not extend to state instrumentalities directly providing utility service. *Commonwealth of Pennsylvania v. Merritt-Chapman & Scott Corp.*, 248 A. 2d 194 (1968). In *Merritt-Chapman*, the Pennsylvania Supreme Court acknowledged that the Commission does have jurisdiction over "persons or corporations" operating turnpikes for the public for compensation, but concluded that a state instrumentality such as the Turnpike Commission, was not a "person or corporation" within the meaning of the Public Utility Code, and therefore not a public utility. *Merritt-Chapman*, 248 A.2d at 196 ("[I]t has been the position of the Legislature and the view of this Court that the Turnpike Commission is to be regarded essentially as an agency of the Commonwealth. As such it cannot be a public utility within the Public Utility Code.").

The correct application of the above-cited authority to the regulation of passenger carriers has been relatively simple in some contexts, but more difficult in others. For example, some Pennsylvania municipal corporations provide a passenger bus service that operates on scheduled routes. When the buses are owned by the municipality, the drivers are municipal employees, and the routes do not extend beyond the corporate limits of the municipality, it is well accepted that this type of service is non-jurisdictional.

More problematic, however, is the provision of these services through third parties under contract either with a municipal corporation or a state agency. For instance, many counties offer what are known as "shared-ride" or medical assistance transportation services.<sup>1</sup> These services receive funding through programs administered by the Pennsylvania Department of Transportation ("PennDOT") and the Pennsylvania Department of Public Welfare ("DPW"). Some of these services are provided directly by employees and vehicles owned by municipalities, but it is also common for a municipality to contract with a third party to provide these services.

The regulatory issue presented by these third-party arrangements is whether, and under what conditions, the "state instrumentality and municipal corporation" exception to the Commission's jurisdiction extends to the third party. This includes the extent to which these services are considered to be extra-territorial. A review of Commission and Commonwealth Court precedent is instructive.

The issue was first examined in the context of a complaint filed against the Southeastern Pennsylvania Transportation Authority ("SEPTA"), an entity created by an act of the General Assembly, and several carriers who were providing paratransit service. *Brocal Corporation v. Wheels Inc. et al.*, Docket C-812799 (Order entered May 13, 1983). The Commission was asked to address whether SEPTA, and carriers under contract with SEPTA, needed a certificate of public convenience to provide paratransit service.

The Commission held that the General Assembly gave SEPTA exclusive authority to regulate the rates and services it was established to provide, and that, accordingly, it did not require a certificate of public convenience

<sup>1</sup> A shared-ride program is defined as "Demand-responsive transportation that is available to the general public, operates on a nonfixed route basis and charges a fare to all riders. For transportation to be included in this definition, the first fare-paying passengers to enter the public transportation vehicle must not refuse to share the vehicle with other passengers during a given trip. The term excludes exclusive-ride taxi service, charter and sightseeing services, nonpublic transportation, school bus and limousine services." 72 P. S. § 3761-901.

to provide paratransit service within its service area.<sup>2</sup> The Commission also concluded that motor carriers under contract to SEPTA did not need a certificate, as SEPTA was expressly authorized by statute to contract for the services it provided. As a separate basis for its decision, the Commission also observed that it did not have jurisdiction over agents of a municipal corporation. SEPTA exercised “pervasive control” over the rates and services of these contractors, which was sufficient to establish that the carriers were its agents. *Id.* citing *Breston v. City of Bradford*, 41 PA PUC 349 (1964).

In a subsequent case involving Brocal Corporation, the Commission granted Brocal Corporation’s objection to an assessment on revenue generated as part of transporting passengers pursuant to a program funded by DPW. *Brocal Corp.* 61 Pa. P.U.C. 518 (1986) (“*Brocal II*”). The Commission held that it lacked jurisdiction because DPW retained substantial ongoing control over rates, service, service extensions, etc. of the carrier.

This holding was affirmed in the context of an application for a certificate of public convenience filed by a carrier to provide paratransit service. Application of Helen McNulty, A-0018186 (Order entered April 18, 1989). The service was to be provided pursuant to a contract with Cambria County, but DPW provided 90% of the program funding. The carrier would have to comply with various DPW regulations for the program. The Commission concluded that it lacked jurisdiction over the service because DPW exercised substantial ongoing control over it, consistent with *Brocal II*. Accordingly, the application was dismissed for lack of jurisdiction.

Later the same year, the Commission made a similar finding regarding an application filed by a carrier that was going to provide paratransit service pursuant to a shared-ride program funded by PennDOT. In Re: Application of George Stouffer and Robert Sellers, Co-Partners, t/d/b/a Diamond “S” Cab Company, Docket A-00106732, F.3 (Order entered October 27, 1989). PennDOT had contracted with the Dauphin County Transportation Department to provide a shared-ride program. Dauphin County then subcontracted the program to a carrier that was not licensed to provide paratransit service. In dismissing the application, the Commission concluded that the carrier operated outside the Commission’s jurisdiction under the municipal corporation exception, because Dauphin County exercised substantial ongoing control over the rates and services of the carrier.

In *Pennsylvania Public Utility Commission v. A.J. Myers & Sons, Inc.* A-00106393C892 (Order entered December 5, 1991), the Commission revisited this line of cases, including *Brocal II*, and reevaluated the scope of *Merritt-Chapman*. This case involved a contract between a university and carrier for student transportation. The Commission had filed a complaint against the carrier for transporting students to locations outside its certificated service territory. The carrier argued that the transportation service it provided under the contract was exempt since the university was an instrumentality of the state. In the alternative, the carrier asserted that it should also be exempt since the university exercised substantial ongoing control over its services.

While the record clearly established that the university set the rates and determined the routes for the service, the parties disagreed as to whether the university exercised substantial ongoing control over the carrier. In its decision, the Commission expressly reversed *Brocal II*

and concluded that the service was jurisdictional, and that the carrier needed a certificate of public convenience, stating:

If a state agency wants to provide transportation or other public utility service, then, under the *Merritt-Chapman* case, the agency need not obtain PUC approval. However, that State agency may not contract with a non-PUC certificated utility to provide transportation or other PUC related services.

*A.J. Myers*, pg. 11.

Accordingly, *A.J. Myers* stands for the proposition that municipal corporations enjoy a broader exception to Commission jurisdiction than state instrumentalities. A carrier under contract to a municipal corporation may be exempt from Commission jurisdiction, so long as it is subject to substantial ongoing control by the municipal corporation as to rates, routes, schedules and terms and conditions of service. But the very same carrier under contract to a state instrumentality will normally require a certificate of public convenience, regardless of the degree of control exercised by the state entity over its rates, routes, etc.

The Commission concluded that there was abundant statutory support for this distinction. It noted that the General Assembly had provided Commission oversight over transportation services provided to the State Liquor Control Board, and that PennDOT had adopted regulations requiring carriers participating in its shared-ride program to have a tariff on file with the Commission:

We must recognize and retain our statutory obligation to oversee public utility service provided to other State agencies. We should not continue to endorse the policy prescribed in *Brocal* which would result in having oversight responsibility for public utility service provided to some State agencies but not others.

*A.J. Myers*, pg. 12.

The last issue that will be addressed by this policy statement is what constitutes extraterritorial transportation service by a municipal corporation or its contractor. The Commonwealth Court rendered a decision on this issue in the context of an application to provide paratransit service under a shared-ride program funded by PennDOT. *County of Dauphin v. Pennsylvania Public Utility Commission*, 634 A.2d 281 (Pa. Cmwlth. 1993). The service was being provided by a carrier under contract to Dauphin County. The record showed that some of the persons who used this service would be transported to points outside Dauphin County. The Commission had held that a carrier was operating beyond the corporate limits of Dauphin County, and thus subject to its jurisdiction. On appeal, the Commonwealth Court reversed the Commission, finding that the service was deemed to be within the corporate limits so long as the trip began in Dauphin County. *Id.* at 283. The Court concluded that by limiting the service to trips that began within Dauphin County, the carrier was not holding itself out to the public beyond the County’s corporate limits. *Id.*

#### Discussion

##### A. Summary of Commission Jurisdiction

The Public Utility Code and relevant precedent state that transportation services offered by municipal corporations are not subject to Commission jurisdiction if the

<sup>2</sup> The sole exception to this was taxi service. 74 Pa.C.S. § 1701.

service is provided within a municipal corporation's geographic limits. The Commonwealth Court has held that trips must only begin within the corporate limits of the municipal corporation to satisfy this geographic requirement. *County of Dauphin*, 634 A.2d at 283. Similarly, a state agency, authority, etc., such as the Pennsylvania Turnpike Commission or PennDOT may directly provide utility-type transportation services using its own employees and facilities without obtaining a certificate of public convenience. See generally, *Commonwealth of Pennsylvania v. Merritt-Chapman & Scott Corp.*, 248 A. 2d 194 (1968).

Municipal corporations sometimes contract with third parties to provide passenger transportation services. These include shared-ride and medical transportation services funded through programs administered by PennDOT and DPW. These services will be considered non-jurisdictional so long as the services originate within the corporate limits of the municipality, and are subject to the substantial or pervasive, ongoing control of the contracting municipal corporation. See generally, *Brocal Corporation v. Wheels Inc. et al*, Docket C-812799 (Order entered May 13, 1983); *Brocal Corp.* 61 Pa. P.U.C. 518 (1986).

However, the substantial ongoing control exemption does not apply to contracts between state instrumentalities and passenger transportation carriers. These services may only be provided if the carrier has a certificate of public convenience, or otherwise meets one of the other exceptions to Commission jurisdiction identified in the Public Utility Code. See generally, *Pennsylvania Public Utility Commission v. A.J. Myers & Sons, Inc.* A-00106393C892 (Order entered December 5, 1991).

The Commission, therefore, proposes the guidelines in Annex A to assist municipal corporations, common carriers, other state agencies and members of the public in determining when our jurisdiction is implicated. After a review of public comment filed in response to this Order, the Commission will adopt a final policy statement.

Accordingly, pursuant to its authority under Section 501 of the Public Utility Code, 66 Pa.C.S. § 501, the Commission proposes to adopt the following policy statement; *Therefore*,

*It Is Ordered That:*

1. The proposed amendments to 52 Pa. Code Chapter 41, as set forth in Annex A hereto, are issued for comment.
2. The Secretary shall submit this Order and Annex A to the Governor's Budget Office for review of fiscal impact.
3. The Secretary shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
4. Interested persons may submit an original and 15 copies of written comments to the Office of the Secretary, Pennsylvania Public Utility Commission, P. O. Box 3265, Harrisburg, PA, 17105-3265, within 60 days from the date this Order is published in the *Pennsylvania Bulletin*.
5. A copy of this Proposed Policy Statement and Annex A shall be served on the Office of Consumer Advocate,

and The Office of Small Business Advocate, and will be posted on the Commission's website at [www.puc.state.pa.us](http://www.puc.state.pa.us).

6. The contact person for this matter is Adam D. Young, (717) 772-8582, Law Bureau (legal). Alternate formats of this document are available to persons with disabilities and may be obtained by contacting Sherri DelBiondo, Regulatory Coordinator, Law Bureau, (717) 772-4579.

ROSEMARY CHIAVETTA,  
*Secretary*

**Fiscal Note:** 57-284. No fiscal impact; (8) recommends adoption.

## Annex A

### TITLE 52. PUBLIC UTILITIES

#### PART I. PUBLIC UTILITY COMMISSION

##### Subpart B. CARRIERS OF PASSENGERS OR PROPERTY

#### CHAPTER 41. GENERAL ORDERS, POLICY STATEMENT AND GUIDELINES ON TRANSPORTATION UTILITIES

##### TRANSPORTATION

#### § 41.22. Motor carrier passenger transportation services by municipal corporations or State instrumentalities—statement of policy.

(a) *General rule.* As a general rule, passenger transportation services provided by State instrumentalities or municipal corporations within their corporate limits are not subject to Commission jurisdiction. Passenger transportation service is considered to be within the corporate limits if the trip begins within the corporate limits of the municipal corporation.

(b) *Definitions.* The following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

*Municipal corporation*—The term as defined in 66 Pa.C.S. § 102 (relating to definitions).

*State instrumentality*—

(i) The Commonwealth, its agencies, boards, offices, commissions, councils, departments, bureaus and authorities.

(ii) The term includes independent agencies of the Commonwealth and State affiliated entities such as the State System of Higher Education.

*Substantial ongoing control*—The act of setting or affirmatively approving the rates, routes, schedules, terms and conditions of service, and the monitoring and enforcement of a contractor's compliance with them.

(c) *Third party contracts.* Generally, passenger transportation services provided by third parties under contract to State instrumentalities, and their subcontractors, are subject to Commission jurisdiction unless the service is exempted by meeting the requirements in subsection (d).

(d) *Exemption.* Passenger transportation services provided by third parties under contract to municipal corporations, and their subcontractors, are not subject to the Commission's jurisdiction when the following conditions are present:

- (1) The service is provided within the corporate limits, as described in subsection (a).
- (2) The service is subject to substantial ongoing control by the municipal corporation as to the following:
  - (i) The rates charged to passengers for the service.
  - (ii) The routes for the service.
  - (iii) The schedule of the service.
  - (iv) The terms and conditions of the service, including who is eligible to be a passenger.

(e) *Evidence of substantial ongoing control.* Substantial ongoing control is evidenced as follows:

- (1) The terms of a written contract between the third-party and the municipal corporation.
- (2) A statute, regulation, ordinance or other provision of law that the third-party contractor must comply with in the provision of the transportation services.
- (3) Written audits or inspection reports of the contractor's compliance with the contract and relevant provisions of law.

[Pa.B. Doc. No. 11-1181. Filed for public inspection July 15, 2011, 9:00 a.m.]

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