BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Generic Investigation Regarding	:	I-2008-2022003
Transportation Assessments	:	

RECOMMENDED DECISION

Before
Wayne L. Weismandel
Administrative Law Judge

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HISTORY OF THE PROCEEDING

By Ratification Order in Petition for Emergency Relief of the Pennsylvania Taxi and Paratransit Association, Docket Number P-2008-2013624, adopted and entered February 14, 2008, the Pennsylvania Public Utility Commission (Commission), among other things, initiated the above-captioned proceeding.

By Notice dated February 14, 2008, an Initial Prehearing Conference was scheduled for March 14, 2008, and the case was assigned to me.

My Prehearing Conference Order dated February 21, 2008, was sent to all persons and entities assessed by the Commission as members of the motor carrier passenger, motor carrier property, and railroad groups. Notice of the initiation of the above-captioned proceeding and of the Initial Prehearing Conference, as well as of a Technical Conference to be held on March 19, 2008, was also published in the Pennsylvania Bulletin on February 23, 2008.

Between February 14, 2008, and March 14, 2008, a number of Petitions to Intervene were filed in accordance with the Commission's regulations at 52 Pa.Code §§ 5.71-5.76.

The Initial Prehearing Conference occurred as scheduled on March 14, 2008. At the Initial Prehearing Conference, none of the Petitions to Intervene were opposed. Consequently, they were granted. A transcript of the proceeding containing 65 pages was produced.

By Order Granting Petitions To Intervene dated March 14, 2008, Wheeling & Lake Erie Railway Company, R.J. Corman Railroad Company/Allentown Lines, Inc., Valley Transportation, Inc., Boston Coach-Pennsylvania Corp. t/a Boston Coach, Global Medical Transportation Services, Inc., Lehigh Valley Transportation Services, Inc., Philadelphia Regional Limousine Association, Erie Transportation

Services, Inc. t/a Erie Yellow Cab, Warren Taxi Service, Pocono Cab Company, LLC, Samuel J. Lansberry, Inc., and Pennsylvania Motor Truck Association were granted party intervenor status.

By Order Requiring Entry Of Appearance Of Counsel dated March 14, 2008, Keystone State Railroad Association, CSX Corporation, Western New York & Pennsylvania Railroad LLC, Bucks Transit Co., Inc., Milford Tri-State Taxi, Inc., Limo Today.Com, Inc. t/a Hollywood Limo & Trans., Corry Cab Company, Easton Taxi, Inc., King Limousine and Transportation Service, Inc., Posten Taxi, Inc., Posten Transportation, Inc., Rainbow Cab, Inc., Royal Coach Limousine, Inc., S & S Transit, Inc., A. Royal Limousine L.L.C., J.J. Serafin, Inc. t/a AAAA Limousines and AAAA Transport, PA Joy Rides, Inc., Red Carpet Limousine Inc., Fusaro Brothers, Inc. t/a Maxwell Taxicab, Delaware County Transportation Service, Inc., A RIX Limousine Service, Inc., and All Occasion Limousine, Inc. were ordered to have legal counsel file an entry of appearance on their behalf on or before March 28, 2008, or have their objection dismissed.

By Scheduling And Briefing Order dated March 14, 2008, procedures for the Technical Conference scheduled for March 19, 2008, were established, the Commission's rules regarding discovery were modified to accommodate the time schedule for this case, and a litigation and briefing schedule was established.

The Technical Conference occurred as scheduled on March 19, 2008. Commission Chairman Holland, Vice Chairman Cawley, and Commissioners Pizzingrilli and Christy attended. Representatives of the Commission's Fiscal Office, the railroad group, the motor carrier passenger group, and the motor carrier property group made presentations. Nine witnesses offered sworn testimony and three individuals made unsworn statements. A transcript of the proceeding containing 74 pages (numbered 66 through 139) was produced.

By Hearing Notice dated March 20, 2008, the scheduling of an Initial and Further Hearing for March 31, April 2, April 3, and April 4, 2008, was confirmed.

By Order Denying Petitions To Intervene dated March 21, 2008, North Shore Railroad Company, Shamokin Valley Railroad Company, Lycoming Valley Railroad Company, Juniata Valley Railroad Company, Nittany & Bald Eagle Railroad Company, Union Railroad Company, McKeesport Connecting Railroad Company, Norfolk Southern Railway Company, Inc., Buffalo & Pittsburgh Railroad, Inc., Classy Cab Company, Inc., and Cranberry Taxi, Inc. were denied intervention because each of these entities were parties to this case by virtue of objections to assessment notices they had previously filed.

By Order Severing Issues dated March 25, 2008, the specific issues unique to the situations of Ali Baba Transportation Co., Park Avenue Luxury Limousine, Inc., Bucks County Transport, Inc., Barker Brothers, Inc. t/a Pittsburgh North Aire Ride, Aladdin Limo, Inc., A RIX Limousine Service, Inc., All Occasion Limousine, Inc., Fred and Janice Williams, and Blue Mountain Limousine Service (Jeffrey L. Bailey) were severed from the generic issues raised in their filed objections to assessment notices. The specific issues were to be separately docketed and proceed outside of the above-captioned case, while the generic issues would remain and be litigated in the above-captioned case.

By Order Striking Entry Of Appearance Of Counsel dated March 25, 2008, the entry of appearance of William H.R. Casey, Esquire, filed on or about March 12, 2008, on behalf of Adam Meyer, Inc., Camp Curtin Transfer, Inc., Clemmer Moving & Storage, Inc., Fiamingo Moving & Storage, Inc., Fisher-Hughes Transport, Inc., Frick Transfer, Inc., Glose Moving & Storage Inc. d/b/a O'Brien's Moving & Storage, Inc., Keller Moving & Storage, Inc., Reads Van Service, Inc., M.F. Rocky Moving Co., Shelly Moving & Storage, Inc., Diane Garland d/b/a Shively's Moving & Storage Co., Jack Treier Moving Storage, Inc., George W. Weaver, Inc., and Zeigler's Storage & Transfer, Inc. was stricken because none of the entities on whose behalf Mr. Casey had entered his appearance were a party nor an intervenor to this case.

The Initial Hearing occurred as scheduled on March 31, 2008. There being no objection to granting the Petition To Intervene filed by the Pennsylvania Taxi and Paratransit Association on March 17, 2008, it was granted. A total of four witnesses testified; one each on behalf of the Commission's Fiscal Office, Norfolk Southern Railway Company, Inc., the Philadelphia Regional Limousine Association, and the Pennsylvania Taxi and Paratransit Association. The Commission's Fiscal Office entered into evidence, without objection, Statement No. 1 and Exhibits Nos. 1 through 22. Norfolk Southern Railway Company, Inc. entered into evidence, without objection, Exhibits A and B. By Stipulation of the parties, McKeesport Connecting Railroad Company Exhibit No. 1 and Union Railroad Company Exhibit No. 1 were entered into evidence without objection. R.J. Corman Railroad Company/Allentown Lines, Inc. Exhibits Nos. 1 and 2 were also entered into evidence without objection. A transcript of the proceeding containing 74 pages (numbered 66 through 139) was produced. The Hearing was completed on March 31, 2008, therefore the Further Hearing sessions scheduled for April 2, 3, and 4, 2008, were canceled.

By Order Granting Petition To Intervene dated March 31, 2008, the granting of party intervenor status to the Pennsylvania Taxi and Paratransit Association was confirmed.

By Initial Decision Dismissing Objections dated March 31, 2008, the objections of Keystone State Railroad Association, CSX Corporation, Western New York & Pennsylvania Railroad LLC, Bucks Transit Co., Inc., Milford Tri-State Taxi, Inc., Limo Today.Com, Inc. t/a Hollywood Limo & Trans., Corry Cab Company, Easton Taxi, Inc., King Limousine and Transportation Service, Inc., Posten Taxi, Inc., Posten Transportation, Inc., Rainbow Cab, Inc., Royal Coach Limousine, Inc., S & S Transit, Inc., A. Royal Limousine L.L.C., J.J. Serafin, Inc. t/a AAAA Limousines and AAAA Transport, PA Joy Rides, Inc., Red Carpet Limousine Inc., Fusaro Brothers, Inc. t/a Maxwell Taxicab, Delaware County Transportation Service, Inc., A RIX Limousine Service, Inc., and All Occasion Limousine, Inc. were dismissed for failure to have

required legal counsel enter an appearance and for failure to comply with the Order Requiring Entry Of Appearance Of Counsel dated March 14, 2008.

By Cancellation Notice dated April 1, 2008, cancellation of the further Hearing sessions scheduled for April 2, 3, and 4, 2008, was confirmed.

By letter dated April 3, 2008, Union Railroad Company and McKeesport Connecting Railroad Company withdrew their request made at the Initial Hearing for a late-filed exhibit to be identified as Commission Fiscal Office Exhibit 23.

Timely Main Briefs were submitted by the Commission's Fiscal Office, Norfolk Southern Railway Company, Inc.; Boston Coach-Pennsylvania Corp. d/b/a Boston Coach; Pennsylvania Motor Truck Association and Samuel J. Lansberry, Inc. (a Joint Brief); R.J. Corman Railroad Company/Allentown Lines, Inc.; Philadelphia Regional Limousine Association; McKeesport Connecting Railroad Company and Union Railroad Company (a Joint Brief); North Shore Railroad Company, Nittany & Bald Eagle Railroad Company, Juniata Valley Railroad Company, Shamokin Valley Railroad Company, Wellsboro & Corning Railroad Company, and Lycoming Valley Railroad Company (a Joint Brief); Reading Blue Mountain & Northern Railroad Company and C&S Railroad Corporation (a Joint Brief); Buffalo & Pittsburgh Railroad, Inc. and York Railway Company (a Joint Brief); and Pennsylvania Taxi and Paratransit Association, Yellow Cab Company of Pittsburgh, Pittsburgh Cab Company, Inc., Airport Limousine Service, Inc., Transportation Information Enterprises, Erie Transportation Services, Inc. t/a Erie Yellow Cab, Burgit's City Taxi, McCarthy Flowered Cabs, Touch of Class Limo, Inc., Handy Delivery, Inc., Quick Service Taxi Company, Inc., WGM Transportation, Inc., and Warren Taxi Service (a Joint Brief).

By Order Regarding Official Notice dated April 29, 2008, the parties were advised of my intention to take official notice of the facts shown by Page 24 of the official Minutes of the Pennsylvania Public Utility Commission Public Meeting held on August 8, 2007, and by Page 14 of the official Minutes of the Pennsylvania Public Utility

Commission Public Meeting held on November 8, 2007, and given until May 10, 2008, to request, in writing, the opportunity to show that those facts are not properly noticed or that alternative facts should be noticed.

Timely Reply Briefs were submitted by the Commission's Fiscal Office, Norfolk Southern Railway Company, Inc.; Pennsylvania Motor Truck Association and Samuel J. Lansberry, Inc. (a Joint Brief); McKeesport Connecting Railroad Company and Union Railroad Company (a Joint Brief); Reading Blue Mountain & Northern Railroad Company and C&S Railroad Corporation (a Joint Brief); Buffalo & Pittsburgh Railroad, Inc. and York Railway Company (a Joint Brief); Pennsylvania Taxi and Paratransit Association, Yellow Cab Company of Pittsburgh, Pittsburgh Cab Company, Inc., Airport Limousine Service, Inc., Transportation Information Enterprises, Erie Transportation Services, Inc. t/a Erie Yellow Cab, Burgit's City Taxi, McCarthy Flowered Cabs, Touch of Class Limo, Inc., Handy Delivery, Inc., Quick Service Taxi Company, Inc., WGM Transportation, Inc., and Warren Taxi Service (a Joint Brief); and East Penn Railroad, LLC.

No timely written requests to show that the facts shown by Page 24 of the official Minutes of the Pennsylvania Public Utility Commission Public Meeting held on August 8, 2007, and by Page 14 of the official Minutes of the Pennsylvania Public Utility Commission Public Meeting held on November 8, 2007, are not properly noticed or that alternative facts should be noticed were received.

The parties, either by filed objection or by granted intervention, to this case are the Commission's Fiscal Office, Shamokin Valley Railroad Company, Buffalo & Pittsburgh Railroad, Inc., Juniata Valley Railroad Company, Lycoming Valley Railroad Company, Wellsboro & Corning Railroad Company, York Railway Company, McKeesport Connecting Railroad Company, Nittany & Bald Eagle Railroad Company, Norfolk Southern Railway Company, Inc., North Shore Railroad Company, Union Railroad Company, East Penn Railroad, LLC, C&S Railroad Corporation, Reading Blue Mountain & Northern Railroad Company, Tri-County Transit Service, Inc., McCarthy

Flowered Cabs, Conshohocken Yellow Cab, Inc., Valley Paratransit Service, Inc., Cranberry Taxi, Inc., Pittsburgh Cab Company, Inc., Classy Cab Company, Inc., Lansdale Yellow Cab Co., Inc. t/a North Penn Carriers, Joseph A. Marauoli t/a Yellow Cab Of Easton, Suburban Transit Network, Inc. t/a TransNet, Norristown Transportation Company, Norristown Yellow Cab Co., Inc., Willow Grove Yellow Cab Co. Inc. t/a Bux-Mont Transportation Services Company, Mid-County Transportation Services, Inc., Touch of Class Limo, Inc., Shelmar Corporation t/a Shelmar Limousine Service, Scott A. Dechert t/a Distinctive Limousine Service, Main Line Transit Service, Inc., Joseph A. Trapuzzano t/a Broadway Limousine, Raymond J. Lech t/a Twilight Limousine Service, Lawrence A. Waite t/a Airport Sedan Service, Gateway Limousine Service, LLC, Lea C. Morgan t/a Amore' Limousines, Paul Liberati t/a An Exceptional Limousine, Willis P. Umble, Yellow Cab Company of Pittsburgh, Airport Limousine Service, Inc., Transportation Information Enterprises, Burgit's City Taxi, Handy Delivery, Inc., Quick Service Taxi Co., Inc., WGM Transportation, Inc., Ali Baba Transportation, Inc., Park Avenue Luxury Limousine, Inc., Bucks County Transport, Inc., Barker Brothers, Inc. t/a Pittsburgh North Aire Ride, Aladdin Limo, Inc., Fred W. Williams, Blue Mountain Limousine Service (Jeffrey L. Bailey), Wheeling & Lake Erie Railway Company, R.J. Corman Railroad Company/Allentown Lines, Inc., Valley Transportation, Inc., Boston Coach-Pennsylvania Corp. t/a Boston Coach, Global Medical Transportation Services, Inc., Lehigh Valley Transportation Services, Inc., Philadelphia Regional Limousine Association, Erie Transportation Services, Inc. t/a Erie Yellow Cab, Warren Taxi Service, Pocono Cab Company, LLC, Pennsylvania Taxi and Paratransit Association, Samuel J. Lansberry, Inc., and Pennsylvania Motor Truck Association.

FINDINGS OF FACT

1. By Ratification Order in Petition for Emergency Relief of the Pennsylvania Taxi and Paratransit Association, Docket Number P-2008-2013624, adopted and entered February 14, 2008, the Commission, among other things, initiated the above-captioned proceeding.

2. A Technical Conference before the Chairman, Vice Chairman, and Commissioners was held on March 19, 2008, during which presentations were made by representatives of the Fiscal Office, the railroad group of public utilities, the motor carrier of passengers group of public utilities, and the motor carrier of property group of public utilities.

3. An Initial Hearing was held on March 31, 2008, during which evidence was received from the Fiscal Office, Norfolk Southern Railway Company, Inc., the Philadelphia Regional Limousine Association, and the Pennsylvania Taxi and Paratransit Association.

4. Official Notice was taken of the facts shown by Page 24 of the official Minutes of the Pennsylvania Public Utility Commission Public Meeting held on August 8, 2007, and by Page 14 of the official Minutes of the Pennsylvania Public Utility Commission Public Meeting held on November 8, 2007.

5. The parties, either by filed objection or by granted intervention, to this case are the Commission's Fiscal Office, Shamokin Valley Railroad Company, Buffalo & Pittsburgh Railroad, Inc., Juniata Valley Railroad Company, Lycoming Valley Railroad Company, Wellsboro & Corning Railroad Company, York Railway Company, McKeesport Connecting Railroad Company, Nittany & Bald Eagle Railroad Company, Norfolk Southern Railway Company, Inc., North Shore Railroad Company, Union Railroad Company, East Penn Railroad, LLC, C&S Railroad Corporation, Reading Blue Mountain & Northern Railroad Company, Tri-County Transit Service, Inc., McCarthy Flowered Cabs, Conshohocken Yellow Cab, Inc., Valley Paratransit Service, Inc., Cranberry Taxi, Inc., Pittsburgh Cab Company, Inc., Classy Cab Company, Inc., Lansdale Yellow Cab Co., Inc. t/a North Penn Carriers, Joseph A. Marauoli t/a Yellow Cab Of Easton, Suburban Transit Network, Inc. t/a TransNet, Norristown Transportation Company, Norristown Yellow Cab Co., Inc., Willow Grove Yellow Cab Co. Inc. t/a Bux-Mont Transportation Services Company, Mid-County Transportation Services, Inc., Touch of Class Limo, Inc., Shelmar Corporation t/a Shelmar Limousine Service, Scott A. Dechert t/a Distinctive Limousine Service, Main Line Transit Service, Inc., Joseph A.

Trapuzzano t/a Broadway Limousine, Raymond J. Lech t/a Twilight Limousine Service, Lawrence A. Waite t/a Airport Sedan Service, Gateway Limousine Service, LLC, Lea C. Morgan t/a Amore' Limousines, Paul Liberati t/a An Exceptional Limousine, Willis P. Umble, Yellow Cab Company of Pittsburgh, Airport Limousine Service, Inc., Transportation Information Enterprises, Burgit's City Taxi, Handy Delivery, Inc., Quick Service Taxi Co., Inc., WGM Transportation, Inc., Ali Baba Transportation, Inc., Park Avenue Luxury Limousine, Inc., Bucks County Transport, Inc., Barker Brothers, Inc. t/a Pittsburgh North Aire Ride, Aladdin Limo, Inc., Fred W. Williams, Blue Mountain Limousine Service (Jeffrey L. Bailey), Wheeling & Lake Erie Railway Company, R.J. Corman Railroad Company/Allentown Lines, Inc., Valley Transportation, Inc., Boston Coach-Pennsylvania Corp. t/a Boston Coach, Global Medical Transportation Services, Inc., Lehigh Valley Transportation Services, Inc., Philadelphia Regional Limousine Association, Erie Transportation Services, Inc. t/a Erie Yellow Cab, Warren Taxi Service, Pocono Cab Company, LLC, Pennsylvania Taxi and Paratransit Association, Samuel J. Lansberry, Inc., and Pennsylvania Motor Truck Association.

6. The amount to be assessed to all public utilities for fiscal year 2007-2008 was determined to be $49,483,000.

7. For fiscal year 2007-2008 the Commission acted twice with respect to assessment of public utilities.

8. At Public Meeting on August 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated August 1, 2007, from its Bureau of Administrative Services.

9. The recommendation adopted by the Commission at Public Meeting on August 8, 2007, established a total assessment for the fiscal year of $49,483,000 to be allocated to and collected from seven groups of utilities furnishing the same kind of service, specifically, Electric, Water/Wastewater, Gas, Telephone, Transportation, Pipeline, and Steam Heat.

10. At Public Meeting on November 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated October 30, 2007, from its Bureau of Administrative Services.

11. The recommendation adopted by the Commission at Public Meeting on November 8, 2007, divided the Transportation group into three separate groups, specifically, motor carrier passenger, motor carrier property, and railroad.

12. For fiscal years 2002-2003, 2003-2004, 2004-2005, 2005-2006, and 2006-2007 the Commission used the same seven groups (Electric, Water/Wastewater, Gas, Telephone, Transportation, Pipeline, and Steam Heat) as being the groups of utilities furnishing the same kind of service.

13. For fiscal years 1992-1993, 1993-1994, 1994-1995, and 1995-1996 the Commission used 10 groups; for fiscal years 1996-1997 and 1997-1998 the Commission used 11 groups; for fiscal years 1998-1999 and 1999-2000 the Commission used 12 groups; and for fiscal years 2000-2001 and 2001-2002 the Commission used 11 groups as being the groups of utilities furnishing the same kind of service.

14. In accordance with the Commission's August 8, 2007 adoption of the Bureau of Administrative Services' August 1, 2007 recommendation, assessment notices were sent out on or about August 23, 2007, to all of the individual public utilities comprising each of the seven groups, except for the Transportation group.

15. In accordance with the Commission's November 8, 2007 adoption of the Bureau of Administrative Services' October 30, 2007 recommendation, assessment notices were sent out on or about December 28, 2007, to all of the individual public utilities comprising the motor carriers of property, motor carriers of passengers, and railroad groups.

16. Eight generic issues are encompassed by the various objections of the motor carriers of passengers and railroad groups in this case.

17. By imposing safety standards and performing safety inspections of motor vehicles and by regulating the construction, alteration, relocation, suspension, and abolition of railroad crossings, the Commission in fact supervises and regulates motor carriers of passengers, motor carriers of property, and railroads.

18. Persons or corporations owning or operating equipment or facilities for transporting passengers or property as a common carrier are grouped together in the definitional section of the Public Utility Code under the definition of "public utility."

19. Persons or corporations owning or operating equipment or facilities for producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power are grouped together in the definitional section of the Public Utility Code under the definition of "public utility."

20. The Commission has recognized that both its direct and its indirect costs must be allocated to the same groups when assessment calculations are being done.

21. When the Commission acted on November 8, 2007, to change its August 8, 2007 determination that there was a single Transportation group and established three groups (motor carrier of passengers, motor carrier of property, and railroads) for assessment purposes, it offered two reasons for doing so.

22. The first reason offered by the Commission for changing the previous determination is that the new tripartite grouping is "consistent with prior Commission treatment of these utilities for assessment purposes."

23. The new tripartite grouping is consistent with that used in six of the previous fifteen fiscal years, or less than half of the time.

24. The second reason offered by the Commission for changing the previous determination is that the new tripartite grouping "will reflect more accurately the costs of regulation attributable to each of these utility groups providing the same kind of service."

25. In calendar year 2006 the Commission kept no records of direct costs attributable to each of the three new groups, but only of direct costs attributable to the Transportation group as a whole.

26. In Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006), the Commission rejected United Parcel Service, Inc.'s position that the air, motor, rail, and water carriage businesses comprise separate industries, with separate and very different regulatory concerns, and adopted the Fiscal Office's position that grouping all common carriers into one group for assessment purposes is consistent with a plain reading of the Public Utility Code.

27. The position of the Fiscal Office regarding the grouping of transportation utilities in the instant case is exactly opposite the position it took in Re United Parcel Service, Inc..

28. When the Commission adopted the recommendation dated August 1, 2007, from its Bureau of Administrative Services at Public Meeting on August 8, 2007, it acted consistently with its holding in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006).

29. When the Commission adopted the recommendation dated October 30, 2007, from its Bureau of Administrative Services at Public Meeting on November 8, 2007, it acted inconsistently with both its holding in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006), and its action at Public Meeting on August 8, 2007.

30. The Commission, in Re Dominion Retail, Inc., 101 Pa. PUC 837 (2006), has recognized that notices of assessments contain all the indicia of an adjudication.

31. The Commission, in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006), has previously determined that it need not adopt a Regulation establishing the groups of public utilities furnishing the same kind of service for assessment purposes.

32. Allowing the Commission the flexibility to establish the groups furnishing the same kind of service for assessment purposes without going through the lengthy, complicated process of adopting a Regulation is eminently sensible.

33. In preparing the assessments after the Commission's Public Meeting on November 8, 2007, instead of debiting the direct expenses incurred during calendar year 2006 to the three groups of motor carriers of passengers, motor carriers of property, and railroads, the Commission estimated what those direct expenses might have been.

34. The method the Commission used to make its estimates is fatally flawed.

35. The Commission's Bureau of Transportation & Safety conducted a three-month time study of only Bureau of Transportation & Safety employees' activities, broken down by the three groups of motor carriers of passengers, motor carriers of property, and railroads, in the Summer of 2007 (June through August, 2007).

36. Commission Bureaus other than the Bureau of Transportation & Safety also incur expenses that are directly attributable to the regulation of these groups.

37. None of the direct time of employees of these other Bureaus was included in the Bureau of Transportation & Safety three-month time study.

38. The particular time period used by the Bureau of Transportation & Safety for its time study encompassed an extremely active period for employees of that Bureau with respect to motor carriers of passengers.

39. The fact that abnormal activity involving the Bureau of Transportation & Safety employees occurred during the period of the time study implies that any results are skewed toward over-stating normal direct expenses incurred for regulating that group.

40. The Commission's Fiscal Office admits that the effect of the trifurcation of the Transportation group was to increase the proportion of the total Transportation group assessment payable by motor carriers of passengers by 291 percent, to increase the proportion of the total Transportation group assessment payable by railroads by 293 percent, and to decrease the proportion of the total Transportation group assessment payable by motor carriers of property by 49 percent.

41. The Fiscal Office witness testified that there was no substantial increase in regulatory activity with respect to motor carriers of passengers from 2006/2007 to 2007/2008.

42. The Fiscal Office witness also testified that there was no substantial change in the cost of regulating railroads between fiscal year 2006-2007 and fiscal year 2007-2008.

43. Assessments are ultimately computed on the basis of gross intrastate operating revenues.

44. The Commission, in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006), has recognized a need for interplay between the formulaic requirements of 66 Pa.C.S.A. § 510(a) and (b) and the reasonable share standard of 66 Pa.C.S.A. § 510(f) in determining a specific public utility's assessment.

45. For fiscal year 2007-2008 the assessments of the motor carriers of passengers and of the railroad groups nearly tripled solely as a result of the Commission's division of the Transportation group into three groups.

DISCUSSION

The Commission's assessment process is controlled by the provisions of 66 Pa.C.S.A. § 510. That section provides:

> **§ 510. Assessment for regulatory expenses upon public utilities**
>
> **(a) Determination of assessment.--**Before November 1 of each year, the commission shall estimate its total expenditures in the administration of this part for the fiscal year beginning July of the following year, which estimate shall not exceed three-tenths of 1% of the total gross intrastate operating revenues of the public utilities under its jurisdiction for the preceding calendar year. Such estimate shall be submitted to the Governor in accordance with section 610 of the act of April 9, 1929 (P.L. 177, No. 175), known as "The Administrative Code of 1929." At the same time the commission submits its estimate to the Governor, the commission shall also submit that estimate to the General Assembly. The commission or its designated representatives shall be afforded an opportunity to appear before the Governor and the Senate and House Appropriations Committees regarding their estimates. The commission shall subtract from the final estimate:
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> (1) The estimated fees to be collected pursuant to section 317 (relating to fees for services rendered by commission) during such fiscal year.
>
> (2) The estimated balance of the appropriation, specified in section 511 (relating to disposition, appropriation and disbursement of assessments and fees), to be carried over into such fiscal year from the preceding one.
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> The remainder so determined, herein called the total assessment, shall be allocated to, and paid by, such public utilities in the manner prescribed. If the General Assembly

fails to approve the commission's budget for the purposes of this part, by March 30, the commission shall assess public utilities on the basis of the last approved operating budget. At such time as the General Assembly approves the proposed budget the commission shall have the authority to make an adjustment in the assessments to reflect the approved budget. If, subsequent to the approval of the budget, the commission determines that a supplemental budget may be needed, the commission shall submit its request for that supplemental budget simultaneously to the Governor and the chairmen of the House and Senate Appropriations Committees.

(b) Allocation of assessment.--On or before March 31 of each year, every public utility shall file with the commission a statement under oath showing its gross intrastate operating revenues for the preceding calendar year. If any public utility shall fail to file such statement on or before March 31, the commission shall estimate such revenues, which estimate shall be binding upon the public utility for the purposes of this section. For each fiscal year, the allocation shall be made as follows:

(1) The commission shall determine for the preceding calendar year the amount of its expenditures directly attributable to the regulation of each group of utilities furnishing the same kind of service, and debit the amount so determined to such group. The commission may, for purposes of the assessment, deem utilities rendering water, sewer or water and sewer service, as defined in the definition of “public utility” in section 102 (relating to definitions), as a utility group.

(2) The commission shall also determine for the preceding calendar year the balance of its expenditures, not debited as aforesaid, and allocate such balance to each group in the proportion which the gross intrastate operating revenues of such group for that year bear to the gross intrastate operating revenues of all groups for that year.

(3) The commission shall then allocate the total assessment prescribed by subsection (a) to each group in the proportion which the sum of the debits made to it bears to the sum of the debits made to all groups.

(4) Each public utility within a group shall then be assessed for and shall pay to the commission such proportion of the amount allocated to its group as the gross intrastate operating revenues of the public utility for the preceding calendar year bear to the total gross intrastate operating revenues of its group for that year.

(c) Notice, hearing and payment.--The commission shall give notice by registered or certified mail to each public utility of the amount lawfully charged against it under the provisions of this section, which amount shall be paid by the public utility within 30 days of receipt of such notice, unless the commission specifies on the notices sent to all public utilities an installment plan of payment, in which case each public utility shall pay each installment on or before the date specified therefor by the commission. Within 15 days after receipt of such notice, the public utility against which such assessment has been made may file with the commission objections setting out in detail the grounds upon which the objector regards such assessment to be excessive, erroneous, unlawful or invalid. The commission, after notice to the objector, shall hold a hearing upon such objections. After such hearing, the commission shall record upon its minutes its findings on the objections and shall transmit to the objector, by registered or certified mail, notice of the amount, if any, charged against it in accordance with such findings, which amount or any installment thereof then due, shall be paid by the objector within ten days after receipt of notice of the findings of the commission with respect to such objections. If any payment prescribed by this subsection is not made as aforesaid, the commission may suspend or revoke certificates of public convenience, certify automobile registrations to the Department of Transportation for suspension or revocation or, through the Department of Justice, may institute an appropriate action at law for the amount lawfully assessed, together with any additional cost incurred by the commission or the Department of Justice by virtue of such failure to pay.

(d) Suits by public utilities.--No suit or proceeding shall be maintained in any court for the purpose of restraining or in anywise delaying the collection or payment of any assessment made under subsections (a), (b) and (c), but every public utility against which an assessment is made shall pay the same as provided in subsection (c). Any

public utility making any such payment may, at any time within two years from the date of payment, sue the Commonwealth in an action at law to recover the amount paid, or any part thereof, upon the ground that the assessment was excessive, erroneous, unlawful, or invalid, in whole or in part, provided objections, as hereinbefore provided, were filed with the commission, and payment of the assessment was made under protest either as to all or part thereof. In any action for recovery of any payments made under this section, the claimant shall be entitled to raise every relevant issue of law, but the findings of fact made by the commission, pursuant to this section, shall be prima facie evidence of the facts therein stated. Any records, books, data, documents, and memoranda relating to the expenses of the commission shall be admissible in evidence in any court and shall be prima facie evidence of the truth of their contents. If it is finally determined in any such action that all or any part of the assessment for which payment was made under protest was excessive, erroneous, unlawful, or invalid, the commission shall make a refund to the claimant out of the appropriation specified in section 511 as directed by the court.

(e) Certain provisions not applicable.--The provisions of this part relating to the judicial review of orders and determinations of the commission shall not be applicable to any findings, determinations, or assessments made under this section. The procedure in this section providing for the determination of the lawfulness of assessments and the recovery back of payments made pursuant to such assessment shall be exclusive of all other remedies and procedures.

(f) Intent of section.--It is the intent and purpose of this section that each public utility subject to this part shall advance to the commission its reasonable share of the cost of administering this part. The commission shall keep records of the costs incurred in connection with the administration and enforcement of this part or any other statute. The commission shall also keep a record of the manner in which it shall have computed the amount assessed against every public utility. Such records shall be open to inspection by all interested parties. The determination of such costs and assessments by the commission, and the records and data upon which the same are made, shall be considered prima facie correct; and in

> any proceeding instituted to challenge the reasonableness or correctness of any assessment under this section, the party challenging the same shall have the burden of proof.
>
> **(g) Saving provision.--**This section does not affect or repeal any of the provisions of the act of July 31, 1968 (P.L. 769, No. 240), known as the "Commonwealth Documents Law."

66 Pa.C.S.A. § 510.

By November 1 of a calendar year the Commission must estimate its total expenditures for the fiscal year beginning the following July 1 and submit this estimate to the Governor and the General Assembly for approval. In preparing its estimate of total expenditures, the Commission is required to subtract estimated fees to be collected during the applicable fiscal year and the estimated amount of the unused appropriation from the preceding fiscal year. Upon approval by the Governor and the General Assembly the estimated expenditures, less the required subtractions, becomes the approved amount for the Commission to assess upon public utilities for administration of the provisions of the Public Utility Code, 66 Pa.C.S.A. §§ 101 et seq.

Thereafter, every public utility is required, by March 31 of each calendar year, to file with the Commission a statement showing its gross intrastate operating revenues for the preceding calendar year. If a public utility neglects to timely file its gross intrastate operating revenues report, the Commission is authorized to estimate such revenues and the Commission's estimate is binding upon the public utility for the purposes of calculating its assessment.

Based upon the filed assessment reports (or Commission estimates in lieu thereof), and using a statutorily prescribed formula, the Commission prepares and sends each public utility, by certified mail, a notice of assessment setting forth the sum due. A public utility may file objections to the assessment notice within 15 days after receipt. Absent an objection, payment is due within 30 days of receipt of the assessment notice. If payment is not timely made, the Commission may suspend or revoke the public

utility's certificate(s) of public convenience, certify motor vehicle registrations to the Department of Transportation for suspension or revocation, or institute an action at law for the amount lawfully assessed, together with any additional cost incurred. A public utility that makes timely payment may, at any time within two years from the date of payment, sue the Commonwealth to recover the amount paid, or any part thereof, upon the grounds that the assessment was excessive, erroneous, unlawful, or invalid, provided that timely objections to the assessment had previously been filed.

The statutorily prescribed formula for determining each public utility's assessment requires that the Commission first determine the amounts of its actual expenditures during the preceding calendar year directly attributable to the regulation of each group of utilities furnishing the same kind of service (direct costs). These direct costs are then debited against each of the utility groups in the amount that each group caused to be incurred. The Commission's remaining amounts of its actual expenditures during the preceding calendar year (indirect costs) are then allocated to each group of utilities furnishing the same kind of service in the proportion which the gross intrastate operating revenues for the preceding calendar year of each group bears to the gross intrastate operating revenues for the preceding calendar year of all utility groups. The direct costs and the proportional share of indirect costs calculated for each group of utilities furnishing the same kind of service is then assigned to each utility group for collection from the individual utilities comprising that group. The assessment of each individual public utility is determined from the amount assigned to the utility group of which the individual public utility is a part. This assessment is done on the basis of the proportion the individual public utility's gross intrastate operating revenue for the preceding calendar year bears to the gross intrastate operating revenue for the same year of all the individual public utilities comprising its group of utilities furnishing the same kind of service.

The final assessment amount for each individual public utility is further constrained by the requirement that it be the individual public utility's reasonable share of the cost of administering the Public Utility Code.

One result of the statutorily prescribed formula for determining each public utility's assessment is that the determination of what constitutes a group of utilities furnishing the same kind of service becomes extremely important. Both direct and indirect costs are assigned to the groups for collection by assessment. As to direct costs, if there is only one group called "Transportation" that encompasses motor carriers of property, motor carriers of passengers, and railroads, the direct costs will be spread among all of the individual public utilities rendering any of these types of service. On the other hand, if there are three separate groups, motor carriers of property, motor carriers of passengers, and railroads, only the direct costs attributable to an individual public utility's more narrowly defined group will be part of the individual public utility's assessment. A similar effect obtains with respect to indirect costs. The amount of indirect costs to be collected by assessment from any one public utility varies with the number of groups over which these indirect costs are spread.

For fiscal year 2007-2008 the Commission acted twice with respect to assessment of public utilities. At Public Meeting on August 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated August 1, 2007, from its Bureau of Administrative Services. The recommendation adopted by the Commission established a total assessment for the fiscal year of $49,483,000 to be allocated to and collected from seven groups of utilities furnishing the same kind of service, specifically, Electric, Water/Wastewater, Gas, Telephone, Transportation, Pipeline, and Steam Heat. These same seven groups were used by the Commission for fiscal years 2002-2003, 2003-2004, 2004-2005, 2005-2006, and 2006-2007.1[1] The recommendation adopted by the Commission provided:

> That the Bureau of Administrative Services-Assessment Section compute, in accordance with Section 510 of the Public Utility Code, and pursuant to the foregoing findings and determinations, the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on each and every public utility.

In accordance with the Commission's adoption of the Bureau of Administrative Services' recommendation, assessment notices were sent out on or about August 23, 2007, to all of the individual public utilities comprising each of the seven groups, except for the Transportation group.

At Public Meeting on November 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated October 30, 2007, from its Bureau of Administrative Services. This recommendation divided the Transportation group into three separate groups, specifically, motor carrier passenger, motor carrier property, and railroad. The recommendation adopted by the Commission at Public Meeting on November 8, 2007, provided:

> The Bureau of Administrative Services, Assessment Section, will compute, in accordance with Section 510 of the Public Utility Code, the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on motor carriers of passengers, motor carriers of property, and railroads. Assessments for all other utility groups were computed and mailed in accordance with the August 1, 2007 recommendation.

In accordance with the Commission's November 8, 2007 adoption of the Bureau of Administrative Services' October 30, 2007 recommendation, assessment notices were sent out on or about December 28, 2007, to all of the individual public utilities comprising the motor carriers of property, motor carriers of passengers, and railroad groups.

In response to the assessment notices sent to the motor carriers of property, motor carriers of passengers, and railroad groups, on January 14, 2008, the Pennsylvania Taxi and Paratransit Association filed a Petition For Emergency Relief, Docket Number P-2008-2013624. Citing the magnitude of the assessment increase to the motor carriers of passengers, the Petition For Emergency Relief requested, among other things, an installment payment plan for the assessed amounts.

On that same day, Commission Chairman Holland issued an Emergency Order that did four things:

1. Granted the Petition For Emergency Relief.

2. Established an installment payment plan for the motor carriers of passengers and railroad groups (three equal installments, due March 15, 2008, June 15, 2008, and September 15, 2008).

3. Authorized a temporary 1 percent surcharge onto the amount of each fare for the motor carriers of passengers.

4. Ordered the Fiscal Office to issue supplemental notices of assessment to each transportation utility and that objections filed within 15 days of the supplemental notices would be considered timely.

At Public Meeting on January 24, 2008, the Commission unanimously adopted a properly seconded Motion by Chairman Holland to, among other things, extend the date for consideration of the January 14, 2008 Emergency Order to February 14, 2008, and to extend the due date for the payment of the motor carriers of passengers and railroad groups' assessments to March 17, 2008.

By Ratification Order dated February 14, 2008, at Docket Number P-2008-2013624, the Commission, among other things, ordered:

> That a "Generic Investigation Regarding Transportation Assessment" be initiated at Docket No. I-2008-2022003 to address and resolve common issues regarding transportation assessments and that this proceeding be assigned to the Office of Administrative Law Judge (OALJ) for hearing and decision.
> Order Paragraph 5.

The issues in this investigation case, in accordance with the terms of the February 14, 2008 Ratification Order, are the common (or "generic") challenges brought by various members of the motor carriers of passengers and railroad groups to the Commission's assessments for fiscal year 2007-2008. Specific objections, pertaining only to the particular public utility making them, are not being considered in this case, but rather in separately docketed cases.

The issues which may be fairly said to be encompassed by the various objections of the motor carriers of passengers and railroad groups in this case are:

1. Do the assessments of the motor carriers of passengers and railroad groups for fiscal year 2007-2008 constitute discriminatory taxation of the members of those groups?

2. Does a proper application of the principles of statutory construction require that the Commission interpret 66 Pa.C.S.A. § 510(b) as prohibiting the division of the transportation group into the three groups of motor carriers of property, motor carriers of passengers, and railroads?

3. Does the unappealed decision of the Pennsylvania Commonwealth Court in United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 789 A.2d 353 (Pa.Cmwlth. 2001) (UPS I) prohibit the Commission from dividing the transportation group into the three groups of motor carriers of property, motor carriers of passengers, and railroads?

4. Does the history of the Commission's previous interpretation, and the rationale for that interpretation, of there being only a single transportation group for assessment purposes preclude the Commission from dividing the transportation group into three groups without offering a reasoned explanation for the change?

5. Does the Commission's action regarding assessments for fiscal year 2007-2008 in adopting the recommendation dated October 30, 2007, from its Bureau of Administrative Services at Public Meeting on November 8, 2007, without providing affected utilities notice and an opportunity to be heard violate the provisions of 66 Pa.C.S.A. § 703(g)?

6. Does the Commission have to define the groups of utilities furnishing the same kind of service by the adoption of a Regulation?

7. Do the Commission's calculations of assessments for fiscal year 2007-2008 for motor carriers of property, motor carriers of passengers, and railroads comply with the statutory requirements of 66 Pa.C.S.A. § 510?

8. Do the 291 percent and 293 percent increases in the proportion of the total transportation assessment incurred by the motor carriers of passengers and the railroads, respectively, violate the provisions of 66 Pa.C.S.A. § 510(f)?

These issues will be considered in order.

1. Do the assessments of the motor carriers of passengers and railroad groups for fiscal year 2007-2008 constitute discriminatory taxation of the members of those groups?

Answer: No.

Some of the parties contend that the increased assessment amounts for members of the motor carriers of passengers and the railroad groups resulting from the division of what was previously the single Transportation group into three groups (with a simultaneous reduction in the assessment amounts for members of the motor carriers of property group) constitutes discriminatory taxation. This argument must fail because the premise upon which it relies is wrong. The Commission's assessments are not a tax.

The Pennsylvania Commonwealth Court has stated that "[t]he question of whether an enactment is a tax or regulatory measure is determined by the purposes for which it is enacted and not by its title." White v. Medical Professional Liability Catastrophe Loss Fund, 131 Pa.Cmwlth. 567, 571, 571 A.2d 9, 11 (1990). In White the Court also noted that:

> The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.

White, 131 Pa.Cmwlth. at 571, 571 A.2d at 11 (citation omitted).

The Pennsylvania Supreme Court has identified the features of a license fee, as distinguished from a tax, as follows:

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

National Biscuit Co. v. Philadelphia, 374 Pa. 604, 615-616, 98 A.2d 182, 188 (1953).

The Commission's assessments on public utilities are not for the purpose of raising revenue. They are specifically described as being for "the cost of administering" the Public Utility Code. 66 Pa.C.S.A. § 510(f). Assessments can only be imposed on public utilities, a type of business regulated by the Commission under its police power. Delmarva Power & Light Co. v. Pa. Public Utility Comm'n, 582 Pa. 338,

870 A.2d 901 (2005) (the Commission can not assess electric generation suppliers because they are not public utilities for the purposes of 66 Pa.C.S.A. § 510). By imposing safety standards and performing safety inspections of motor vehicles and by regulating the construction, alteration, relocation, suspension, and abolition of railroad crossings, the Commission in fact supervises and regulates motor carriers of passengers, motor carriers of property, and railroads. 66 Pa.C.S.A. §§ 1501, 2702. Failure to pay a Commission assessment results in the suspension or revocation of the public utility's certificate of public convenience. 66 Pa.C.S.A. §510(c). Without a valid certificate of public convenience, an entity can not legally engage in rendering public utility service. 66 Pa.C.S.A. §§ 1101, 1102.

2. Does a proper application of the principles of statutory construction require that the Commission interpret 66 Pa.C.S.A. § 510(b) as prohibiting the division of the transportation group into the three groups of motor carriers of property, motor carriers of passengers, and railroads?

Answer: No.

Various parties argue that a proper application of the principles of statutory construction prohibits the Commission from dividing the former Transportation group into the three groups of motor carriers of property, motor carriers of passengers, and railroads as was done by the Commission's November 8, 2007 adoption of the Bureau of Administrative Services' October 30, 2007 recommendation. These parties focus on the second sentence of 66 Pa.C.S.A. §510(b)(1), which states, "The commission may, for purposes of the assessment, deem utilities rendering water, sewer or water and sewer service, as defined in the definition of 'public utility' in section 102 (relating to definitions), as a utility group."

The parties' arguments are that either the application of the maxims *expressio unius est exclusio alterius* or *inclusio unius est exclusio alterius* or the reference to

the definitions found in section 102 of the Public Utility Code establish the meaning of the phrase "each group of utilities furnishing the same kind of service."

The maxims *expressio unius est exclusio alterius* and *inclusio unius est exclusio alterius* have similar, but slightly different, meanings. The first teaches that the express mention of one meaning in a statute implies the exclusion of other meanings. Lamar Advertising Co. v. Zoning Hearing Bd., 939 A.2d 994, 1000 (Pa.Cmwlth. 2007). See, also, L.S. v. David Eschbach, Jr., Inc., 583 Pa. 47, 874 A.2d 1150 (2005). An example of the application of this maxim is that a deemed approval provision for a permit for the construction of residential buildings does not apply to an application for a permit to construct a billboard. The meaning of a residential building (defined as a one-family or two-family dwelling unit) can not be interpreted as including a billboard, something that is not a dwelling unit at all. Lamar Advertising Co. v. Zoning Hearing Bd., 939 A.2d 994, 1000 (Pa.Cmwlth. 2007). The second maxim means that a specific listing of similar things excludes from the operation of the provision any other similar things that were not specifically listed. For example, a rule limiting the class of arbitrators qualified to apply a rule regarding delay damages to "those appointed under the Arbitration Act of June 16, 1836 . . . or the Health Care Services Malpractice Act of October 15, 1975" can not be interpreted to include either statutory or common law arbitrators as having the same power. Hennessey v. American Mutual Insurance Co., 327 Pa.Super. 367, 475 A.2d 842 (1984). Neither of these two maxims offer any real assistance in defining a specific group of utilities furnishing the same kind of service. Additionally, neither is applicable in leading to a conclusion that the legislature, by permitting the Commission to "deem utilities rendering water, sewer or water and sewer service . . .as a utility group," in any way affected the Commission's ability to determine whether there should be one or three or more "groups" of utilities providing some type of transportation service.

As to the argument that the reference to the definitions in section 102 of the Public Utility Code that is found in the second sentence of 66 Pa.C.S.A. § 510(b)(1) restricts the Commission's establishing groups of utilities furnishing the same kind of service to the groupings found in the definitional section, it too must fail. It is true that 66

Pa.C.S.A. § 102, in defining what is a "public utility", groups together persons or corporations owning or operating equipment or facilities for "[t]ransporting passengers or property as a common carrier." 66 Pa.C.S.A. § 102(1)(iii). However, it is also true that in defining what is a "public utility" 66 Pa.C.S.A. § 102 groups together those persons or corporations owning or operating equipment or facilities for "[p]roducing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation." 66 Pa.C.S.A. § 102(1)(i). None of the parties making the argument that the reference to the definitions in section 102 in the second sentence of 66 Pa.C.S.A. § 510(b)(1) contend that the Commission must treat gas, electric, and steam utilities as a single group furnishing the same kind of service. Clearly, the reference to the definitions in section 102 of the Public Utility Code is only meant to provide the reader with a reference for the definitions of what kinds of activities describe utilities rendering water, sewer or water and sewer service, i.e., "[d]iverting, developing, pumping, impounding, distributing, or furnishing water to or for the public for compensation", and "[s]ewage collection, treatment, or disposal for the public for compensation." 66 Pa.C.S.A. § 102(1)(ii) and (vii). While the definitions found in 66 Pa.C.S.A. § 102 may provide assistance in determining if the Commission's groupings of utilities furnishing the same kind of service are reasonable, those definitions are not controlling.

3. Does the unappealed decision of the Pennsylvania Commonwealth Court in United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 789 A.2d 353 (Pa.Cmwlth. 2001) (UPS I) prohibit the Commission from dividing the transportation group into the three groups of motor carriers of property, motor carriers of passengers, and railroads?

Answer: No.

The unappealed decision of the Pennsylvania Commonwealth Court in United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 789 A.2d 353 (Pa.Cmwlth. 2001) (UPS I) only decided that the word "group" used in 66 Pa.C.S.A. § 510(b)(2)

means "each group of utilities furnishing the same kind of service" as that phrase is used in 66 Pa.C.S.A. § 510(b)(1). UPS I at 359. That is, once the Commission has established groups of utilities furnishing the same kind of service for the purpose of allocating direct costs, it must use the same groups for the allocation of indirect costs. The UPS I decision did not address the Commission's authority to determine the number nor the composition of groups of utilities furnishing the same kind of service at all. The Pennsylvania Supreme Court, in United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 574 Pa. 304, 830 A.2d 941 (2003) (UPS III) explained and approved of that part of the UPS I decision, saying:

> [T]he direct expense portions of the relevant assessments are to be restored to their original form, *i.e.*, allocated among the Utility Groups as defined in this opinion (eleven or twelve, depending upon the fiscal year of the assessment). The Commission's gross indirect expenses are to be allocated among the same Utility Groups for each assessment year, per *Section 510(b)(2),* in the proportion that the gross intrastate operating revenue for each Utility Group bears to the gross intrastate operating revenues of all Utility Groups for that year.

UPS III at 317, 830 A.2d at 949.

The Pennsylvania Supreme Court also noted in UPS III that it was "offer[ing] no opinion concerning the assessment methodology that may be available to the Commission within the confines of the guiding statute on a prospective basis." UPS III at 317, 830 A.2d at 949, n.15.

None of the parties in this case have directed my attention to any court decision ruling on the Commission's authority to determine the number nor the composition of groups of utilities furnishing the same kind of service, nor has my own research revealed any. The only decision dealing with this precise question is that of the Commission itself in Re United Parcel Service, Inc. 101 Pa. PUC 548 (2006), where the Commission answered the following material question in the affirmative:

> Does the Commission have the authority under the Public Utility Code to group all common carriers in one utility group for assessment purposes?

In explaining its answer to the material question, the Commission said:

> [W]e have not interpreted the *UPS III* ruling as intended to foreclose this Commission's revision of the methodology used for the allocation of direct costs on a prospective basis.

101 Pa. PUC at 554.

Further, the Commission went on to say:

> [W]e can find no basis in the Code for the Section 510(b)(1) allocation of direct costs to utilities furnishing the same kind of services to remain static and unaffected by the changes necessary to implement the court's mandate [in UPS I] regarding Section 510(b)(2).

101 Pa. PUC at 555.

In summary, the Commission has recognized that both its direct and its indirect costs must be allocated to the same groups when assessment calculations are being done, but that it retains the power to redefine those groups from one fiscal year to another. The unappealed decision in UPS I does not require a different result.

4. Does the history of the Commission's previous interpretation, and the rationale for that interpretation, of there being only a single transportation group for assessment purposes preclude the Commission from dividing the transportation group into three groups without offering a reasoned explanation for the change?

Answer: Yes.

For fiscal years 2002-2003, 2003-2004, 2004-2005, 2005-2006, and 2006-2007 the Commission established seven groups of utilities furnishing the same kind of service, specifically, Electric, Water/Wastewater, Gas, Telephone, Transportation,

Pipeline, and Steam Heat. These same seven groups were used by the Commission when at Public Meeting on August 8, 2007, it unanimously approved a properly seconded Motion to adopt the recommendation dated August 1, 2007, from its Bureau of Administrative Services for the fiscal year 2007-2008. However, at Public Meeting on November 8, 2007, the Commission unanimously approved another properly seconded Motion to adopt the new recommendation dated October 30, 2007, from its Bureau of Administrative Services. This new recommendation divided the Transportation group into three separate groups, specifically, motor carrier passenger, motor carrier property, and railroad. The only explanation for the change offered in the new recommendation dated October 30, 2007, is:

> Upon further review, we recommend that the transportation group be divided into three (3) separate utility groups: motor carrier passenger, motor carrier property, and railroad. This grouping is consistent with prior Commission treatment of these utilities for assessment purposes, and will reflect more accurately the costs of regulation attributable to each of these utility groups providing the same kind of service.
> Staff Recommendation from Bureau of Administrative Services,

October 30, 2007, p.1

The new recommendation purports to offer two reasons for the change from one Transportation group to three separate groups.

First, it says, this new tripartite grouping is "consistent with prior Commission treatment of these utilities for assessment purposes." While this statement is literally true, it is not complete. For fiscal year 1992-1993 through fiscal year 1995-1996 there were only two groups, common carrier by motor vehicle (just called "motor" in fiscal years 1994-1995 and 1995-1996) and railroad. For fiscal year 1996-1997 through fiscal year 2001-2002 there were three groups, motor carrier (called motor common carrier in fiscal years 1998-1999 through 2001-2002), motor carrier property, and railroad. Finally, for fiscal year 2002-2003 through fiscal year 2006-2007, and initially for fiscal year 2007-2008, there was only one group, Transportation. Consequently, the new categorization of three groups is consistent with that used for the six fiscal years 1996-1997 through 2001-

2002, but not with the categorization used for the four fiscal years 1992-1993 through 1995-1996 nor with the categorization used for the five fiscal years 2002-2003 through 2006-2007. In other words, the new tripartite grouping is consistent with that used in six of the previous fifteen fiscal years, or less than half of the time. This hardly constitutes such a level of consistency as to be a persuasive reason for making the change from one group to three. Additionally, no explanation is offered as to why being consistent with the fiscal year 1996-1997 through fiscal year 2001-2002 time period is better than being consistent with the fiscal year 1992-1993 through fiscal year 1995-1996 time period or the fiscal year 2002-2003 through fiscal year 2006-2007 time period.

The second reason advanced by the new recommendation for changing from one group to three is that such change "will reflect more accurately the costs of regulation attributable to each of these utility groups providing the same kind of service." As will be seen, because the Commission kept no records of direct costs attributable to each of the three new groups, but only of direct costs attributable to the Transportation group as a whole, this reason is completely unfounded. It also begs the question of whether or not the new groupings are better than the lone Transportation group in reflecting utility groups providing the same kind of service.

The weakness of the offered reasons for dividing the Transportation group into three parts is important because the Commission has very recently made cogent argument as to why one Transportation group complied with the statutory requirement.

In Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006) the Commission held that it was "constrained to conclude that our determination to group all common carriers into one utility group for assessment purposes is consistent with a plain reading of the [Public Utility] Code." 101 Pa. PUC at 556. The Commission made this holding after considering the arguments of the Fiscal Office (whose position the Commission adopted) and of United Parcel Service, Inc., a motor carrier of property that had argued that:

> [T]he air, motor, rail, and water carriage businesses comprise separate industries, with their separate and very different regulatory concerns.

101 Pa. PUC at 555.

In the instant case, the Fiscal Office takes exactly the opposite position from the one it took in the 2006 proceeding and the one that the Commission adopted. If the Commission is going to render an inconsistent opinion in the space of 18 months, it must present a clear explanation of the rationale behind the reversal of position. The two reasons advanced by the Commission in the new recommendation dated October 30, 2007, that it adopted at Public Meeting on November 8, 2007, are insufficient.

An administrative agency such as the Commission is not, of course, bound by the rule of stare decisis, but it does have an obligation to render consistent opinions, and should either follow, distinguish or overrule its own precedent. National Fuel Gas Distribution Corp. v. Pa. Public Utility Comm'n, 677 A.2d 861 (Pa.Cmwlth. 1996). See, also, Bell Atlantic-Pennsylvania, Inc. v. Pa. Public Utility Comm'n, 672 A.2d 352 (Pa.Cmwlth. 1995); Peco Energy Co. v. Pa. Public Utility Comm'n, 568 Pa. 39, 791 A.2d 1155 (2002); Dee-Dee Cab, Inc. v. Pa. Public Utility Comm'n, 817 A.2d 593 (Pa.Cmwlth. 2003), app. denied, 575 Pa. 698, 836 A.2d 123 (2003).

When the Commission adopted the recommendation dated August 1, 2007, from its Bureau of Administrative Services at Public Meeting on August 8, 2007, it acted consistently with its holding in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006). When it adopted the new recommendation dated October 30, 2007, from its very same Bureau of Administrative Services on November 8, 2007, the Commission had an obligation to provide a reasoned explanation for the complete turnabout. This it did not do. Consequently, the Commission is precluded from enforcing the determination made at the November 8, 2007 Public Meeting and creating the three groups of motor carriers of passengers, motor carriers of property, and railroads for assessment purposes for fiscal year 2007-2008. Cf., National Fuel Gas Distribution Corp. v. Pa. Public Utility Comm'n, 677 A.2d 861 (Pa.Cmwlth. 1996).

5. Does the Commission's action regarding assessments for fiscal year 2007-2008 in adopting the recommendation dated October 30, 2007, from its Bureau of Administrative Services at Public Meeting on November 8, 2007, without providing affected utilities notice and an opportunity to be heard violate the provisions of 66 Pa.C.S.A. § 703(g)?

Answer: Yes.

Section 703(g) of the Public Utility Code provides:

> **(g) Rescission and amendment of orders.**—The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

When at Public Meeting on August 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated August 1, 2007, from its Bureau of Administrative Services it entered a final, definitive order. Whether it was a final order under recognized standards of judicial and administrative action is not material. It had the effect in law of an order of definitive character in assessment proceedings. "The substance and not the form of commission action is controlling on the question of whether the Commission has entered a final, definitive order." West Penn Power Co. v. Pa. Public Utility Comm'n, 174 Pa.Super. 123, 129, 100 A.2d 110, 113 (1953) (citation omitted). See, also, Dep't of Highways v. Pa. Public Utility Comm'n, 189 Pa.Super. 111, 116, 149 A.2d 552, 555 (1959) (citation omitted). The Commission itself has recognized that notices of assessments contain all the indicia of an adjudication. See, Re Dominion Retail, Inc., 101 Pa. PUC 837, 844 (2006). At the August 8, 2007 Public Meeting the Commission authorized a total assessment for the fiscal year 2007-2008 of $49,483,000 to be allocated to and collected from seven groups of utilities furnishing the same kind of

service, specifically, Electric, Water/Wastewater, Gas, Telephone, Transportation, Pipeline, and Steam Heat. The Commission action directed the Bureau of Administrative Services-Assessment Section to compute the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on each and every public utility, as those public utilities were divided among the seven groups of utilities furnishing the same kind of service. The seven groups contained a single group called "Transportation", not three groups called motor carriers of passengers, motor carriers of property, and railroads. Before this final order of the Commission could be substantively changed, affected parties had to be provided with notice and an opportunity to be heard.

Section 703(g) of the Public Utility Code is a provision implementing the Commission's responsibility to provide due process. That the Commission, as an administrative agency, has such a responsibility is beyond question. Schneider v. Pa. Public Utility Comm'n, 83 Pa.Cmwlth. 306, 479 A.2d 10 (1984). In West Penn Power Co. v. Pa. Public Utility Comm'n, 174 Pa.Super. 123, 100 A.2d 110 (1953), the Pennsylvania Superior Court held:

> The Commission cannot make a final determination on an ultimate question before it for adjudication and subsequently change such determination without observing the requirements of due process.

West Penn at 128-129, 100 A.2d at 113. See, also, Popowsky v. Pa. Public Utility Comm'n, 805 A.2d 637, 642 (2002), app. denied, 573 Pa. 660, 820 A.2d 163 (2003).

The Pennsylvania Supreme Court has cited with approval the holding of the Pennsylvania Commonwealth Court in Scott Paper Co. v. Pa. Public Utility Comm'n, 126 Pa.Cmwlth. 111, 558 A.2d 914 (1989), that :

> [A]lthough an administrative agency may clarify a prior order without affording prior notice and an opportunity to be heard to interested parties, it may not effect substantive change of a prior order unless it has complied with the requirements of *Section 703(g).*

Montour Trail Council v. Pa. Public Utility Comm'n, 547 Pa. 367, 370, 690 A.2d 703, 705 (1997).

The Commission violated the provisions of 66 Pa.C.S.A. § 703(g) when it adopted the recommendation dated October 30, 2007, from its Bureau of Administrative Services at Public Meeting on November 8, 2007, which ordered that assessments be made on transportation utilities comprising three groups rather than the previously ordered single group without providing affected utilities notice and an opportunity to be heard. Consequently, the assessments on the groups of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 must be vacated and new assessments on the single Transportation group calculated and collected. Cf., Montour Trail Council v. Pa. Public Utility Comm'n, 547 Pa. 367, 370, 690 A.2d 703, 705 (1997).

6. Does the Commission have to define the groups of utilities furnishing the same kind of service by the adoption of a Regulation?

Answer: No.

As is true of Issue 3, above, no party has referred me to any court decision holding that the Commission must group public utilities for assessment purposes by adopting a Regulation setting forth the groupings. My own research has likewise failed to find any court decisions on this question. The only decision that addresses this question is that of the Commission itself in Re United Parcel Service, Inc. 101 Pa. PUC 548 (2006), where the Commission answered the following material question in the affirmative:

> Can the Commission establish utility groups for assessment purposes without holding hearings or using the rulemaking process?

In determining that it need not adopt a Regulation establishing the groups of public utilities furnishing the same kind of service, the Commission stated that it:

> viewed the determination as an interpretative rule, coming within the line of cases of (sic) established by *Uniontown Area School Dist. v. Pa. Human Relations Comm'n.*

Re United Parcel Service, Inc., 101 Pa. PUC 548, 556 (2006).

In Uniontown Area School Dist. v. Pa. Human Relations Comm'n, 455 Pa. 52, 313 A.2d 156 (1973), the Pennsylvania Supreme Court defined an interpretative rule as follows:

> An interpretative rule . . . depends for its validity not upon a *law*-making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets.

Uniontown at 77, 313 A.2d at 169.

In other words, the Commission has said that its grouping of utilities into those furnishing the same kind of service is within its purview of statutory interpretation and subject only to a court determination that its declared groupings do not, in fact, track the meaning of the statute. While this may be true, it is less than helpful in deciding if the Commission is required to follow the process for enactment of a Regulation in establishing the groups.

A better guide to the procedures the Commission may utilize in establishing groups furnishing the same kind of service for assessment purposes is found in Pa. Human Relations Comm'n v. Norristown Area School Dist., 473 Pa. 334, 374 A.2d 671 (1977), where the Pennsylvania Supreme Court quoted from Pacific Gas & Electric Co. v. Federal Power Comm'n, 506 F.2d 33 (D.C. Cir. 1974), to explain that:

> "An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedent."

Norristown at 349-350, 374 A.2d at 679.

The teaching of Norristown is that the Commission is not required to enact a Regulation to establish the groups furnishing the same kind of service for assessment purposes, but may achieve the same end through adjudications. That is, the Commission may establish groups for assessment purposes and aggrieved parties may challenge the groupings as part of the procedure established by statute for challenging an assessment. Section 510(d) of the Public Utility Code provides an action at law to recover the assessment amount paid on the ground "that the assessment was excessive, erroneous, unlawful, or invalid, in whole or in part" and that in any such action "the claimant shall be entitled to raise every relevant issue of law." A suit alleging that an assessment was unlawful or invalid because of the groupings made by the Commission would raise a relevant issue of law. Once decided, the adjudication would constitute binding precedent as to the groups established by the Commission.

Allowing the Commission the flexibility to establish the groups furnishing the same kind of service for assessment purposes without going through the lengthy, complicated process of adopting a Regulation is eminently sensible. The Commission is free to adjust to changes in circumstances that may have a determinative effect on the make-up of groups of utilities from one year to the next. At the same time, affected parties are protected from erroneous Commission groupings by the adjudicatory process.

The Commission is not required to engage in the process of adopting a Regulation to establish groups furnishing the same kind of service for assessment purposes.

7. Do the Commission's calculations of assessments for fiscal year 2007-2008 for motor carriers of property, motor carriers of passengers, and railroads comply with the statutory requirements of 66 Pa.C.S.A. § 510?

Answer: No.

Section 510(b)(1) of the Public Utility code provides, in relevant part:

> The commission shall determine for the preceding calendar year the amount of its expenditures directly attributable to the regulation of each group of utilities furnishing the same kind of service, and debit the amount so determined to such group.

In context, the use of the word "shall" in the first sentence of 66 Pa.C.S.A. § 510(b)(1) is mandatory. The Pennsylvania Supreme Court has explained the mandatory meaning of the word "shall" and how to determine when it applies as follows:

> The word "shall" by definition is mandatory, and it is generally applied as such. *Oberneder v. Link Computer Corp., 548 Pa. 201, 696 A.2d 148, 150 (Pa. 1997).* However, the context in which "shall" is used may leave its precise meaning in doubt. *See Gardner v. Workers' Compensation Appeal Board (Genesis Health Ventures), 585 Pa. 366, 888 A.2d 758, 764-65 (Pa. 2005)* ;see also *In re Canvass of Absentee Ballots of November 4, 2003 General Election, 577 Pa. 231, 843 A.2d 1223, 1231-32* (citations omitted) ("Although some contexts may leave the precise meaning of the word 'shall' in doubt ... this Court has repeatedly recognized the unambiguous meaning of the word in most contexts."). When the context in which "shall" is used creates ambiguity, this Court has used the factors in *§ 1921(c)* to ascertain the legislature's intent. *See Gardner, at 765.* This Court, however, has "recognized that the term 'shall' is mandatory for purposes of statutory construction when a statute is unambiguous." *Koken v. Reliance Insurance Company, 586 Pa. 269, 893 A.2d 70, 81 (Pa. 2006)* (citations omitted).

Chanceford Aviation Properties, LLP v. Chanceford Twp. Bd. Of Supervisors, 592 Pa. 100, 108, 923 A.2d 1099, 1104 (2007).

Here, the statute is unambiguous. The Commission is directed to use its expense figures from the preceding calendar year, to determine from those figures the amounts that are direct expenses of regulating each of the groups of utilities furnishing the same kind of service, and to charge those amounts against the respective groups. Such an allocation of direct expenses to the respective groups causing the expenses to be incurred accords precisely with the legislative intent that each public utility shall pay its reasonable share of administering the Public Utility Code. 66 Pa.C.S.A. § 501(f).

It is uncontested, however, that this is not what the Commission did in determining the 2007-2008 assessments for the groups of motor carriers of passengers, motor carriers of property, and railroads pursuant to the November 8, 2007 adoption of the recommendation dated October 30, 2007, from its Bureau of Administrative Services.

At the Initial Hearing on March 31, 2008, the Fiscal Office's witness testified that records were not kept in calendar year 2006 that would allow direct expenses to be charged to the three groups. Records were only maintained for the single group of Transportation. Tr. 251-253, Fiscal Office Statement No. 1 pp. 6-7.

Instead of debiting the direct expenses incurred during calendar year 2006 to the three groups of motor carriers of passengers, motor carriers of property, and railroads, the Commission estimated what those direct expenses might have been. This is a clear violation of the requirement of the controlling statute.

Even if the use of an estimate for determining the amount of direct expenses to be charged to the three groups were permissible, and it is not, the method the Commission used to make its estimates is fatally flawed. The Commission's Bureau of Transportation & Safety conducted a three-month time study of only Bureau of Transportation & Safety employees' activities, broken down by the three groups, in the Summer of 2007 (June through August, 2007. Tr. 181-182). The Bureau of Transportation & Safety then calculated the percentages of direct time attributable to each of the three groups over that period and the Fiscal Office used those percentages to extrapolate the direct time for each of the three groups in calendar year 2006. This methodology is deficient in at least two ways.

First, while the Commission's Bureau of Transportation & Safety accounts for the largest share of the Commission's direct expenses in regulating motor carriers of passengers, motor carriers of property, and railroads, other Commission Bureaus also incur expenses that are directly attributable to the regulation of these groups. The Secretary's Bureau files and serves pleadings and decisions in cases pertaining to public utilities that are

components of these groups. The Law Bureau prosecutes cases in litigation before the Commission involving members of these groups. The Office of Administrative Law Judge conducts formal hearings and prepares decisions involving members of these groups. The Office of Special Assistants prepares orders for Commission approval in matters pertaining to members of these groups. None of the direct time of employees of these other Bureaus was included in the Bureau of Transportation & Safety three-month time study.

Second, there was uncontested evidence introduced at the Initial Hearing that the particular time period used by the Bureau of Transportation & Safety for its time study encompassed an extremely active period for employees of that Bureau with respect to motor carriers of passengers. Tr. 313. The fact that abnormal activity involving the Bureau of Transportation & Safety employees occurred during the period of the time study implies that any results are skewed toward over-stating normal direct expenses incurred for regulating that group.

In any event, the use of an after-the-fact, limited time frame time study to estimate direct expenses of the Commission in regulating motor carriers of passengers, motor carriers of property, and railroads clearly contravenes the statutory mandate. The Pennsylvania Supreme Court has said:

> *Section 510(b)(I)* is clear that the PUC shall determine the amount of its expenditures directly attributable to the regulation of *each group of utilities furnishing the same kind of service* and debit the amount determined to *such group*.

United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 74 Pa. 304, 310, 830 A.2d 941, 944-945 (2003) (emphasis in original).

The Commission did not comply with the mandatory statutory procedures and the resulting assessments of the motor carriers of passengers, motor carriers of property, and railroads are, consequently, invalid.

8. Do the 291 percent and 293 percent increases in the proportion of the total transportation assessment incurred by the motor carriers of passengers and the railroads, respectively, violate the provisions of 66 Pa.C.S.A. § 510(f)?

Answer: Yes.

The Commission's Fiscal Office admits that the effect of the trifurcation of the Transportation group was to increase the proportion of the total Transportation group assessment payable by motor carriers of passengers by 291 percent, to increase the proportion of the total Transportation group assessment payable by railroads by 293 percent, and to decrease the proportion of the total Transportation group assessment payable by motor carriers of property by 49 percent.2[2] Tr. 157. At the same time, the Fiscal Office witness testified that there was no substantial increase in regulatory activity with respect to motor carriers of passengers from 2006/2007 to 2007/2008. Tr. 312-313. The Fiscal Office witness also testified that there was no substantial change in the cost of regulating railroads between fiscal year 2006-2007 and fiscal year 2007-2008. Tr. 207. While it is true that these last two admissions do not directly address the fact that assessments are ultimately computed on the basis of gross intrastate operating revenues, which may well have changed significantly without a corresponding change in either regulatory activity or cost of regulation, the magnitude of the increases to motor carriers of passengers and railroads is startling. The statute clearly states that the intent and purpose of the assessment procedure is to have each public utility "advance to the commission its reasonable

share of the cost of administering" the Public Utility Code. 66 Pa.C.S.A. § 510(f) (emphasis added). If the only determinant of a public utility's assessment was its previous year's gross intrastate operating revenues, this statutory provision could be quickly rendered mere surplusage with respect to an especially successful public utility (having large and annually growing intrastate gross operating revenues) requiring very little (and annually diminishing) need of regulatory activity.

The Commission itself has recognized a need for interplay between the formulaic requirements of 66 Pa.C.S.A. § 510(a) and (b) and the reasonable share standard of 66 Pa.C.S.A. § 510(f). In Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006), the Commission answered the following material question in the affirmative:

> Can a utility assert a valid "unreasonably-high-assessment" claim if the Commission has correctly applied its assessment formula to that utility?

If all that controlled the legality of an individual utility's assessment was the application of the properly derived factor to its previous year's gross intrastate operating revenues, there would be no basis left for an "unreasonably-high-assessment" claim. The mere mathematics alone would be all that is either required or permitted. Only by understanding that the results of the correct application of the statutory formula can be modified if the results cause an unreasonable share of the Commission's costs to administer the Public Utility Code to be charged to a specific public utility can all of the words of the statute be given effect.

One method of evaluating whether a particular public utility's assessment is no more than a reasonable share of the Commission's costs to administer the Public Utility Code is to compare the level of regulatory activity for the class of public utilities to which the particular utility belongs from one year to the next. If the level of regulatory activity remains relatively constant or decreases for the group as a whole while the assessment of the particular member of

the group increases significantly, this is an indication that the particular public utility's assessment may be more than its reasonable share.

In the instant case, there is uncontradicted evidence that the assessments of the motor carriers of passengers and of the railroad groups nearly tripled solely as a result of the Commission's division of the Transportation group into three groups. When combined with the Commission's defective methodology employed in calculating the assessments (see Issue 7, above), these increases violate the provisions of 66 Pa.C.S.A. § 510(f).

Based upon the foregoing discussion and determination of the identified issues, the Commission can change the groups of utilities furnishing the same kind of service from one year to another. Such change must only be done prospectively, however, so that accurate records are kept of the direct expenses incurred for each of the groups before assessments incorporating those direct expenses are made. Additionally, though the Commission is not required to establish groups for assessment purposes by Regulation, the Commission is required to give a reasoned explanation when it changes the composition of the groups of utilities furnishing the same kind of service. Only if the Commission changes the composition of the groups of utilities furnishing the same kind of service during a single assessment cycle does it have to provide notice and an opportunity to be heard in accordance with the provisions of 66 Pa.C.S.A. §703(g). Assessments must be calculated in accordance with the statutory directives of 66 Pa.C.S.A. § 510(a) and (b) and imposed in compliance with the reasonable share standard of 66 Pa.C.S.A. § 510(f).

The Commission's assessments of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 were made without the Commission offering a reasoned explanation of the change from one Transportation group to three groups, without providing affected utilities with notice and an opportunity to be heard as required by the provisions of 66 Pa.C.S.A. § 703(g) in the circumstances of this assessment cycle, without complying with the mandatory procedures of 66 Pa.C.S.A. §

510(b)(1) in determining direct costs, and without complying with the reasonable share standard of 66 Pa.C.S.A. § 510(f). Each of these deficiencies constitute an independent basis for vacating and invalidating the 2007-2008 assessments of motor carriers of passengers, motor carriers of property, and railroads. The Commission must rescind the assessment notices sent to the motor carriers of passengers, motor carriers of property, and railroad groups and prepare new assessments for the public utilities involved, using a single Transportation group as it did for fiscal years 2002-2003, 2003-2004, 2004-2005, 2005-2006, and 2006-2007.

CONCLUSIONS OF LAW

1. The Commission has jurisdiction over the parties to, and the subject matter of, this proceeding.

2. The Commission's assessment process is controlled by the provisions of 66 Pa.C.S.A. § 510.

3. By November 1 of a calendar year the Commission must estimate its total expenditures for the fiscal year beginning the following July 1 and submit this estimate to the Governor and the General Assembly for approval.

4. In preparing its estimate of total expenditures, the Commission is required to subtract estimated fees to be collected during the applicable fiscal year and the estimated amount of the unused appropriation from the preceding fiscal year.

5. Upon approval by the Governor and the General Assembly the estimated expenditures, less the required subtractions, becomes the approved amount for the Commission to assess upon public utilities for administration of the provisions of the Public Utility Code, 66 Pa.C.S.A. §§ 101 et seq.

6. Every public utility is required, by March 31 of each calendar year, to file with the Commission a statement showing its gross intrastate operating revenues for the preceding calendar year.

7. If a public utility neglects to timely file its gross intrastate operating revenues report, the Commission is authorized to estimate such revenues and the Commission's estimate is binding upon the public utility for the purposes of calculating its assessment.

8. Using a statutorily prescribed formula, the Commission prepares and sends each public utility, by certified mail, a notice of assessment setting forth the sum due.

9. A public utility may file objections to the assessment notice within 15 days after receipt.

10. Absent an objection, payment is due within 30 days of receipt of the assessment notice.

11. If payment is not timely made, the Commission may suspend or revoke the public utility's certificate(s) of public convenience, certify motor vehicle registrations to the Department of Transportation for suspension or revocation, or institute an action at law for the amount lawfully assessed, together with any additional cost incurred.

12. A public utility that makes timely payment may, at any time within two years from the date of payment, sue the Commonwealth to recover the amount paid, or any part thereof, upon the grounds that the assessment was excessive, erroneous, unlawful, or invalid, provided that timely objections to the assessment had previously been filed.

13. The statutorily prescribed formula for determining each public utility's assessment requires that the Commission first determine the amounts of its actual expenditures during the preceding calendar year directly attributable to the regulation of each group of utilities furnishing the same kind of service (direct costs).

14. Direct costs are debited against each of the utility groups in the amount that each group caused to be incurred.

15. The Commission's remaining amounts of its actual expenditures during the preceding calendar year (indirect costs) are allocated to each group of utilities furnishing the same kind of service in the proportion which the gross intrastate operating revenues for the preceding calendar year of each group bears to the gross intrastate operating revenues for the preceding calendar year of all utility groups.

16. The direct costs and the proportional share of indirect costs calculated for each group of utilities furnishing the same kind of service is assigned to each utility group for collection from the individual utilities comprising that group.

17. The assessment of each individual public utility is determined from the amount assigned to the utility group of which the individual public utility is a part.

18. The assessment is done on the basis of the proportion the individual public utility's gross intrastate operating revenue for the preceding calendar year bears to the gross intrastate operating revenue for the same year of all the individual public utilities comprising its group of utilities furnishing the same kind of service.

19. The final assessment amount for each individual public utility is further constrained by the requirement that it be the individual public utility's reasonable share of the cost of administering the Public Utility Code.

20. The determination of what constitutes a group of utilities furnishing the same kind of service is extremely important in ultimately establishing an individual public utility's assessment.

21. For fiscal year 2007-2008 the Commission acted twice with respect to assessment of public utilities.

22. At Public Meeting on August 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated August 1, 2007, from its Bureau of Administrative Services.

22. The recommendation adopted by the Commission on August 8, 2007, provided:

> That the Bureau of Administrative Services-Assessment Section compute, in accordance with Section 510 of the Public Utility Code, and pursuant to the foregoing findings and determinations, the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on each and every public utility.

23. The recommendation adopted by the Commission on August 8, 2007, established a total assessment for the fiscal year 2007-2008 of $49,483,000 to be allocated to and collected from seven groups of utilities furnishing the same kind of service, specifically, Electric, Water/Wastewater, Gas, Telephone, Transportation, Pipeline, and Steam Heat.

24. At Public Meeting on November 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated October 30, 2007, from its Bureau of Administrative Services.

25. The recommendation adopted by the Commission at Public Meeting on November 8, 2007, provided:

> The Bureau of Administrative Services, Assessment Section, will compute, in accordance with Section 510 of the Public Utility Code, the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on motor carriers of passengers, motor carriers of property, and railroads. Assessments for all other utility groups were computed and mailed in accordance with the August 1, 2007 recommendation.

26. The recommendation adopted by the Commission at Public Meeting on November 8, 2007, divided the Transportation group into three separate groups, specifically, motor carrier passenger, motor carrier property, and railroad.

27. By Ratification Order dated February 14, 2008, at Docket Number P-2008-2013624, the Commission, among other things, ordered:

> That a "Generic Investigation Regarding Transportation Assessment" be initiated at Docket No. I-2008-2022003 to address and resolve common issues regarding transportation assessments and that this proceeding be assigned to the Office of Administrative Law Judge (OALJ) for hearing and decision.

28. The issues in this investigation case, in accordance with the terms of the February 14, 2008 Ratification Order, are the common (or "generic") challenges brought by various members of the motor carriers of passengers and railroad groups to the Commission's assessments for fiscal year 2007-2008.

29. The Commission's assessments are not a tax.

30. The question of whether an enactment is a tax or regulatory measure is determined by the purposes for which it is enacted and not by its title.

31. The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.

32. The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

33. The Commission's assessments on public utilities are not for the purpose of raising revenue, rather, they are specifically described as being for the cost of administering the Public Utility Code.

34. Assessments can only be imposed on public utilities, a type of business regulated by the Commission under its police power.

35. Failure to pay a Commission assessment results in the suspension or revocation of the public utility's certificate of public convenience.

36. Without a valid certificate of public convenience, an entity can not legally engage in rendering public utility service.

37. The maxim *expressio unius est exclusio alterius* teaches that the express mention of one meaning in a statute implies the exclusion of other meanings.

38. The maxim *inclusio unius est exclusio alterius* means that a specific listing of similar things excludes from the operation of the provision any other similar things that were not specifically listed.

39. Neither of the maxims *expressio unius est exclusio alterius* nor *inclusio unius est exclusio alterius* offer any real assistance in defining a specific group of utilities furnishing the same kind of service.

40. Neither of the maxims *expressio unius est exclusio alterius* nor *inclusio unius est exclusio alterius* is applicable in leading to a conclusion that the legislature, by permitting the Commission to deem utilities rendering water, sewer or water and sewer service . . .as a utility group, in any way affected the Commission's ability to determine whether there should be one or three or more "groups" of utilities providing some type of transportation service.

41. The reference to the definitions in section 102 of the Public Utility Code that is found in the second sentence of 66 Pa.C.S.A. § 510(b)(1) does not restrict the Commission's establishing groups of utilities furnishing the same kind of service to the groupings found in the definitional section.

42. While the definitions found in 66 Pa.C.S.A. § 102 may provide assistance in determining if the Commission's groupings of utilities furnishing the same kind of service are reasonable, those definitions are not controlling.

43. The unappealed decision of the Pennsylvania Commonwealth Court in United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 789 A.2d 353 (Pa.Cmwlth. 2001) (UPS I) only decided that the word "group" used in 66 Pa.C.S.A. § 510(b)(2) means "each group of utilities furnishing the same kind of service" as that phrase is used in 66 Pa.C.S.A. § 510(b)(1).

44. The Pennsylvania Supreme Court, in United Parcel Service, Inc. v. Pa. Public Utility Comm'n, 574 Pa. 304, 830 A.2d 941 (2003) (UPS III) approved of that part of the UPS I decision.

45. Once the Commission has established groups of utilities furnishing the same kind of service for the purpose of allocating direct costs, it must use the same groups for the allocation of indirect costs.

46. Neither the UPS I decision nor the UPS III decision addressed the Commission's authority to determine the number nor the composition of groups of utilities furnishing the same kind of service.

47. The Commission has decided that it retains the power to redefine groups of utilities furnishing the same kind of service from one fiscal year to another.

48. In Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006) the Commission held that it was "constrained to conclude that our determination to group all common carriers into one utility group for assessment purposes is consistent with a plain reading of the [Public Utility] Code."

49. When the Commission adopted the recommendation dated August 1, 2007, from its Bureau of Administrative Services at Public Meeting on August 8, 2007, it acted consistently with its holding in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006).

50. When the Commission adopted the new recommendation dated October 30, 2007, from its Bureau of Administrative Services on November 8, 2007, it acted inconsistently with its holding in Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006).

51. When the Commission adopted the new recommendation dated October 30, 2007, from its Bureau of Administrative Services on November 8, 2007, it acted inconsistently with its adoption of the recommendation dated August 1, 2007, from its Bureau of Administrative Services at Public Meeting on August 8, 2007.

52. An administrative agency such as the Commission is not, of course, bound by the rule of stare decisis, but it does have an obligation to render consistent opinions, and should either follow, distinguish or overrule its own precedent.

53. If the Commission is going to render an inconsistent opinion in the space of 18 months, it must present a clear explanation of the rationale behind the reversal of position.

54. The Commission did not, on adoption of the new recommendation dated October 30, 2007, from its Bureau of Administrative Services on November 8, 2007, present a clear explanation for its reversal of position from that it had taken in either Re United Parcel Service, Inc., 101 Pa. PUC 548 (2006) or in adopting the recommendation dated August 1, 2007, from its Bureau of Administrative Services at Public Meeting on August 8, 2007.

55. Because of its failure to present a clear explanation for its reversal of position, the Commission is precluded from enforcing the determination made at the November 8, 2007 Public Meeting and creating the three groups of motor carriers of passengers, motor carriers of property, and railroads for assessment purposes for fiscal year 2007-2008.

56. Section 703(g) of the Public Utility Code provides:

> **(g) Rescission and amendment of orders.**—The commission may, at any time, after notice and after opportunity to be heard as provided in this chapter, rescind or amend any order made by it. Any order rescinding or amending a prior order shall, when served upon the person, corporation, or municipal corporation affected, and after notice thereof is given to the other parties to the proceedings, have the same effect as is herein provided for original orders.

57. The substance and not the form of commission action is controlling on the question of whether the Commission has entered a final, definitive order.

58. Notices of assessments contain all the indicia of an adjudication.

59. When at Public Meeting on August 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated August 1, 2007, from its Bureau of Administrative Services it entered a final, definitive order.

60. When at Public Meeting on November 8, 2007, the Commission unanimously approved a properly seconded Motion to adopt the recommendation dated October 30, 2007, from its Bureau of Administrative Services it entered a final, definitive order.

61. The Commission action at Public Meeting on August 8, 2007, directed the Bureau of Administrative Services-Assessment Section to compute the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on each and every public utility, as those public utilities were divided among the seven groups of utilities furnishing the same kind of service.

62. Before this final order of the Commission could be substantively changed, affected parties had to be provided with notice and an opportunity to be heard.

63. The Commission cannot make a final determination on an ultimate question before it for adjudication and subsequently change such determination without observing the requirements of due process.

64. Although an administrative agency may clarify a prior order without affording prior notice and an opportunity to be heard to interested parties, it may not effect substantive change of a prior order unless it has complied with the requirements of Section 703(g) of the Public Utility Code.

65. The Commission violated the provisions of 66 Pa.C.S.A. § 703(g) when it adopted the recommendation dated October 30, 2007, from its Bureau of Administrative Services at Public Meeting on November 8, 2007, which ordered that assessments be made on transportation utilities comprising three groups rather than the previously ordered single group without providing affected utilities notice and an opportunity to be heard.

66. The assessments on the groups of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 must be vacated and new assessments on the single Transportation group calculated and collected.

67. The Commission has decided that it need not adopt a Regulation establishing the groups of public utilities furnishing the same kind of service.

68. An interpretative rule depends for its validity not upon a law-making grant of power, but rather upon the willingness of a reviewing court to say that it in fact tracks the meaning of the statute it interprets.

69. An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedent.

70. The Commission is not required to enact a Regulation to establish the groups furnishing the same kind of service for assessment purposes, but may achieve the same end through adjudications.

71. A suit alleging that an assessment was unlawful or invalid because of the groupings made by the Commission would raise a relevant issue of law.

72. Section 510(b)(1) of the Public Utility code provides, in relevant part:

> The commission shall determine for the preceding calendar year the amount of its expenditures directly attributable to the regulation of each group of utilities furnishing the same kind of service, and debit the amount so determined to such group.

73. The word “shall” by definition is mandatory, and it is generally applied as such.

74. The context in which “shall” is used may leave its precise meaning in doubt.

75. Although some contexts may leave the precise meaning of the word “shall” in doubt it has been repeatedly recognized that the meaning of the word in most contexts is unambiguous.

76. The term “shall” is mandatory for purposes of statutory construction when a statute is unambiguous.

77. The first sentence of 66 Pa.C.S.A. § 510(b)(1) is unambiguous.

78. In context, the use of the word “shall” in the first sentence of 66 Pa.C.S.A. § 510(b)(1) is mandatory.

79. The first sentence of 66 Pa.C.S.A. § 510(b)(1) directs the Commission to use its expense figures from the preceding calendar year, to determine from those figures the amounts that are direct expenses of regulating each of the groups of utilities furnishing the same kind of service, and to charge those amounts against the respective groups.

80. In estimating the amounts that were direct expenses of regulating the motor carrier of passenger group, the motor carrier of property group, and the railroad group in calendar year 2006 the Commission did not comply with the mandatory requirements of the first sentence of 66 Pa.C.S.A. § 510(b)(1).

81. The use of an after-the-fact, conducted in a limited-time frame study to estimate direct expenses of the Commission in regulating motor carriers of passengers, motor carriers of property, and railroads clearly contravenes the statutory mandate.

82. The Commission did not comply with the mandatory statutory procedures for allocating direct costs with respect to motor carriers of passengers, motor carriers of property, and railroads and the resulting assessments of the motor carriers of passengers, motor carriers of property, and railroads are, consequently, invalid.

83. Section 510(f) of the Public Utility Code clearly states that the intent and purpose of the assessment procedure is to have each public utility advance to the Commission its reasonable share of the cost of administering the Public Utility Code.

84. The Commission has recognized a need for interplay between the formulaic requirements of 66 Pa.C.S.A. § 510(a) and (b) and the reasonable share standard of 66 Pa.C.S.A. § 510(f).

85. Only by understanding that the results of the correct application of the statutory formula contained in 66 Pa.C.S.A. § 510(a) and (b) can be modified if the results cause an unreasonable share of the Commission's costs to administer the Public Utility Code to be charged to a specific public utility can all of the words of the statute be given effect.

86. The near tripling of the assessments of the motor carriers of passengers and of the railroad groups solely as a result of the Commission's division of the Transportation group into three groups, when combined with the Commission's

defective methodology employed in calculating the assessments, violate the provisions of 66 Pa.C.S.A. § 510(f).

87. The Commission can change the groups of utilities furnishing the same kind of service from one year to another. Such change must only be done prospectively, however, so that accurate records are kept of the direct expenses incurred for each of the groups before assessments incorporating those direct expenses are made.

88. Only if the Commission changes the composition of the groups of utilities furnishing the same kind of service during a single assessment cycle does it have to provide notice and an opportunity to be heard in accordance with the provisions of 66 Pa.C.S.A. §703(g).

89. The Commission is not required to establish groups for assessment purposes by Regulation, but the Commission is required to give a reasoned explanation when it changes the composition of the groups of utilities furnishing the same kind of service.

90. Assessments must be calculated in accordance with the statutory directives of 66 Pa.C.S.A. § 510(a) and (b) and imposed in compliance with the reasonable share standard of 66 Pa.C.S.A. § 510(f).

91. The Commission's assessments of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 were made without the Commission offering a reasoned explanation of the change from one Transportation group to three groups, requiring that the said assessments be vacated.

92. The Commission's assessments of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 were made without the Commission providing affected utilities with notice and an opportunity to be heard as required by the provisions of 66 Pa.C.S.A. § 703(g) in the circumstances of this assessment cycle, rendering the said assessments invalid.

93. The Commission's assessments of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 were made without the Commission complying with the mandatory procedures of 66 Pa.C.S.A. § 510(b)(1) in determining direct costs, rendering the said assessments illegal.

94. The Commission's assessments of motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 were made without the Commission complying with the reasonable share standard of 66 Pa.C.S.A. § 510(f), rendering the said assessments invalid.

ORDER

THEREFORE,

IT IS RECOMMENDED:

1. That all notices of assessment previously sent to motor carriers of passengers, motor carriers of property, and railroads for fiscal year 2007-2008 be, and hereby are, rescinded.

2. That the Bureau of Administrative Services-Assessment Section compute, in accordance with Section 510 of the Public Utility Code, and pursuant to the foregoing findings and determinations, the amount of the general assessment for the Fiscal Year July 1, 2007 to June 30, 2008 on the Transportation group as such group was established for fiscal years 2002-2003 through 2006-2007.

3. That the objections to assessment of Shamokin Valley Railroad Company, Buffalo & Pittsburgh Railroad, Inc., Juniata Valley Railroad Company, Lycoming Valley Railroad Company, Wellsboro & Corning Railroad Company, York Railway Company, McKeesport Connecting Railroad Company, Nittany & Bald Eagle Railroad Company, Norfolk Southern Railway Company, Inc., North Shore Railroad Company, Union Railroad Company, East Penn Railroad, LLC, C&S Railroad Corporation, Reading Blue Mountain & Northern Railroad Company, Tri-County Transit Service, Inc., McCarthy Flowered Cabs, Conshohocken Yellow Cab, Inc., Valley Paratransit Service, Inc., Cranberry Taxi, Inc., Pittsburgh Cab Company, Inc., Classy Cab Company, Inc., Lansdale Yellow Cab Co., Inc. t/a North Penn Carriers, Joseph A. Marauoli t/a Yellow Cab Of Easton, Suburban Transit Network, Inc. t/a TransNet, Norristown Transportation Company, Norristown Yellow Cab Co., Inc., Willow Grove Yellow Cab Co. Inc. t/a Bux-Mont Transportation Services Company, Mid-County Transportation Services, Inc., Touch of Class Limo, Inc., Shelmar Corporation t/a

Shelmar Limousine Service, Scott A. Dechert t/a Distinctive Limousine Service, Main Line Transit Service, Inc., Joseph A. Trapuzzano t/a Broadway Limousine, Raymond J. Lech t/a Twilight Limousine Service, Lawrence A. Waite t/a Airport Sedan Service, Gateway Limousine Service, LLC, Lea C. Morgan t/a Amore' Limousines, Paul Liberati t/a An Exceptional Limousine, Willis P. Umble, Yellow Cab Company of Pittsburgh, Airport Limousine Service, Inc., Transportation Information Enterprises, Burgit's City Taxi, Handy Delivery, Inc., Quick Service Taxi Co., Inc., WGM Transportation, Inc., Ali Baba Transportation, Inc., Park Avenue Luxury Limousine, Inc., Bucks County Transport, Inc., Barker Brothers, Inc. t/a Pittsburgh North Aire Ride, Aladdin Limo, Inc., Fred W. Williams, Blue Mountain Limousine Service (Jeffrey L. Bailey), Wheeling & Lake Erie Railway Company, R.J. Corman Railroad Company/Allentown Lines, Inc., Valley Transportation, Inc., Boston Coach-Pennsylvania Corp. t/a Boston Coach, Global Medical Transportation Services, Inc., Lehigh Valley Transportation Services, Inc., Philadelphia Regional Limousine Association, Erie Transportation Services, Inc. t/a Erie Yellow Cab, Warren Taxi Service, Pocono Cab Company, LLC, Pennsylvania Taxi and Paratransit Association, Samuel J. Lansberry, Inc., and Pennsylvania Motor Truck Association are sustained in part and dismissed in part in accordance with the terms of this decision.

4. That the record at Docket Number I-2008-2022003 be marked closed.

Date: May 16, 2008

Wayne L. Weismandel
Administrative Law Judge