

**PENNSYLVANIA
PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265**

**Generic Investigation Regarding
Transportation Assessments**

**Public Meeting held June 5, 2008
JUN-2008-OSA-0170*
Docket No. I-2008-2022003**

MOTION OF CHAIRMAN WENDELL F. HOLLAND

Before the Pennsylvania Public Utility Commission (Commission) for consideration and disposition is the Recommended Decision (R.D.) of Administrative Law Judge (ALJ) Wayne L. Weismandel and the Exceptions filed by the Commission's Bureau of Administrative Services, Fiscal Office (Fiscal Office); Samuel J. Lansberry, Inc.¹ (Lansberry), the Pennsylvania Motor Truck Association² (PMTA) and Union Railroad Company and McKeesport Connecting Railroad Company³ (URC/MCRC) and Norfolk Southern Railway Company, Inc. (Norfolk Southern)⁴.

In his R. D., issued on May 16, 2008, the ALJ identified the issues presented in this case, and resolved them, as follows:

Issue 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?

Recommended answer: No.

Issue 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

¹ Lansberry is a privately-owned motor carrier of property.

² PMTA is a state-wide trade association representing approximately 2,200 members comprised of motor property carriers as well as allied and trade members.

³ URC and MCRC are railroad common carriers. Both are subsidiaries of Trinstar, Inc., which is, in turn, a wholly-owned subsidiary of United States Steel Corporation.

⁴ Norfolk Southern adopted the Exceptions filed by "the other railroad companies."

into the three groups of motor carriers of property, motor carriers of passengers, and railroads?

Recommended answer: No.

Issue 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?

Recommended answer: No.

Issue 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?

Recommended answer: Yes.

Issue 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)?

Recommended answer: Yes.

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

Recommended answer: No.

Issue 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?

Recommended answer: No.

Issue 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)?

Recommended answer: Yes.

I respectfully disagree with the ALJ's disposition of Issues Nos. 4, 5, 7 and 8.

Issue 4: As correctly noted by the ALJ, an administrative agency is not subject to the principle of *stare decisis* to the same degree as is an appellate court, although if an agency renders inconsistent decisions it should distinguish or overrule its own precedents. *Dee-Dee Cab, Inc. v. Pa. PUC*, 817 A.2d 593 (Pa. Cmwlth. 2003); *Bell Atlantic-Pennsylvania, Inc. v. Pa. PUC*, 672 A.2d 352 (Pa. Cmwlth. 1995). However, I disagree with the ALJ's determination that the Fiscal Office failed to provide a reasonable explanation for changing Commission precedent.

The Commission continually evaluates its assessment procedures and strives to allocate and assign costs to all of the entities that it regulates in the most equitable manner possible. In 2007, data for each of the three transportation groups became available. The Commission's Fiscal Office employed this recently available data to more accurately reflect the costs of regulation attributable to these three transportation groups.

The methodology employed by the Fiscal Office is consistent with, and analogous to, the manner in which a cost of service study is utilized in a general rate proceeding to equitably assign and allocate the total cost a utility incurs to serve its customers among and between its many different classes of customers. Utilization of a cost of service study is necessary and proper as, by definition, different classes of customers, require incurrence of different costs to serve their requirements. In virtually all circumstances the assignment and allocation of costs by customer class must be supported by a cost of service study. *Lloyd v. Pa. PUC*, 904 A. 2nd 1010 (Pa. Cmwlth. 2006) *allocatur denied*, 591 Pa. 676, 916 A. 2d 1104 (2007).

Issue 5: I agree with the Fiscal Office that this Commission's action in adopting a staff recommendation on assessments is not an order within the meaning of Section 703(g). In *Petition of Dominion Retail, Inc. For Refund of Assessments Paid to the Public Utility Commission*, Docket No. M-00061940 (Order entered September 29, 2006), we stated (at page 14) "the notices of assessments contain all the [indicia] of an adjudication. An administrative adjudication is defined at 2 Pa. C.S. § 101 as any final order, decree, decision, determination or ruling by an agency affecting personal or

property rights.” It is the assessment notice mailed to a public utility, rather than our intermediate decision regarding utility groups, that constitutes an order. Also, as explained in the Ratification Order and in the notices sent to all transportation utilities, the Commission’s action at the earlier August 8, 2007 public meeting determined assessment factors for all utilities except transportation utilities because the assessments for those utilities were still under review.

Issue 7: I agree with the Fiscal Office that 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. Section 510(b)(1) does not specify or otherwise require the use of time sheet data or any other specific methodology to make a determination of the Commission’s expenditures directly attributable to the regulation of each group of utilities furnishing the same kind of service. Because adequate time sheet data was not available for calendar year 2006, the Fiscal Office used a three-month sample of 2007 time sheet data from the Bureau of Transportation and Safety to determine the portions of direct expenses attributable to each transportation group. At the time, this was the best evidence available to make this determination, and contrary to the claim that the time period for this study was abnormal, the accuracy of the initial time study was confirmed by a longer follow-up study conducted by the Bureau of Transportation and Safety. I am satisfied that this statistical sampling approach is indeed representative of how the Commission incurred costs to regulate the transportation groups.

Issue 8: As to the magnitude of the assessment increases for the railroads and passenger carriers for fiscal year 2007-2008, I agree with the ALJ’s observation that the general reasonableness of an assessment under Section 510(f) should be measured, to some extent, based on the level of assessments in prior years. For example, I recognize that railroads and passenger carriers have become accustomed to the lower level of assessments that had been in place for the prior five years and have made business plans based on those levels continuing.

While our allocation of expenses justifies the levels of assessments invoiced by the Commission, and we have already adopted several means to mitigate the impact of these increases, I believe additional mitigation is appropriate. Under these circumstances, I believe that the current assessment payments for rail and passenger carriers should be reduced by one-third which, in effect, would waive the third installment provided for in the Ratification Order.

THEREFORE, I MOVE:

1. That the Recommended Decision of Administrative Law Judge Wayne L. Weismandel, issued on May 16, 2008, is affirmed in part and reversed in part, consistent with this Motion.

2. That those railroads and passenger carriers who elected to pay their FY 2007-2008 assessments in three equal installments, who previously paid the first payment due to the Commission, shall pay the second installment by June 20, 2008, in accordance with the Ratification Order.

3. That the third installment payment is waived for all railroads and passenger carriers.

4. That those railroads and passenger carriers who previously paid their FY 2007-2008 assessment in full shall receive a credit in the amount of the overpayment. This credit will be deducted from the amount due for the FY 2008-2009 assessment invoice, giving these railroad and passenger utilities a reduced amount due for FY 2008-2009.

5. That passenger carriers may continue to add a temporary 1% surcharge onto the final amount of each fare, according to the terms set forth in the Ratification Order.

6. That the Office of Special Assistants prepare the appropriate Opinion and Order.

DATE

WENDELL F. HOLLAND, CHAIRMAN