

**BEFORE THE
ALABAMA PUBLIC SERVICE COMMISSION
MONTGOMERY, ALABAMA**



IN RE:)
)
MEDI-RIDES TRANSPORTATION, LLC,)
)
Applicant.)

DOCKET NO.: 32561



**EXCEPTIONS OF MEDICAL TRANSPORT OF ALABAMA LLC TO REPORT AND
RECOMMENDED ORDER OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Rule 20 of the Rules of Practice of the Alabama Public Service Commission (“APSC” or the “Commission”), Protestant Medical Transport of Alabama LLC (“MTA” or the “Protestant”), f/k/a ALA-Three, LLC d/b/a Express Medical Transporters, hereby files the following Exceptions to the Report and Recommended Order of the Administrative Law Judge (“ALJ”) in the above-styled cause. For the reasons set forth below, the application of Medi-Rides Transportation, LLC (“Medi-Rides” or the “Applicant”) to provide transportation services in the State of Alabama should be denied.

STATEMENT OF THE ISSUES

Whether the ALJ erred in finding there is a need for the proposed service that cannot be met by the existing carriers, that the proposed operations are superior to those of the existing carriers, or that the proposed operations are reasonably necessary for the public good.

Whether the ALJ erred in finding that the Protestants provided insufficient evidence of a detrimental impact on their operations should Medi-Rides’ application be granted, thereby jeopardizing the maintenance of sound economic conditions for the existing carriers providing reasonably adequate service in the proposed service area.

ARGUMENT

I. The Certification Standard.

The legal standards for an applicant seeking a Certificate of Public Convenience and Necessity (“CPCN”) to operate as a common carrier within this state are well-established under Alabama case law. These legal principles and policies governing the granting of a certificate by the APSC, as referenced by the ALJ on pages 12 and 13 of his Report and Recommended Order, are set forth in the decision of the Alabama Supreme Court in *Purolator Courier Corp. v. Alabama Pub. Serv. Comm’n*, 514 So. 2d 832, 835 (Ala. 1987), citing *Service Express, Inc. v. Baggett Transp. Co.*, 281 Ala. 666, 669-70, 207 So. 2d 418, 421-22 (1968):

“The Commission, in its recent order issued under Docket No. 14747, said sound economic conditions in the transportation industry require that existing motor carriers should normally have the right to transport all traffic they can handle adequately, efficiently and economically, in the territory they service without added competition of a new operation. Proof of public convenience and necessity requires an affirmative showing that the proposed operations are superior to those presently authorized carriers; or that the proposed operations will serve a useful purpose which cannot or will not be met by existing carriers. Under the requirement of proving public convenience and necessity, there must be an affirmative showing not only that a common carrier service is required, in the convenience of the public proposed to be served, but also that it is a necessity on the part of such public. *The maintenance of sound economic conditions in the transportation industry would be jeopardized by allowing a new operator to enter a field of competition with existing carriers who are furnishing reasonable adequate service. The burden of proof is upon the applicant to establish that the public convenience and necessity requires [sic] the applicant’s service and that the services of existing carriers are inadequate. A certificate should not be granted where there is existing adequate service over the routes applied for, and if adequate unless the existing carrier [has] been given an opportunity to furnish such additional service as may be required.*”

Quoting the examiner’s order in *Alabama Public Service Comm’n v. Perkins*, 275 Ala. 1 at 4, 151 So. 2d 627 at 629-30 (1962).

(Emphasis added). See also *Alabama Pub. Serv. Comm’n v. Billy Barnes Enter., Inc.*, 650 So. 2d 879, 881 (Ala. 1994). As the ALJ found:

The maintenance of sound economic conditions in the transportation industry would be jeopardized by allowing a new operator to enter a field of competition with existing carriers who are furnishing reasonably adequate service. Motor carriers serving an area should be afforded an opportunity to transport all the traffic they can adequately, efficiently and economically handle without additional competition from a new operation.

Report and Recommended Order at 12. In determining the adequacy of service of an existing carrier, the Commission must consider the resources that carrier brings to bear, and if adequate, provide it with an opportunity to provide the required additional service. *Purolator Courier Corp.*, 514 So. 2d at 835.

MTA respectfully submits that the weight of the evidence provided at the public hearing on September 27, 2016, demonstrates that MTA is providing reasonably adequate service, that it would be detrimentally impacted by the entry of another competitor into an already crowded and highly-competitive market, and that Medi-Rides' proposed operations will not serve any useful purpose which cannot or will not be met by MTA and the other existing carriers.

II. The Evidence of Record Does Not Support a Finding that Medi-Rides' Services Will Serve A Useful Purpose Which Cannot or Will Not Be Met by the Existing Carriers.

At the hearing, three witnesses addressed a general need for non-emergency medical transportation services in Elmore County. Although witness Ms. Tammy Wilson works in the Business Office of Central Alabama Radiation and Oncology and her employer does not arrange for or provide medical transportation services, she testified of an observed need for such services in Elmore County only, as did Ms. Christine Lacy. Report and Recommended Order at 6-7. Ms. Amy Jeter, a social worker for Tallassee Community Hospital's Hospice Care in Elmore County, testified as follows:

MR. MARTIN: Okay. Do you see a need for transportation services or added services in your area -- or in your county?

MS. JETER: Yes, I do.

MR. MARTIN: Or surrounding counties?

MS. JETER: Yes, I do.

(Tr. at 84). She provided no other testimony regarding a need for services. On cross-examination, Ms. Jeter testified further:

MS. BILLINGSLEY: Okay. When you said that you were aware of individuals that rescheduled due to a lack of transportation, you don't know if that's whether or not they've had a family member that cancelled on them at the last minute or whether they called the taxi company and the taxi didn't come? You don't really know the facts and circumstances, do you?

MS. JETER: No, not always.

MS. BILLINGSLEY: Okay. You just know that sometimes a patient says, I just can't get there?

MS. JETER: Correct.

MS. BILLINGSLEY: And you don't always know the reason why?

MS. JETER: Correct.

MS. BILLINGSLEY: Okay. So if -- if you were able to add more companies to your list, could that help fill in some of the gaps that you think you're seeing?

MS. JETER: Yes.

MS. BILLINGSLEY: Okay. And when -- when you say that there is an additional need, do you mean that somebody can't always get there within 30 minutes or they can't get there at all during the day? What -- what's the frame of reference for that?

MS. JETER: *My experience is not necessarily with medical appointments as much as it is with -- I work for hospice, so we don't typically send our patients to the doctor. Occasionally we do. But our -- our expertise is to keep them at home.*

MS. BILLINGSLEY: Right.

MS. JETER: We do provide respite care to our patients, which is usually in the hospital or a nursing home. And so typically, that's the kind of transportation that I am involved with as far as what is on my caseload.

MS. BILLINGSLEY: Okay. And so that's normally scheduled in advance?

MS. JETER: Yes, it is.

(Tr. at 87-89) (emphasis added).

Ms. Jeter and her co-worker, Ms. Kandy Gantt, expressly stated that their experience was limited to hospice care only, which rarely requires transportation for medical care, and both stated no objection to utilizing the services of MTA. (Tr. at 87-89)¹. **There is absolutely no**

¹ Ms. Gantt, a bereavement coordinator for Community Hospice Care, testified further that she does not arrange for transportation services and is not familiar with the scheduling of transportation for Community Hospice Care's patients. Report and Recommended Order at 8.

testimony in the record supporting a need for Medi-Rides' services to medical facilities in Jefferson and Autauga counties, and not one witness addressed an identified need for transportation services to those counties or for non-emergency medical transportation services to any county other than Elmore County.

Likewise, no witnesses testified that the services of MTA were inadequate to meet the need for non-emergency transportation services in the areas proposed to be served by Medi-Rides, and Ms. Warhurst expressly stated that MTA has a base of operations in Montgomery County and is already providing services to all of the counties proposed to be served by the Applicant. Report and Recommended Order at 8-9. She further testified that MTA has the resources² and the capacity to meet any existing transportation needs and absorb any additional transports that Medi-Rides might be able to provide. Report and Recommended Order at 10. Mr. Peterson testified in detail that MTA is already providing service to cities in Tallapoosa, Macon and Autauga counties on a daily basis and has vehicles available in those areas to provide any transportation services needed. More importantly, he stated that MTA serves medical facilities in Jefferson and Autauga counties from these areas on a weekly basis – a need which was not at all addressed by Medi-Rides – and that MTA already serves Tallassee Community Hospital and the Montgomery Cancer Center on a weekly basis. Report and Recommended Order at 11.

Medi-Rides provided no evidence that its proposed operations are superior to those of MTA; no evidence that its proposed operations will serve a useful purpose that cannot or will not be met by the existing carriers; and, based on these facts, no evidence that its proposed operations are reasonably necessary for the public good. Report and Recommended Order at 13.

² Ms. Warhurst's testimony regarding MTA's resources is recounted by the ALJ in pages 8 - 10 of his Report and Recommended Order.

Because MTA has the needed resources to provide the additional services sought by Medi-Rides, it should first be given the opportunity to provide any additional services required before allowing the Applicant into the market area. *Purolator Courier Corp.*, 514 So. 2d at 835.

III. Medi-Rides' Certification Threatens the Maintenance of Sound Economic Conditions for Existing Providers.

MTA respectfully submits that the ALJ erred in concluding that “it does not appear that the institution of service by Medi-Rides, for certain counties in central Alabama, would result in excessive detriment to the Protestant.” Report and Recommended Order at 13. Further, the ALJ failed to make the requisite finding that MTA is not providing reasonably adequate service in order to support the entry of another competitor into the transportation market.

Ms. Warhurst testified that the profit margin per vehicle for MTA’s ambulatory transports is \$85; the profit margin per vehicle for a wheelchair transport is \$345. The non-ambulatory transports thus subsidize the cost of the ambulatory transports. Accordingly, when a competitor such as Medi-Rides comes into the market to cherry-pick the wheelchair customers, it drastically affects MTA’s profit margin. (Tr. at 120-22). In particular, Ms. Warhurst provided an exhibit listing approximately 100 non-emergency medical transportation providers with which MTA competes on a statewide basis; she stated further that MTA also competes with numerous taxi-cab companies with unrestricted motor carrier certificates and with brokers such as Boomerang and Uber, who are using unlicensed individuals to provide non-emergency medical transportation throughout the state. (Tr. 123-26). Ms. Warhurst testified in detail that the loss of any business negatively impacts MTA’s profits and its ability to provide service to its existing customers:

MS. BILLINGSLEY: Can you tell the Commission how MTA has fared historically in terms of profitability and how you’re doing now?

MS. WARHURST: At one point, we were up like 14 percent. And then when these other companies started coming in, the ones that were certificated, the ones that weren't, we've dropped down to where now we're in the red.

MS. BILLINGSLEY: When you bought the company back in 2009, were you infusing substantial amounts of capital into the business on a monthly basis?

MS. WARHURST: Yes, ma'am.

MS. BILLINGSLEY: Okay. And then approximately when did you start becoming profitable?

MS. WARHURST: Probably about a year and a half ago.

MS. BILLINGSLEY: Okay. And then recently have you had to make further infusions of capital into the business?

MS. WARHURST: I have.

MS. BILLINGSLEY: Okay. So what do you attribute the downturn in the company's ability to maintain a profit to?

MS. WARHURST: Too many people in the state doing the same job.

MS. BILLINGSLEY: Have you been using the same business model or tweaking your business model to make it more cost efficient?

MS. WARHURST: We have done everything we can to cut rates on everything just so we can make a profit.

MS. BILLINGSLEY: When a lot of the new entrants in the area -- when they concentrate their operations more in serving the municipal areas, what does that do to you?

MS. WARHURST: That takes away a lot of money. But on the other hand, then we have to go out into the outer-lying areas, which is costing us more to work out in there, but that's part of doing business.

MS. BILLINGSLEY: Okay. And you're going to take the rural transports; is that correct?

MS. WARHURST: Yes. Yes.

MS. BILLINGSLEY: You've always taken the rural --

MS. WARHURST: Always.

MS. BILLINGSLEY: -- transports?

MS. WARHURST: Always.

MS. BILLINGSLEY: Okay. But they are the more expensive transports, aren't they?

MS. WARHURST: They are.

MS. BILLINGSLEY: Do they tie up your vehicles and your drivers for longer periods of time?

MS. WARHURST: Yes, they do.

MS. BILLINGSLEY: Does it cost more per trip?

MS. WARHURST: It does.

MS. BILLINGSLEY: The overhead is greater?

MS. WARHURST: Yes.

MS. BILLINGSLEY: So that reduces your profit margin further?

MS. WARHURST: Yes.

(Tr. at 126-29).

There was absolutely no testimony presented during the hearing that MTA's services are not "reasonably adequate," as required under *Alabama Pub. Serv. Comm'n v. Higginbotham*, 256 Ala. 621, 56 So. 2d 401 (1951), and *Alabama Pub. Serv. Comm'n v. Crow*, 247 Ala. 120, 22 So. 2d 721 (1945), to support the entry of another competitor into the non-emergency medical transportation market.

Absent proof of inadequate service on the part of the existing carriers in the areas proposed to be served by Medi-Rides, and based on the explicit testimony of Ms. Warhurst regarding the detrimental impact on MTA's business from increased competition, the ALJ erred in concluding that MTA's business operations would not be detrimentally impacted by the grant of a certificate to Medi-Rides. The ALJ, in fact, conceded that MTA would be impacted, stating that "it does not appear that the institution of service by Medi-Rides, for certain counties in central Alabama, would result in *excessive* detriment to the Protestant." (Emphasis added). Report and Recommended Order at 13. The ALJ fails to cite the evidentiary basis for his conclusion that the detriment suffered by MTA would not be "excessive" due to Medi-Rides' market entry or the legal basis for finding that "excessive" detriment is required under the applicable case law to support a finding that the maintenance of sound economic conditions in the industry would be jeopardized by an additional entrant.

In *Interstate Commerce Comm'n v. J-T Transp. Co., Inc.*, 368 U.S. 81, 82 S. Ct. 216, 7 L. Ed. 2d 147 (1961), the U.S. Supreme Court detailed the well-established precedent regarding the administration of the federal Motor Carrier Act of 1935, particularly as it applies to the standards for entry of a new competitor in the transportation industry. This case sets forth the bases for the Alabama cases cited by the ALJ in support of his Report and Recommended Order. In particular, the Court concluded that overwhelming precedent supports the denial of a permit "for

traffic that can be handled with reasonable adequacy by a protestant” and that protestants risk adverse effects from the loss of potential traffic:

...there is reason in policy for the Commission to deny an application when the protestant is able to furnish ‘reasonably adequate’ services. The Motor Carrier Act expresses a policy, as we have seen, of preserving existing common carriage against the inroads of contract carriage. One way of putting that policy into effect is to deny a contract-carrier application, as the Commission has always done, unless the applicant can demonstrate that its service will be substantially superior to that afforded by existing carriers. Another way of describing this practice, which the 1957 amendments have in no way affected, is that no permit will issue for traffic that can be handled with reasonable adequacy by a protestant.

Interstate Commerce Comm’n, 82 S. Ct. at 230-31.

We have ourselves unanimously held ... that legally cognizable injury might accrue to an existing carrier denied potential traffic.

Id. at 231-32.

This is the content of the ‘presumption’ that flows from a protestant’s showing of its willingness and ability: a decidedly adverse effect from a loss of ‘potential’ traffic.

Id. at 232-33.

The evidence of record does not support a finding that MTA is not furnishing reasonably adequate service, or that the service inadequate, nor has the ALJ made such a finding. “‘A certificate *should not be granted* where there is existing adequate service over the routes applied for, and if adequate unless the existing carrier [has] been given an opportunity to furnish such additional service as may be required.’” *Service Express, Inc.*, 207 So. 2d at 421-22 (emphasis added). See also *Interstate Commerce Comm’n*, 82 S. Ct. at 222, citing to *Beatty Motor Express, Inc., Extension - Soap to Pittsburgh, Pa.*, 66 M.C.C. 160, 162 (1955) (holding that “existing carriers should be accorded the right to transport all traffic which, under normal conditions, they can handle adequately, efficiently, and economically in the territory served by them, without the competition of a new operation.”), and *Overland Freight Lines, Inc., Extension - Kentucky*, 69 M.C.C. 143, 148 (1956) (denying an application from a competing carrier despite delays and

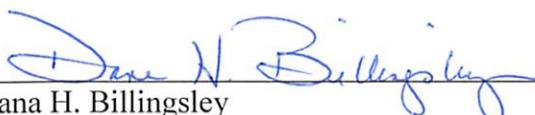
overtime costs incurred by the existing common carriers; holding that ““(W)e cannot reasonably conclude that their placements, as a whole, have been so unreasonably delayed or so inconveniently made as to merit a finding that the services of these carriers have been inadequate.’ Past diligence and future willingness to spot equipment at the plant were shown and relied on to deny the application.”).³

In the absence of such a finding, MTA respectfully submits that the ALJ erred in denying MTA and the existing carriers the opportunity to furnish any additional service required and erred in ignoring the evidence of detrimental impact resulting from the entry of a new competitor in a highly proliferated market, as testified to by Ms. Warhurst.

CONCLUSION

For all these reasons, the ALJ’s Report and Recommended Order should be revised to deny the application of Medi-Rides Transportation, LLC for a Certificate of Public Convenience and Necessity to provide transportation services in the State of Alabama. Should the ALJ and the Commission determine that Medi-Rides’ application should still be granted, MTA respectfully requests that the Commission revise its order to restrict Medi-Rides’ authority to Elmore County only, based on the testimony of record.

Respectfully submitted on this the 15th day of November, 2016.



Dana H. Billingsley
Attorney for Medical Transport of Alabama LLC

³ With regard to Ms. Lacy’s testimony that she endured long delays awaiting transportation from MTA from her dialysis treatments, Mr. Peterson testified that “the Medicaid social worker should be putting in [Ms. Lacy’s] order for every other day for pick-up. And then normally, it depends on if she’s a four-hour dialysis person or an eight-hour dialysis person, putting in a set pick-up time for the return. ...[s]he should have a set time that we should be going back to pick her up for her return ride.” (Tr. at 147-49). He represented that he would work with Ms. Lacy to remedy her situation of long wait times for transportation. (Tr. at 149).

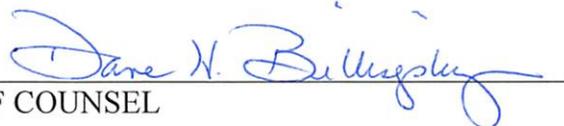
OF COUNSEL:

WILKERSON & BRYAN, P.C.
P.O. Box 830
Montgomery, Alabama 36101-0830
Telephone: (334) 265-1500
Facsimile: (334) 265-0319
dana@wilkinsonbryan.com

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on all counsel of record as listed below by placing a copy thereof in the United States Mail, postage prepaid, on this the 15th day of November, 2016:

James A. Martin
Post Office Box 780865
Tallasse, Alabama 36078


OF COUNSEL