

STATEMENTS OF POLICY

PENNSYLVANIA PUBLIC UTILITY COMMISSION

[52 PA. CODE CH. 41]

[M-2011-2163034]

Revision to 52 Pa. Code § 41.11 Regarding Ill or Injured Exemption to Common Carrier By Motor Vehicle Service

Public Meeting held
July 8, 2015

Commissioners Present: Gladys M. Brown, Chairperson; John F. Coleman, Jr., Vice Chairperson; James H. Cawley; Pamela A. Witmer; Robert F. Powelson

Revision to 52 Pa. Code § 41.11 Regarding Ill or Injured Exemption to Common Carrier By Motor Vehicle Service; Doc. No. M-2011-2163034

Order Withdrawing Proposed Policy Statement

By the Commission:

The Commission's jurisdiction over the transportation of passengers and property by motor vehicle is subject to a number of exemptions, including one that applies to the transportation of ill, injured or dead persons. On March 17, 2011, the Commission adopted a proposed policy statement which defined the scope of this exemption as it pertained to the transportation of ill or injured persons for medical treatment. For the reasons set forth in greater detail below, most importantly the comments filed in response to the proposed policy statement and the recently adopted Emergency Medical Services System Act, we are discontinuing this proposed policy statement.

Background

The transportation of ill, injured or dead persons by a corporation or individual falls within an exemption to the definition of "common carrier by motor vehicle" service at Section 102 of the Public Utility Code, 66 Pa.C.S. § 102. Specifically, the definition of common carrier by motor vehicle does not include "any person or corporation who or which furnishes transportation to any injured, ill or dead person." This exemption has been long understood to exclude the emergency transportation of persons by ambulance from Commission jurisdiction. This exemption also appears in the definition of "transportation of passengers and property" in Section 102:

Any and all service in connection with the receiving, transportation, elevation, transfer in transit, ventilation, refrigeration, icing, storage, handling, and delivering of property, baggage or freight, as well as any and all service in connection with the transportation or carrying of passengers, but shall not mean any service in connection with the receiving, transportation, handling or delivering of voting machines to and from polling places for or on behalf of any political subdivision of this Commonwealth for use in any primary, general or special election, or the transportation of any injured, ill or dead person, or the transportation by towing of wrecked or disabled motor vehicles, or the transportation of pulpwood or chemical wood from woodlots.

66 Pa.C.S. § 102, definition of "transportation of passengers or property." (emphasis added).¹ The phrase "injured, ill or dead person" is not defined in the Public Utility Code.

The Commission previously addressed the scope of this exemption in several fully litigated cases, a petition for declaratory order, and two rulemaking proceedings. Two of the Commission's decisions were reviewed by the Commonwealth Court of Pennsylvania. While the scope of this exemption to emergency transportation has been well understood, its application to non-emergency transportation of ill or injured persons has been problematic. A review of precedent and the Commission's policy statement is instructive.

The issue was first examined in *Chappell v. PUC*, 425 A.2d 873 (Pa. Cmwlth. 1981). In this case, the Commonwealth Court reviewed the Commission's exercise of jurisdiction over a motor carrier who proposed to transport non-ambulatory injured or ill persons to physicians' offices for medical treatment using ambulances and a station wagon, which was capable of being used as an ambulance. The Commission held that the injured or ill exemption applied only to emergency medical treatment, and that it always required certificates for the non-emergency transportation of passengers.

The Commonwealth Court reversed the Commission's decision and held that the exemption did apply to some non-emergency transportation of ill or injured passengers. The Court acknowledged that the legislature did not intend for the exemption to "[A]pply with respect to all injured and ill persons, for such an interpretation would encompass persons suffering from minor ailments as well as the more seriously ill and would include transportation to non-medical as well as medical destinations." *Chappell* at 875. (emphasis in the original). The Court noted that the Commission had by its own admission chosen to adopt a narrow interpretation of the exemption. However, the Court concluded that the Statutory Construction Act did not require this provision to be interpreted strictly, and that it should be "...liberally construed to affect the objects of the statute and promote justice." *Id.*; 1 Pa.C.S. § 1928(c).

The Court concluded that the exemption should be interpreted as follows:

The exemption, therefore, must be interpreted as applying to the transportation which is afforded persons who, because they are injured and ill, require transportation for medical treatment. In other words, the statute exempts the transportation of patients for purposes of medical treatment. Such a construction is not actually at odds with PUC licensing practices, for carriers such as Reading have already been licensed to provide a medi-taxi service to the elderly and incapacitated, in addition to the ill, for non-medical as well as for medical purposes. On the other hand, *DAC's non-emergency operation is limited to providing transportation for non-ambulatory patients to and from various medical facilities for medical treatment, and it does not offer taxi service, transport ambulatory persons, or provide transportation for non-medical purposes.* The DAC provides, in effect, an ambulance service which falls within the exemption

¹ This exemption was added to the Public Utility Code in 1949. Prior to that, the Commission did regulate service by ambulances and hearses. See *Re Med-Bus, Inc.*, Docket A-00101278 (Order entered July 19, 1979).

afforded by Section 102(9) of the Code, as opposed to a medi-taxi service, which does not.

Id. (emphasis added). *Chappell* therefore stands for the proposition that a certificate is not required in situations where there is a “non-emergency” transport of a “non-ambulatory” patient to and from a medical facility for medical treatment.

The Commission issued a policy statement to implement the *Chappell* decision at 52 Pa. Code § 41.1, which was adopted and became effective September 12, 1981.² The policy statement provided that the exemption would apply when the following circumstances were present:

- (1) The transportation is performed by a carrier providing paratransit service utilizing specialized equipment.
- (2) The passengers are persons, including patients, who—because they are injured or ill—require transportation to or from health care providers as defined in Section 103 of the Health Care Facilities Act (35 P. S. § 448.103).

A patient was defined as “a natural person receiving health care from a health care provider.” “Specialized equipment,” however, was not defined.

Several weeks after this policy statement was published in the *Pennsylvania Bulletin*, the Commonwealth Court revisited the scope of this exemption in *Triage, Inc. v Pa. Public Utility Commission*, 450 A.2d 790 (Pa. Cmwlth. 1982). Here, a petitioner was appealing the Commission’s finding that a certificate of public convenience was not required for the transportation of certain disabled, elderly or wheelchair bound persons to and from appointments at doctors’ offices, clinics, hospitals, etc. The Commission had concluded that a certificate was not necessary in this case under the ill or injured exemption according to the recent *Chappell* decision by the Commonwealth Court.

The Commonwealth Court, however, reversed the Commission, finding that a certificate was necessary. The Court distinguished its holding in *Chappell* as follows:

In *Chappell* we determined that an ambulance service which transports “non-ambulatory patients to and from various medical facilities,” absent concomitant taxi service, transportation of ambulatory persons, or transportation for non-medical purposes, falls within the Section 102(9) exemption. 57 Pa. Commonwealth Ct. at 23, 425 A.2d at 876. A careful examination of *Triage’s* application reveals, however, that it does not match *Chappell* in two key particulars: (1) *it is intended to be a taxi service, not an ambulance service, and* (2) *it does intend to transport ambulatory individuals.*

Triage at 792 (emphasis added). The Court, in reviewing the application, determined that the petitioner intended to offer a taxi-type service and would include the transport of ambulatory individuals. The Court noted that the petitioner’s service was unlike an ambulance service in that it would not be available for individual patient use. However, the Court did not address the Commission’s statement of policy, and whether it complied with *Chappell*. This was perhaps due to the fact that the case was argued before the Court prior to the policy statement’s publication in the *Pennsylvania Bulletin*.

This issue was next revisited some years later in the context of an enforcement proceeding over unlicensed

paratransit service. *Pennsylvania Public Utility Commission v. National Medi-Vans, Inc.*, C-903059 (Order entered April 18, 1991). The Commission had instituted a complaint against a carrier for providing paratransit services without a certificate of public convenience. Specifically, the carrier had transported non-ambulatory patients to and from physician’s offices, hospitals, and nursing homes. The presiding administrative law judge dismissed the complaint, finding that the service fell within the *Chappell* exemption.

The Commission’s Law Bureau excepted to the decision, arguing that the transportation to a physician’s office did not meet the definition of “health care facility” within the Health Care Facilities Act (HCFA), and that therefore this service did not fall within the exemption. The respondent asserted that *Chappell* required the Commission to interpret the exemption broadly, and that exclusion for transport to a physician’s offices was improperly narrow. It also noted that that the Commission’s policy statement did not include a definition for “health care facility.” The Commission, while not adopting the respondent’s argument on the meaning of *Chappell*, acknowledged that its policy statement needed revision if it planned to rely on the “health care facility” definition in the HCFA.

Shortly after this, the Commission revised Section 41.11 to comply with the language of the HCFA as it was codified at that time. Policy Statement on Transportation of Persons to or from Medical Locations by Paratransit Operations Utilizing Specialized Equipment 52 Pa. Code § 41.11, Docket M-910291 (Order entered July 17, 1991). Section 41.11 was amended to add definitions for health care facility, health care institution, health care provider and health maintenance organization. Health care facility and health maintenance organization were defined as having the same meaning as those terms in Section 103 of the HCFA, 35 P. S. § 448.103. The modified policy statement was codified as follows:

§ 41.11. Transportation of persons to or from medical locations by paratransit operations utilizing specialized equipment—statement of policy

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

Health care facility—A general or special hospital, as defined in section 103 of the Health Care Facilities Act (35 P. S. § 448.103).

Health care institution—The major categories of health care institutions include: hospitals, nursing care institutions, home health agencies, infirmaries and behavioral health services.

Health care provider—A person who operates a health care facility, health care institution or health maintenance organization.

Health maintenance organization—An organization which provides health care services as defined in section 103 of the Health Care Facilities Act.

(b) If the following circumstances are present, the Commission will regard that operation as beyond the regulatory jurisdiction of the Commission, under 66 Pa.C.S. § 102(9) (relating to definitions):

(1) The transportation is performed by a carrier providing paratransit service utilizing specialized equipment.

² Transportation of Patients to or from Medical Locations by Paratransit Operations Utilizing Specialized Equipment, Docket No. M-810225 (Order issued April 4, 1981). 11 Pa.B. 3108.

(2) The passengers are persons, including patients, who—because they are injured or ill—require transportation to or from health care providers, as defined in this section.

(c) This policy statement effectuates the Commonwealth Court decision of *Chappell v. Pennsylvania Public Utility Commission*, 57 Pa. Commw. 17, 425 A.2d 873 (1981).

(d) This policy statement also incorporates the Commonwealth Court decision of *Triage, Inc. v. Pennsylvania Public Utility Commission*, 69 Pa. Commw. 230, 450 A.2d 790 (1982) and the Commission's decision of *Pennsylvania Public Utility Commission v. National MediVans, Inc.*, Docket No. C-903059 (Order entered April 18, 1991).

As codified, this policy statement did not expressly include the Commonwealth Court's holdings regarding ambulatory vs. non-ambulatory patients. It also appeared to maintain, through the definition section, the exclusion of transportation to physician's offices from this exemption.

This policy statement was applied in two cases shortly thereafter. In both, the Commission held that the exemption did not apply to the motor carrier service at issue in each case. *Connellsville Taxi Service, Inc. v. Central Cab Company*, A-101803C901 (Order entered May 22, 1992), 1992 Pa. PUC LEXIS 79; Application of White Line Taxi and Transfer Company, Inc., A-00000990, F.004, (Order entered June 17, 1992), 1992 Pa. PUC LEXIS 170.

In *White Line*, the ALJ held that the Suburban wagons the applicant proposed to use for paratransit service did not meet the definition of "specialized equipment" at Section 41.11(b) of the Commission's policy statement. These vehicles were not ambulances or capable of being used as ambulances. The ALJ also noted that applicant did not state whether the service would be used for ambulatory or non-ambulatory services. Applying *Triage*, the Commission held that the service was more akin to taxi service, and did not fall within the exemption. In the *Connellsville* case, the Commission applied the policy statement to find that transportation service to a physician's private offices was not covered by the exemption. Rather, the service had to be provided to a health care facility as defined by the HCFA.

The Commission last applied this policy statement in 1996. *Petition of Tri-State Emergency Systems, Inc. d/b/a Emery Care for Declaratory Order*, Docket P-00961060 (Order entered June 10, 1996). Emery Care wished to expand its service to transport ambulatory patients needing assistance to non-hospital medical facilities, clinics and physicians' offices for medical treatment. It proposed to use vans equipped with basic life support equipment and staffed by paramedics and emergency medical technicians. It asked the Commission to determine whether its proposed service fell within the ill or injured exemption.

In *Tri-State*, the Commission applied the policy statement to reaffirm its prior holdings that transportation to a physician's office was not covered by the exemption. It clarified the meaning of "specialized equipment" to require basic life support equipment and oxygen, as well as staffing of vehicle with medical attendants. The Commission also acknowledged that the policy statement was silent on the ambulatory status of the individuals to be transported.

Proposed Policy Statement Order

On March 17, 2011, the Commission adopted a proposed policy statement which amended 52 Pa. Code

§ 41.11 to more accurately reflect several Commonwealth Court and Commission decisions over the years defining the scope of the injured, ill, or dead exemption. The proposed policy statement explained that the exemption applied to "non-ambulatory" persons transported to "facilities" as opposed to "providers." Additionally, the specialized equipment standard was expanded to require a driver plus one additional person capable of providing basic life support care, in order to fall within the exemption.

In sum, the proposed policy statement would exempt from Commission jurisdiction certain trips, but the person being transported: (1) must be non-ambulatory; (2) the vehicles used should either be an ambulance, or a vehicle that by its nature and equipment has ambulance-like characteristics; (3) the vehicle should also be operated by at least one person, in addition to the driver, with some form of first responder or medical training in the transport of ill or injured persons; and (4) the person must be transported to or from a "health care facility" or physicians' offices at which reviewable "clinically related health service" is rendered.

To this end, the Commission solicited comments on the proposed policy statement, which reads as follows:

§ 41.11. Transportation of persons to or from medical locations by paratransit operations utilizing specialized equipment—statement of policy.

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

Basic life support services—The pre-hospital or inter-hospital emergency medical care and management of illness or injury performed by specially trained, certified or licensed personnel, including, but not limited to, automated external defibrillation, cardiopulmonary resuscitation, airway management, control and stabilization of bleeding or injuries, and first aid.

Basic life support equipment—Equipment necessary to provide basic life support services.

Health care facility—[A general or special hospital, as defined in section 103 of the Health Care Facilities Act (35 P.S. § 448.103).] Any health care facility providing clinically related health services, including, but not limited to, a general or special hospital, including psychiatric hospitals, rehabilitation hospitals, ambulatory surgical facilities, long-term care nursing facilities, cancer treatment centers using radiation therapy on an ambulatory basis and inpatient drug and alcohol treatment facilities, both profit and nonprofit and including those operated by an agency or State or local government. The term shall also include a hospice. The term shall include an office used primarily for the private or group practice by health care practitioners where diagnostic, rehabilitative and treatment services are offered.

[***Health care institution***—The major categories of health care institutions include: hospitals, nursing care institutions, home health agencies, infirmaries and behavioral health services.]

[***Health care provider***—A person who operates a health care facility, health care institution or health maintenance organization.]

[**Health maintenance organization—An organization which provides health care services as defined in section 103 of the Health Care Facilities Act.**]

Non-ambulatory person—One who is not able to walk, not able to walk without assistance, or who has a medical condition such that even assisted ambulation is medically contraindicated.

(b) *Exemption criteria.* If the following circumstances are present, the Commission will regard that operation as beyond the regulatory jurisdiction of the Commission **pursuant to the ill or injured exemption to the definition of common carrier by motor vehicle [under]** at 66 Pa.C.S. § 102[(9)] (relating to definitions):

(1) The transportation is performed by a carrier providing paratransit service utilizing [**specialized**] **basic life support** equipment. **The vehicle must be operated by a driver and at least one additional person with medical training, such as an emergency medical technician, sufficient to provide basic life support services.**

(2) The passengers are **non-ambulatory** persons, including patients, who—because they are injured or ill—require transportation to or from health care facilities [**providers**], as defined in this section.

(c) *Purpose.* This policy statement effectuates the Commonwealth Court decision of *Chappell v. Pennsylvania Public Utility Commission*, 57 Pa. Commw. 17, 425 A.2d 873 (1981) and *Triage, Inc. v. Pennsylvania Public Utility Commission*, 69 Pa. Commw. 230, 450 A.2d 790 (1982).

[(d) **This policy statement also incorporates the Commonwealth Court decision of *Triage, Inc. v. Pennsylvania Public Utility Commission*, 69 Pa. Commw. 230, 450 A.2d 790 (1982) and the Commission's decision of *Pennsylvania Public Utility Commission v. National MediVans, Inc.*, Docket No. C-903059 (Order entered April 18, 1991).**]

The proposed policy statement and accompanying notice requesting comments from interested parties were published in the *Pennsylvania Bulletin* on June 11, 2011 at 41 Pa.B. 3009. The Commission received comments from the Pennsylvania Department of Health (DOH), Pennsylvania Emergency Health Services Council (PEHSC), Ambulance Association of Pennsylvania (AAP), American Medical Response Mid-Atlantic, Inc. (AMR), Burholme EMS (Burholme) and Northeast Community Ambulance (Northeast), Med-Trans, Inc., (Med-Trans), McGonigle Ambulance Service, Inc., (McGonigle), East Pennsboro Ambulance Service, Inc., (East Penn), Central Pocono Ambulance (Central Pocono), Superior Ambulance Service, Inc., (Superior), Fayetteville Volunteer Fire Department, Inc., Jeannette E.M.S., Somerset Ambulance Association, Inc., Ford City Ambulance, 7th Ward Civic Association and Millcreek Paramedic Service, Inc., Bellefonte EMS (Bellefonte) and Lock Haven EMS (Lock Haven), Bucks County Transport, Inc.(Bucks County), Norristown Transportation Company (Norristown), Suburban Transit Network, Inc.(Suburban), Byers Taxi Service, Inc., Francis E. Criner, Manor Valley Taxi, Inc., Tri County Access Co., Veterans Cab Company, Inc., YCG Acquisition Corporation and Barkers Brothers.

We shall now address in seriatim the comments received in response to the Commission's proposed policy statement.

Comments

A. Pennsylvania Department of Health

The DOH submits in its comments that the Commission, in drafting the proposed policy statement, inappropriately relied on prior court cases and statements of policy that were published prior to the existence of the original Emergency Medical Services System Act (EMS System Act) of 1985 and the recently enacted Act 37 of 2009.³ On this point, the DOH succinctly states:

The legislature has enacted appropriate statutory provisions concerning the care of ill or injured patients who require monitoring, observation, or treatment pursuant to the EMS System Act. While the Department does not have authority over common carriers, which is under the auspices of the Commission, the Department does regulate emergency medical services under the EMS System Act.

As to the EMS System Act, which it should be noted is not referenced at any point in the Commission's proposed policy statement, the DOH states:

Under the EMS System Act, if a person requires medical assessment, monitoring, treatment or observation, the vehicle is considered an emergency medical services vehicle and thus must be licensed by the Department. The Commission's definition of basic life support services could place a common carrier vehicle under the authority of the Department as it could meet the definition of providing emergency medical services. While the Commission is not required to adopt the definitions and standards contained in the EMS System Act, it would provide less confusion and more cohesion if the Commission adopted the same language concerning the transportation of ill or injured patients.

In conclusion, the DOH asserts that the Commission's proposed policy statement myopically focuses on the destination of the patient as opposed to also focusing on the needs of the patient in reaching his or her destination.⁴ The DOH requests that the Commission revisit its proposed policy statement in regards to definitions that are contained or addressed in the EMS System Act; its vehicle staffing requirements for when a patient requires the type of monitoring that would place it under the EMS System Act; a further clarification of wheelchair and stretcher vehicles that provide monitoring, and the possible penalties that an unlicensed vehicle or service could face for violation of the EMS System Act.⁵

B. Pennsylvania Emergency Health Services Council

PEHSC is recognized as the official advisory board to the DOH. Its relationship with the DOH spans over 25 years. PEHSC submits:

The PUC should cooperate with the PA Department of Health and revise the proposed regulation to remove the exemption language for ill or injured persons and simply state the exemption is provided to licensed EMS organizations under the oversight of

³The EMS System Act is administered by the DOH through the Bureau of Emergency Medical Services.

⁴The DOH states that it does not wish to see common carriers unintentionally violate the EMS System Act because their only concern was whether they were meeting the requirements for exemption under the Commission's authority.

⁵DOH further requests that the Commission not adopt this proposed policy statement until such time as the Commission and DOH can meet to ensure that both the Commission's and DOH's missions are not compromised.

the PA Department of Health. This will permit the Department to establish guidance to licensed EMS agencies providing wheelchair and stretcher services. This will further ensure the appropriate transportation of "patient" vs. "person."

PEHSC also states that the proposed policy statement is in conflict with the current EMS System Act (Act 37 of 2009) and would increase the cost to provide EMS transportation.

C. Ambulance Association of Pennsylvania

The AAP states that it is Pennsylvania's lead organization serving the needs of its members in the emergency and non-emergency ambulance and medical transportation community. The AAP represents over 200 ambulance providers in the Commonwealth which comprise the majority of the emergent and non-emergent ambulance transports.

The AAP submits that the Commission should not adopt the proposed policy statement because the proposed policy statement would place EMS providers in conflict with their licensing agency, namely, the DOH. In this regard, the AAP highly recommends that the Commission allow the DOH to take the lead on licensing wheelchair/stretcher vans and medical transportation to health care facilities. The AAP maintains:

The Department of Health is the agency that regulates emergency medical services, certifies EMS providers, and the licensing of EMS vehicles regardless of the destination location. The AAP suggests the PUC allow the Department of Health to take the lead on licensing wheelchair/stretcher and medical transportation of the person to or from a facility, a physician's office or any other location to receive or from which the person received health care services.

In sum, the AAP strongly opposes the adoption of the proposed policy statement because the proposed policy statement is in conflict with the EMS System Act.

D. American Medical Response Mid-Atlantic, Inc., Burholme EMS and Northeast Community Ambulance

AMR provides over 20,000 ambulance and wheelchair trips annually to patients in hospitals and nursing facilities in Philadelphia and the surrounding counties. Burholme is a non-profit community EMS serving Philadelphia and Eastern Montgomery County. Many of Burholme's local seniors depend on specialized service day to day in order to meet their outpatient medical needs. Northeast is also a non-profit, community ambulance service which has been in operation since 1947. Northeast utilizes both BLS ambulances and wheelchair vans to transport its patients.

AMR, Burholme and Northeast each state in their comments that the Commission should not adopt the proposed policy statement because, as stated previously by AAP and others, it places EMS providers in conflict with their licensing agency. Each of these organizations highly recommends that the Commission allow the DOH to take the lead on licensing wheelchair/stretcher vans and medical transportation to health care facilities. In addition, each of these organizations recommends that the Commission adopt the definitions in the EMS System Act.

In conclusion, each of these organizations maintains:

Should the proposed policy be adopted in its' [sic] current form, the provision of this type of medical transportation service would become economically

unfeasible, creating a barrier to access of care for the ill or injured. The requirements to meet the medical exemption would double the labor cost as well as the cost of equipment and supplies. EMS Agencies, struggling to retain seasoned staff for EMS, would not have the ability to offer this service and more patients would not be able to afford the transportation.

E. Med-Trans, Inc., McGonigle Ambulance Service, Inc., East Pennsboro Ambulance Service, Inc. Central Pocono Ambulance and Superior Ambulance Service, Inc.

Med-Trans provides transportation services to nursing facilities, hospitals and dialysis and cancer centers in Chester County, Pennsylvania. In addition, Med Trans provide transportation services to private individual's residences. Med-Trans has been providing ambulance and wheelchair van transportation to a large population of elderly, incapacitated and/or ill persons in Chester County for over 30 years.

McGonigle provides transportation services to families in need of EMS throughout southwestern Mercer County, Pennsylvania and is a leader within the EMS industry providing emergency and non-emergency medical transportation services 24 hours a day, 365 days a year. McGonigle provides services to three hospitals with a combined bed capacity of over 400 beds and over 40 skilled nursing facilities, group homes and clinics. McGonigle's primary geographic area of responsibility includes more than 70,000 Pennsylvania residents, as well as many thousands of Pennsylvania visitors and tourists that visit the Commonwealth on an annual basis.

East Pennsboro is a nonprofit corporation that provides 24 hour coverage for emergency and non-emergency transportation service to residents of East Pennsboro Township and surrounding communities. East Pennsboro provides basic life support emergency service, nonemergency routine ambulance service and quick response emergency service. East Pennsboro's BLS ambulances are manned by a minimum of one emergency medical technician and one emergency responder, as mandated by the DOH.

Central Pocono has been in the transportation business for 52 years as a nonprofit 501 (c) 3 organization. Since 1999, Central Pocono has provided wheelchair transports to patients (who could not go by any other means) to medical appointments, dialysis, outpatient hospitals services, etc. According to Central Pocono, these patients do not need to be monitored, but require assistance from their residences to Central Pocono vans and then from the vans into their medical appointments.

Superior began providing transportation services in 1996 and serves parts of Mercer, Butler, Venango and Lawrence Counties with emergency and nonemergency care. Superior provides BLS and advanced life support services, critical care transport team, paratransit/wheelchair van and EMS education. Superior has 60 employees with over 600 years of combined experience in EMS transportation.

As stated previously by the AAP and others, each of these organizations similarly contends that the Commission should not adopt the proposed policy statement because compliance with the proposed policy statement would place the EMS provider in conflict with their licensing agency. Additionally, each of these organizations maintains that the Commission should allow the DOH to take the lead on licensing wheelchair/stretcher vans and the transportation to health care related facilities. Fi-

nally, these organizations submit that the Commission should adopt the definitions in Act 37 of 2009, the EMS System Act.⁶

F. *Jeannette E.M.S., Inc., Somerset Ambulance Association, Inc., Ford City Hose Company #1 Ambulance Service Inc., 7th Ward Civic Association and Millcreek Paramedic Service, Inc.*

Each of these commentators object to two of the proposed changes to § 41.11, specifically, the proposed policy statement changes that there must be a separate medical attendant in the vehicle in addition to the driver in order for the service to be exempt and also that the exemption would only apply to the transportation of non-ambulatory persons.⁷ These commentators submit:

The [prior] Policy Statement was adopted September 11, 1981 and became effective September 12, 1981. The Policy Statement has therefore been in effect for approximately 30 years. Ambulance companies utilizing paratransit vans equipped to handle wheelchairs have relied upon transportation being exempt from Commission regulation under § 41.11 despite the fact that the persons transported may be ambulatory and despite the fact that there was not a separate medical attendant in the vehicle in addition to the driver. Most ambulance companies utilize emergency medical technicians (EMT's) or paramedics to drive these paratransit vans.

The commentators continue:

Since the transportation is non-emergency transportation, ambulances are not required and paratransit vans meet a distinct need in providing persons to or from medical locations utilizing specialized equipment. The proposal to now require a separate medical attendant on the vehicle in addition to the driver will make it not cost effective to provide such service or will substantially increase the cost of the service. Furthermore, the use of a separate medical attendant will require that the service be provided in an ambulance, which again will substantially increase the cost of transportation since ambulance service costs substantially more than paratransit van service. This would clearly be contrary to the public interest.

In conclusion, these commentators note that there is a specific Pennsylvania statute that was recently enacted (effective February 16, 2010) that prohibits ambulance companies using wheelchair or stretcher vehicles from transporting a person known to require medical assessment, monitoring, treatment or observation, namely, the EMS System Act or Act 37 of 2009.⁸

G. *Bellefonte EMS and Lock Haven EMS*

Both Bellefonte and Lock Haven hold certificates of public convenience from the Commission as common carrier, providing paratransit transportation services. Both Bellefonte and Lock Haven also operate ambulances

and provide trips falling within the ill or injured exemption to the Commission jurisdiction. In response to the Commission's proposed policy statement, Bellefonte and Lock Haven submit:

If the Commission adopts the Policy Statement as written, the cost to the carrier providing service will drastically increase for the trip to be considered exempt by the Commission. The reasons are quite obvious. The carrier will have to supply additional equipment and pay an additional, medically trained attendant to accompany a non-ambulatory person, whether or not his or her services are required. Notwithstanding the increased cost to the provider, reimbursements are not guaranteed (or even likely) to increase at a corresponding rate. Insurance carriers will not reimburse expenses for specialized equipment and additional staffing if the patient is not in need of such equipment and care. As a result, carriers such as Bellefonte and Lock Haven will be forced to face the option of providing a trip with specialized equipment and additional staffing at an operating loss, providing trips under the Commission-issued authority consistent with tariff rates which will result in less operating revenue or ceasing to provide non-emergency, exempt trips altogether.

In conclusion, Bellefonte and Lock Haven aver that the proposed policy statement is bad for business and the citizens of the Commonwealth of Pennsylvania. According to Bellefonte and Lock Haven, imposing a requirement that basic life support services and an additional staff member with medical training be on every exempt trip will cause small to mid-size providers to cease operations, narrow the number of service providers and have a detrimental effect on the public health, safety and welfare.

H. *Bucks County Transport, Inc., Norristown Transportation Company, Suburban Transit Network, Inc.*

Bucks County, Norristown and Suburban submit that the proposed policy statement has adopted a definition of Health Care Facility which deviates from a parallel definition adopted by a sister agency on the related subject of "shared ride transportation," which constitutes a substantial portion of most paratransit operator's service. Specifically, these commentators aver that the Pennsylvania Department of Transportation (PADOT), in its Shared-Ride Transportation Service Reimbursement regulations at 67 Pa. Code § 425.2, defines Health Care Facility as follows:

A general or special hospital including tuberculosis and psychiatric hospitals, rehabilitation facilities, skilled nursing facilities, kidney disease treatment centers, intermediate care facilities, drug or alcohol abuse or dependence centers, county health departments, community mental health centers, mental retardation centers and ambulatory surgical facilities. These facilities are both profit and nonprofit and include those operated by State or local governments. *The terms do not include offices used exclusively for private or group practice by health care practitioners and facilities providing health care services exclusively to a religious organization or for persons in the religious profession. (Emphasis supplied.)*

These commentators state that the Commission, in its proposed policy statement, offers no explanation for its departure from this PADOT regulation which has been in effect since 1986.

⁶ The Fayetteville Volunteer Fire Department, Inc. presented similar comments in opposition of the Commission's proposed policy statement.

⁷ The aforementioned entities hold CPCs from the Commission and all of the entities provide transportation under the exemption at § 41.11. The collective comments were filed by William A. Gray, Esq., an experienced practitioner in transportation matters before the Commission.

⁸ These commentators also conclude that the Commission has misconstrued the aforementioned Commonwealth Court cases commonly known as *Chappell* and *Triage*. According to these commentators, there is no Commonwealth Court requirement that patients be non-ambulatory.

These commentators also submit that the proposed policy statement utilizes a general, dictionary definition for the term “non-ambulatory,” which would exempt from regulation, without a proper factual or legal foundation, transportation of a call of individuals merely because of their limited gait or range of motion.⁹ According to these commentators, a far better definition would be one derived from PADOT regulations at 67 Pa. Code § 425.2, which defines nonambulatory persons and nonambulatory service.

Finally, these commentators conclude that the proposed policy statement should make it clear that all criteria must be fulfilled for the exemption to apply. Accordingly, the word “and” should be inserted between subsections (b)(1) and (b)(2) to avoid future debate on this question.

I. Byers Taxi Service, Inc., Francis E. Criner, Manor Valley Taxi, Inc., Tri County Access Co., Veterans Cab Company, Inc., YCG Acquisition Corporation

These carriers, who all provide transportation of non-ambulatory persons in wheelchair-equipped vehicles, submit that the Commission should either amend § 41.11 to include all physicians’ offices, all of which clearly provide “diagnostic services,” or clarify this regulation so that the transportation to physicians’ offices may fall within the exemption only if the office actually offers treatment and rehabilitative services.

As to the proposed policy statement’s reference to non-ambulatory persons, these carriers state:

The proposed new regulations clearly provide that only non-ambulatory persons may be transported pursuant to the exemption contained in § 41.11(b). In subsection (b)(2) of the proposed regulations, entitled Exemption Criteria, the passengers must be non-ambulatory, which includes patients who, because they are injured or ill, require transportation to or from health care facilities. The question this provision leaves unclear is whether all non-ambulatory persons fall within the definition or only those who are “injured or ill”. There are many persons who are non-ambulatory even though they may not be injured or ill.

These carriers further state:

For example, an elderly person may be unable to walk or may need to use a wheelchair but not actually be injured or ill. Old age is not an “injury” or “illness.” Others may be non-ambulatory due to intoxication or the misuse of chemical substances which may not be deemed to be an injury or illness. It is suggested that subsection (b)(2) be clarified to provide that passengers must be non-ambulatory regardless of whether it is due to injury, illness or some other cause, or that the inability to ambulate must be the result of an actual injury or illness.

Finally, these carriers maintain that subsection (b)(2) should be clarified as to whether a non-ambulatory person may be transported if not suffering from an actual injury or illness that causes the passenger to be non-ambulatory.¹⁰

J. Barker Brothers

Barker Brothers submit that the injured and ill exemption should be applied fairly and consistently across all

transportation providers. To this end, Barker Brothers laments that any revision to the injured and ill exemption must be introduced by the Commission with an opportunity for transportation providers to become aware of the changes and prepare for any increased (or decreased) regulation. In sum, Barker Brothers concludes that providers should not be subject to both a PUC assessment and Pennsylvania sales tax for the same period.

Discussion

Upon review and consideration of the comments filed to the proposed policy statement, the Commission will discontinue the proposed policy statement as drafted and, instead, work with the DOH, through its Bureau of Emergency Medical Services, and the industry stakeholders, in drafting a proposed policy statement that better addresses the issues at hand. This conclusion is buttressed by the plethora of comments which unequivocally stated that compliance with the proposed policy statement would place EMS providers in conflict with their licensing agency.

The Commission’s conclusion herein to not move forward with the proposed policy statement as drafted is further buttressed by the cogent comments of the DOH wherein it stated that the Commission’s proposed policy statement appears to be focused solely on the destination of the patient as opposed to also focusing on the needs of the patient in reaching his or her destination. To this end, the DOH states that it does not wish to see common carriers regulated by the Commission unintentionally violate the EMS System Act because their only concern was whether they were meeting the requirements for exemption under the Commission’s authority.

The Commission’s conclusion herein to not move forward with the proposed policy statement as drafted is also buttressed by the cogent comments of several commentators that compliance with the proposed policy statement will substantially increase the costs of providing this transportation service. Perhaps stated best on the issue of increased costs are the following comments from Bellefonte and Lock Haven:

If the Commission adopts the Policy Statement as written, the cost to the carrier providing service will drastically increase for the trip to be considered exempt by the Commission. The reasons are quite obvious. The carrier will have to supply additional equipment and pay an additional, medically trained attendant to accompany a non-ambulatory person, whether or not his or her services are required. Notwithstanding the increased cost to the provider, reimbursements are not guaranteed (or even likely) to increase at a corresponding rate. Insurance carriers will not reimburse expenses for specialized equipment and additional staffing if the patient is not in need of such equipment and care. As a result, carriers such as Bellefonte and Lock Haven will be forced to face the option of providing a trip with specialized equipment and additional staffing at an operating loss, providing trips under the Commission-issued authority consistent with tariff rates which will result in less operating revenue or ceasing to provide non-emergency, exempt trips altogether.

Similar comments on the issue of increased cost were provided as follows:

Since the transportation is non-emergency transportation, ambulances are not required and paratransit vans meet a distinct need in providing persons to or from medical locations utilizing specialized equip-

⁹ These commentators explain that the vast majority of their riders are senior citizens, whose needs range from having a driver support their arm as they walk to the vehicle, or who only may be able to walk with the assistance of a cane or walker.

¹⁰ The aforementioned comments were filed by John A. Pillar, Esq., another experienced practitioner in transportation matters before the Commission.

ment. The proposal to now require a separate medical attendant on the vehicle in addition to the driver will make it not cost effective to provide such service or will substantially increase the cost of the service. Furthermore, the use of a separate medical attendant will require that the service be provided in an ambulance, which again will substantially increase the cost of transportation since ambulance service costs substantially more than paratransit van service. This would clearly be contrary to the public interest.

Finally, the Commission's conclusion herein to not move forward with the proposed policy statement as drafted is reinforced by the recently adopted Emergency Medical Services System Act.¹¹ As stated previously, the proposed policy statement does not at any point reference the original Emergency Medical Services System Act (EMS System Act) of 1985 or the recently enacted Act 37 of 2009. More importantly, since the issuance of our proposed policy statement, the DOH adopted rules and regulations that set in place a comprehensive Statewide emergency medical services system that is more responsive to the needs of the people of this Commonwealth. Because of the depth of the EMS System Act, which was published in the *Pa. Bulletin* on October 12, 2013 at 43 Pa.B. 6093, we will pause to take an opportunity to review in its entirety the EMS System Act to ensure that any proposed policy statement drafted in the future does not conflict with the EMS System Act. Needless to say, we will be working closely with the DOH to avoid any conflict with the missions of the two agencies.

¹¹ The statutory law on EMS was consolidated by the Act of August 18, 2009 (P. L. 308, No. 37) as Chapter 81 of Title 35 of the *Pennsylvania Consolidated Statutes*.

Conclusion

While more could be said in response to the comments filed to the Commission's proposed policy statement, suffice it to say that it is appropriate for the Commission to take a moment of reflection. Consequently, by this Order, the Commission directs that this proposed policy statement be discontinued; *Therefore*,

It Is Ordered That:

1. The proposed policy statement regarding the ill or injured exemption to common carrier by motor vehicle service is discontinued.
2. A copy of this Order shall be served on all parties that filed comments to the proposed policy statement regarding the ill or injured exemption to common carrier by motor vehicle service at Docket No. M-2011-2163034.
3. A copy of this Order shall be posted on the Commission's website.
4. The Secretary shall submit this Order to the Governor's Budget Office.
5. A notice of withdrawal of the proposed policy statement regarding the ill or injured exemption to common carrier by motor vehicle service shall be published in the *Pennsylvania Bulletin*.
6. Docket No. M-2011-2163034 is closed.

ROSEMARY CHIAVETTA,
Secretary

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