

ENTERED

**PUBLIC SERVICE COMMISSION
OF WEST VIRGINIA
CHARLESTON**

Order Book 05-MCB

At a session of the Public Service Commission of West Virginia, in the City of Charleston, on the 21st day of March, 2005.

CASE NO. CASE NO. 03-2018-MC-C

MICHAEL RAY COLE, dba MTS 1,
Morgantown, Monongalia County.
Application for a certificate.

COMMISSION ORDER

The Commission adopts the Recommended Decision.

BACKGROUND

On December 4, 2003, Michael Ray Cole, doing business as MTS 1 (Applicant or MTS), Morgantown, Monongalia County, filed an application for a certificate-

to operate as a common carrier by motor vehicle in the transportation of passengers in taxicab service between points and places in Monongalia County, on the one hand, and points and places in West Virginia, on the other hand.

Rates: \$2.50 for the first 0.5 mile
.10 for each 0.1 mile thereafter
.25 per minute for waiting time

On January 5, 2004, Staff filed the Initial and Final Joint Staff Memorandum. Staff recommended that a publication order be issued that described the proposed certificate and rates as set forth above.

By Notice of Filing Order dated January 5, 2004, the Applicant was directed to give notice of the filing of the application by publishing a copy of said Order once, in a

newspaper, duly qualified by the Secretary of State, published and of general circulation in Monongalia County.

On January 16, 2004, a protest was filed by Morgantown Cab Company, Inc. (Morgantown Cab).

On January 16, 2004, the Applicant submitted a proper affidavit of publication reflecting that publication had been made in accordance with the Commission's requirements.

A hearing was held on June 11, 2004. Both the Applicant and Morgantown Cab appeared at the hearing.¹

On September 1, 2004, a Recommended Decision was issued to deny MTS's application for a taxi certificate. The ALJ concluded (1) that the evidence did not show that Morgantown Cab has been failing to provide reasonably adequate and efficient service; (2) the availability of a county-wide bus service that provides service at little to no cost makes it unreasonable to approve a second taxi service, when the existing taxi ridership has been declining due to the availability of public transportation; and (3) MTS failed to show that a need existed for an additional taxi service.

On September 16, 2004, MTS filed exceptions to the Recommended Decision. MTS asserted that the ALJ failed to consider the testimony of MTS's witnesses that stated the existing service was inadequate and inefficient.

MTS also objected to the conclusion that the county wide bus service made it unreasonable to approve a second taxi service. According to MTS, the existence of public transportation is not a factor to be considered in granting a taxi certificate. Rather, the quality of the existing service is the controlling factor to be considered in reaching the decision to grant a competing certificate. MTS noted that Mountain Line did not protest the application and its witness indicated that was not at the hearing to testify for or against the application. MTS asserted that Morgantown Cab's business has been declining due to poor service and not because of the existence of public transportation.

On September 27, 2004, Morgantown Cab filed a response to the exceptions. It agreed with the findings and conclusions of the Recommended Decision and asked that it be adopted.

¹ A full review of the evidence presented at the hearing is set forth in the September 1, 2004, Recommended Decision and will not be repeated herein.

DISCUSSION

The ALJ correctly described the standards applicable to the review of this application:

It is well-established in this State that one applying for a common carrier certificate over a defined territory must establish, to the satisfaction of the Commission, that public convenience and necessity require the proposed service. Weirton Ice and Coal Supply Company v. Public Service Commission, 161 W.Va., 240 S.E.2d 686 (1977), and West Virginia Code §24A-2-5. The Commission has interpreted this requirement to mean that the applicant must demonstrate that he or she has the financial ability, experience and fitness to provide a needed, useful, and responsive public service, as well as that the public convenience and necessity require the proposed service. Ford Brothers, Inc., M.C. Case No. 18152, April 9, 1981. The applicant must produce public witnesses who are able to testify that the proposed service is needed in the area of application. Harless Excavating Company, Inc., M.C. Case No. 21256, April 23, 1982.

The pertinent statutory language regarding the granting of applications for certificates of convenience and necessity is set forth in West Virginia Code §24A-2-5(a), which provides, in part, as follows:

[I]f the Commission finds from the evidence that the public convenience and necessity require the proposed service or any part thereof, it shall issue the certificate as prayed for, or issue it for the partial exercise only of the privilege sought, and may attach to the exercise of the right granted by such certificate such terms and conditions as in its judgment, the public convenience and necessity may require.... Before granting a certificate to a common carrier by motor vehicle, the commission shall take into consideration existing transportation facilities in the territory for which a certificate is sought and, in case it finds from the evidence that the service furnished by existing transportation facilities is reasonably efficient and adequate, the commission shall not grant such certificate.

On December 20, 1989, the Supreme Court of Appeals of West Virginia issued a decision in which the Court stated that the quality of existing

services was a controlling factor in reaching a decision on whether or not a competing certificate of convenience and necessity should be granted under West Virginia Code §24A-2-5(a). Stowers and Sons Trucking Company, Inc. v. Public Service Commission of West Virginia, 387 S.E.2d 841 (1989). The Court determined that the Public Service Commission has a mandatory duty, established by the West Virginia Code §24A-2-5, to consider evidence as to the sufficiency of existing service and, if the services are adequate, the certificate shall not be granted.

(Recommended Decision, p. 14-15).

The essence of the testimony presented indicated that there had been occasions where Morgantown Cab made customers wait approximately 45 minutes for a cab. The evidence also indicated that Morgantown Cab completes approximately 10,000 trips per month. Conflicting testimony was presented by both former and current drivers about the condition of the cabs operated by Morgantown Cab. On review of the entire record, the Commission agrees with the Recommended Decision and concludes that MTS failed to show that the public convenience and necessity requires the proposed service, or that Morgantown Cab is failing to provide reasonably efficient service.

The existence of the Mountain Line bus service, the extent of the service provided by Mountain Line and the fact that it provides free transportation to West Virginia University students, faculty and staff is a relevant factor to consider in this case. West Virginia Code §24A-2-5(a) requires the Commission to consider the “existing transportation facilities” in the area and whether the services provided by such facilities is reasonably efficient and adequate.

Under the circumstances presented, the Commission concludes that the ALJ correctly denied the certificate as MTS failed to meet its burden to show that a need exists for an additional taxi company and failed to show that Morgantown Cab is failing to provide reasonably efficient service.

Nonetheless, the Commission is mindful of the fact that problems may exist with the maintenance of Morgantown Cab’s fleet. Based upon the testimony presented at the hearing, the Commission concludes that inspectors from the Commission’s motor carrier section should conduct an inspection of Morgantown Cab’s fleet to insure that they meet all applicable standards.

FINDINGS OF FACT

1. On September 1, 2004, a Recommended Decision was issued to deny MTS's application for a taxi certificate. The ALJ concluded (1) that the evidence did not show that Morgantown Cab has been failing to provide reasonably adequate and efficient service; (2) the availability of a county-wide bus service that provides service at little to no cost makes it unreasonable to approve a second taxi service, when the existing taxi ridership has been declining due to the availability of public transportation; and (3) MTS failed to show that a need existed for an additional taxi service.
2. On September 16, 2004, MTS filed exceptions to the Recommended Decision.
3. On September 27, 2004, Morgantown Cab filed a response to the exceptions.

CONCLUSIONS OF LAW

1. The Commission concludes that the ALJ correctly denied the certificate as MTS failed to meet its burden to show that a need exists for an additional taxi company and failed to show that Morgantown Cab is failing to provide reasonably efficient service.
2. The Commission concludes that the ALJ properly considered the existence of the Mountain Line bus service when reviewing the certificate application.

ORDER

IT IS, THEREFORE, ORDERED that the exceptions of Michael Ray Cole, doing business as MTS 1 to the September 1, 2004, Recommended Decision are denied.

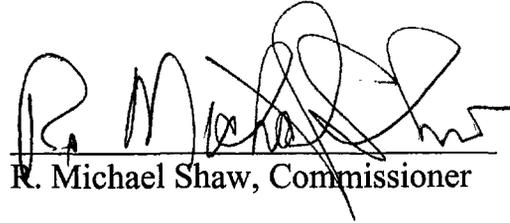
IT IS FURTHER ORDERED that the September 1, 2004, Recommended Decision is hereby adopted as the final Commission Order in this proceeding.

IT IS FURTHER ORDERED that upon entry of this order, this case shall be removed from the Commission's docket of active cases.

IT IS FURTHER ORDERED that the Commission's Executive Secretary serve a copy of this order upon all parties of record by United States First Class Mail and upon Commission Staff by hand delivery.



E. H. Staats, Chairman



R. Michael Shaw, Commissioner

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