

PUBLIC UTILITY COMMISSION
Harrisburg, PA 17105-3265

Public Meeting held March 17, 2011

Commissioners Present:

Robert F. Powelson, Chairman
John F. Coleman, Jr., Vice Chairman
Tyrone J. Christy
Wayne E. Gardner
James H. Cawley

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

Docket No. M-2011-2163034

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. The Commission has promulgated a policy statement that defines the scope of this exemption as it pertains to the transportation of ill or injured persons for medical treatment. The Commission finds that this policy statement requires revision, and seeks comments on the proposed revisions from all interested parties. After reviewing the comments, the Commission will adopt final revisions to the 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

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).

well understood, its application to non-emergency transportation of ill or injured 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 effect 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 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. Pub. Utility Commission*, 450 A.2d 790 (Pa. Cmwlth. 1982). Here, a petitioner was

² *Transportation of Patients to or from Medical Locations by Paratransit Operations Utilizing Specialized Equipment*, Docket M-810225 (Order issued April 4, 1981). 11 Pa.B. 3108.

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 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) 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 Emergy Care for Declaratory Order*, Docket P-00961060 (Order entered June 10, 1996). Emergy 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.

DISCUSSION

A. Scope of the Ill or Injured Exemption to Passenger Carrier Service

We find that the current policy statement should be revised to provide greater regulatory certainty to passenger carriers and to better conform to past Commonwealth Court and Commission precedent. Our objective is to craft a policy statement that is readily understood and able to be consistently applied by Commission staff, motor carriers, and other interested parties. Our review of the current policy statement and its past application identifies the following areas that could be improved:

- The policy statement does not clearly identify which types of passengers are covered by the ill or injured exemption.
- In applying the policy statement, the Commission has maintained a distinction between non-emergency transportation to physicians' offices and other locations where medical treatment is provided. This distinction is not well grounded in law or policy.
- The policy statement is unclear as to the minimum specialized equipment standards for the vehicles used.
- The policy statement is unclear as to the minimum staff requirements for the vehicles used.

The Court in *Chappell* and *Triage* identified the following elements to the ill or injured exemption:

- The transportation is for injured or ill persons who require medical treatment.
- The Court used the HCFA definition of “patients” in clarifying who they considered to be injured or ill. The definition of “patient” in the HCFA then, as it is now, is “a natural person receiving health care in or from a health care provider.”
- The exemption was limited to the transport of “non-ambulatory” patients. *Chappell* at 876.
- In *Triage*, the Court reaffirmed the “non-ambulatory” requirement. It also stated that the exempted service was more akin to ambulance than med-taxi service. For example, the exemption applied to the transport of individuals as opposed to groups of people.

1. Health Care Facility Standard

It appears that the Commission’s policy statement and its past application may not be in conformity with the holdings in *Chappell* and *Triage*. Specifically, the Commission narrowed this precedent via its policy statement to exclude transportation of injured or ill persons to physicians’ offices from the exemption when *Chappell* and *Triage* did not expressly include such a distinction.

We note that the HCFA was amended subsequent to the most recent revisions to the policy statement, and that the definition of “health care facility” has been expanded to include physician’s offices that render “clinically related health services.” 35 P.S. § 448.103. Accordingly, the HCFA in its current form conflicts with *Tri-States* and prior holdings.

It is unclear to what extent the Commonwealth Court in *Chappell* considered the scope of the various definitions of the HCFA in reaching its holding. The Court neither cited to nor quoted from the definition of "health care facility" in the HCFA in the text of its opinion. The HCFA was not referenced at all in *Triage*. The Commission, in crafting its policy statement, may have relied on the definition of "health care facility" in the HCFA as it existed at that time to exclude transportation to physicians' offices from the ill or injured exemption. However, that exclusion does not appear to have been the express intent of the Commonwealth Court either in *Chappell* or *Triage*. The appellant in *Chappell* stated in its application to the Commission that it did plan to offer transport to physicians' offices, and the Court could have excluded such service from its holding if it wished.

As already noted, the definition of "health care facility" in the HCFA was amended in 1992 to include physicians' offices at which reviewable "clinically related health service" is rendered. Clinically related health service is described by the HCFA as including "diagnostic, treatment or rehabilitative services." 35 P.S. § 448.103.

We conclude that the public interest would be best served by, and relevant precedent permits, the application of this exemption to the transportation of ill or injured persons to and from physicians' offices.

2. Non-ambulatory patient, specialized equipment and staffing standard

A more difficult element of the Court's standard to apply is the requirement that the transport be for "non-ambulatory" patients. The Court did not define or provide examples of what it meant by a "non-ambulatory person." It is not a term that appears in the Public Utility Code, and it is not elsewhere defined in Pennsylvania's Statutes and Consolidated Statutes. The Court did provide guidance that the service was more akin to

ambulance than to medi-taxi service.

Merriam-Webster defines "non-ambulatory" as an adjective meaning "not able to walk." Accordingly, it may include persons who are limited to using a wheelchair due to illness or injury, or who a physician has instructed not to walk unassisted because they are convalescing from illness or injury. It might also apply to a person, though they may be able to walk with assistance, who has a medical condition for which even assisted ambulation would be medically contraindicated.

It is true that in *Chappell* and *Triage* the Court did not expressly adopt specialized equipment or staffing standards as conditions to this exemption. However, the Court in *Triage* clearly contemplated that this service was more akin to ambulance than medi-taxi service. The Court noted that ambulances are unique passenger carrying vehicles, in that they are characterized by the Pennsylvania Vehicle Code as an emergency vehicle, and enjoy associated privileges. *Triage* at 792. Accordingly, we conclude that it is within the scope of our authority and the holdings of the Court for the Commission to impose certain reasonable minimum requirements on the nature of the vehicles and their operators.

In sum, to be exempt from Commission jurisdiction, 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. At the same time, we note that entities falling within this exemption to Commission jurisdiction, which transport injured or ill persons via wheelchair vehicle or stretcher vehicle (as

defined by 35 Pa.C.S. § 8139(a) and (b)), and which transport a person who is known or reasonably should be known by the entity to require medical assessment, monitoring, treatment or observation during transportation, fall within the jurisdiction of the Department of Health.

B. Proposed Revisions to the Policy Statement

1. Section 41.11 (a) Definitions.

We find that the current definition of “health care facility” in the HCFA is comprehensive and consistent with the holdings of the Court in *Chappell* and *Triage*. However, we are cognizant of the fact that the HCFA could be amended in the future, resulting in a definition of health care facility that maybe too broad, narrow, or otherwise inconsistent with prior case precedent. While the Commission may look to the HCFA and other state laws on occasion as a useful source of regulatory language, these laws were not enacted for the purposes of public utility regulation. The Commission should not link its regulation of a particular issue to the wording of a law inapplicable to public utilities, especially when not required to do so by law.

We will make use of this particular definition because it is a thorough and accurate description of a subject that is part of our regulatory scheme, not because we are required to use it. Therefore, in amending this policy statement, the current definition of health care facility will be used without reference to the HCFA. We will incorporate language from the definition of “clinically related health service” in the HCFA to identify when transportation to physicians’ offices meets the exemption.

We are also adding a definition for “basic life support services” and “basic life support equipment” to more specifically identify the level of training and equipment

required of the operators and vehicles used in the provision of this service. These definitions are based on published medical literature and protocols on the subject of emergency medical treatment.

A definition of "non-ambulatory person" is proposed to provide clarity about the scope of this exception. As discussed above, this will include those unable to walk, those able to walk only with assistance, or those who may be able to walk with assistance, but for which ambulation is contrary to medical instructions.

Several other existing definitions are being removed as they are duplicative with our revision to "health care facility."

2. Section 41.11(b) Exemption Criteria

This section will be revised to conform to applicable court precedent and to clarify the scope of the exemption. Consistent with *Chappell* and *Triage*, the proposed policy statement provides that the exemption applies to "non-ambulatory" persons transported to "facilities" as opposed to "providers." Moreover, the specialized equipment standard has been expanded to require a driver plus one additional person capable of providing basic life support care.

3. Section 41.11(c) and (d) Purpose

These sections will be consolidated.

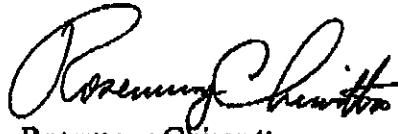
Accordingly, pursuant to its authority under Section 501 of the Public Utility Code, 66 Pa.C.S. §501, the Commission proposes the attached revisions to its policy statement; **THEREFORE,**

IT IS ORDERED:

1. That this Proposed Statement of Policy be issued to solicit comments regarding revisions to Section 41.11 of the Public Utility Code, 52 Pa. Code §41.11.
2. That notice of this Proposed Policy Statement is published in the *Pennsylvania Bulletin*.
3. That a copy of this Order shall be posted on the Commission's website.
4. That the Secretary shall submit this Order and Annex A to the Governor's Budget Office for review of fiscal impact.
5. That the Secretary shall certify this Order and Annex A and deposit them with the Legislative Reference Bureau for publication in the *Pennsylvania Bulletin*.
6. That Comments will be due within 30 days of publication in the *Pennsylvania Bulletin*, and that an original and 15 copies of any comments be served upon the Secretary, Pennsylvania Public Utility Commission, P.O. Box 3265, Harrisburg, PA 17105-3265
7. That the contact person for this proceeding is Adam D. Young, Law Bureau, (717) 772-8582.

8. That a copy of this Proposed Policy Statement shall be served on all licensed paratransit service providers within the meaning of 52 Pa. Code § 29.13(6).

BY THE COMMISSION,


Rosemary Chiavetta
Secretary

(SEAL)

ORDER ADOPTED: March 17, 2011

ORDER ENTERED: March 21, 2011

ANNEX A
TITLE 52. PUBLIC UTILITIES
PART I. PUBLIC UTILITY COMMISSION
Subpart B. CARRIERS OF PASSENGERS OR PROPERTY
CHAPTER 41. GENERAL ORDERS, POLICY STATEMENT
AND GUIDELINES ON TRANSPORTATION UTILITIES

TRANSPORTATION

§ 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).]