MICHAEL S. HENRY, LLC

2336 SOUTH BROAD STREET – PHILADELPHIA, PA 19145
TELEPHONE: 215-218-9800 – FACSIMILE: 215-218-9249
Web Site: www.mshenrylaw.com
E-mail: mshenry@mshenrylaw.com

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April 28, 2014

Fiona E. Wilmarth, Analyst
Scott R. Schalles, Analyst
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, Pennsylvania 17101

Re: Philadelphia Parking Authority – Final Rulemaking Order
Docket No. and Agency ID No. 126-3
52 Pa. Code §1017.51, §1017.52, §1055.31 and §1055.32
Impoundment Procedures

Dear Sir and Madam:

As you are aware, I represent Germantown Cab Company ("Germantown") with regard to the above matter. Both my client and I submitted comments to the proposed regulations in this matter. On March 19, 2014, the governing board of the Philadelphia Parking Authority ("Authority" or "PPA") issued a Final Rulemaking Order and submitted Final Form regulations to IRRC for review. The purpose of this letter is to provide further comment on the Authority's Final Rulemaking Order.

In our comments to the Authority's Proposed Rulemaking, we questioned the Authority's statutory power to confiscate and impound PUC-certified taxicabs, *including, but not limited to, PUC-certified partial rights taxicabs*, when they violate 52 Pa. C.S. §5714(a) by picking up street hails in Philadelphia outside of their service territories. The Authority claims this power pursuant to the act of July 5, 2012, P.L. 1022, No. 119 ("Act 119"), which was enacted after the Commonwealth Court decided *Sawink, Inc. v. Philadelphia Parking Authority*, 34 A.2d 926 (Cmnwlth. Ct. 2012) affirmed by 57 A.3d 644 (Pa. 2012), which held that 53 Pa. C.S. §5714(g)(1) does not empower the Authority to impound taxicabs licensed by the Commission, when they commit a territorial violation proscribed by §5714(a), for example, picking up a hail in Philadelphia.[1] As we

[1] It should be noted that Germantown was one of the PUC-certified carriers that challenged the Authority's impoundment power in *Sawink*. Germantown is a "partial rights" carrier with rights to provide taxicab service in a portion of Philadelphia and is regulated exclusively by the PUC, which issued its certificate of public convenience. The

asserted in our comments to the proposed rulemaking, we do not find any support for the Authority's claim that Section 5714(g), as amended, gives it the power to impound PUC-certified taxicabs, including partial rights taxicabs. Likewise, IRRC raised similar concerns in its Comments and directed the Authority "to identify the specific sections of the revised Act and the specific statutory language in Act 119 that provides the PPA the authority to impound vehicles of partial rights carriers."

In its Final Rulemaking Order, the Authority presents a convoluted analysis of Act 119's amendments to Section 5714. Some of the Authority's analysis has to do with the issue of co-regulation of partial rights taxicabs and the issue of the Authority's jurisdiction to prosecute violations of Section 5714, which, as noted above, are issues that have nothing to do with the Authority's statutory power to impound PUC-certified taxicabs. The Authority also discusses the *Sawink* case at length claiming that Act 119 enacted key amendments to Section 5714 in direct response to the *Sawink* case, which render its holding "untenable."

As an initial matter, I would note that the Authority's conception of Act 119 as a clarifying amendatory statute is flawed. Act 119 did not render the *Sawink* decision untenable, as if the Commonwealth Court had gotten it wrong. The Commonwealth Court was not confused when it found that Section 5714(g), as originally enacted, did not empower the Authority to impound PUC-certified taxicabs. It correctly analyzed the statute in accordance with well-established principles of statutory construction. And its decision was reviewed and affirmed by the Pennsylvania Supreme Court. To suggest that Act 119 was enacted to render the *Sawink* "untenable" indicates that the Authority believes its arguments before the Commonwealth Court had merit and that the General Assembly only needed to enact minor changes in Section 5714 to clarify the language so that even a judge could understand that it had the power to impound PUC-certified taxicabs all along.

But such is not the case. The General Assembly did not empower the Authority to impound PUC certified taxicabs when it enacted the act of July 16, 2004, P.L. 758, No.

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other two were PUC-certified carriers with no rights in Philadelphia, only one of which is affiliated with Germantown. The Authority claims it has the power to co-regulate Germantown and other PUC-certified partial rights carriers with the PUC, which Germantown disputes; however, this issue has no bearing on whether the Authority has statutory power to impound partial rights taxicabs or any other PUC-certified taxicabs.

On a related note, in my comments to the proposed rulemaking, I asserted that the Authority did not have jurisdiction to prosecute PUC carriers, like Germantown, for violations of Section 5714; however, subsequent to the submission of my comments, the Commonwealth Court ruled otherwise in an unpublished decision. See *Germantown Cab Company v. Philadelphia Parking Authority*, 2013 Pa. Commw. Unpub. LEXIS 79. But, like the issue of co-regulation, the Authority's jurisdiction to prosecute PUC carriers for violations of Section 5714 has no bearing on determining the scope of the Authority's statutory powers to impound their vehicles.

94 ("Act 94"). The Authority never had the power to impound PUC-certified taxicabs and it acted outside the scope of its statutory powers when it did so. Subtle clarification of the General Assembly's intent was not necessary because the General Assembly never granted such powers in the first place. On the contrary, any subsequent legislation purporting to grant such powers to the Authority would need to be explicit in the wake of a judicial opinion holding that an existing statute granted no such powers. Act 119 does not explicitly empower the Authority to impound PUC-certified taxicabs when they violate Section 5714(a) by picking up street hails in Philadelphia outside of the their authorized service territories.

The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. 1 Pa. C.S. §1921(a). When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa. C.S. §1921(b). When the words of a statute are not explicit, the intention of the General Assembly may be ascertained by considering, among other matters:

(1) The occasion and necessity for the statute.
(2) The circumstances under which it was enacted.
(3) The mischief to be remedied.
(4) The object to be attained.
(5) The former law, if any, including other statutes upon the same or similar subjects.
(6) The consequences of a particular interpretation.
(7) The contemporaneous legislative history.
(8) Legislative and administrative interpretations of such statute.

The Commonwealth Court found Section 5714 was, at best, ambiguous. *Sawink*, supra at 931. The Commonwealth Court was being generous in its description of the statute; it was, quite frankly, a convoluted mess and Act 119's subtle amendments, which require pages of explanation by the Authority, do little to make it the model of clarity. If the General Assembly had wanted to grant the Authority power to impound PUC-certified taxicabs for territorial violations, it could have used explicit language. It failed to do so. For example, the General Assembly could have amended the statute to read as follows:

> The Authority is empowered to confiscate and impound vehicles, medallions and equipment which are utilized to provide call or demand service in cities of the first class without a proper certificate of public convenience issued by the authority or which are in violation of regulations of the authority, *including PUC-certified taxicabs and partial rights taxicabs that pick up street hails in Philadelphia outside of their authorized service territories.*
>
> (suggested amendatory language in italics)

The absence of such language in subparagraph (a) indicates that the General Assembly did not intend the Authority to have such power with regard to these vehicles. Such an interpretation is consistent with prior legislative history and the mischief the impoundment power was intended to remedy.

In 2004, the General Assembly enacted the act of July 16, 2004, P.L. 758, No. 94 ("Act 94"), which transferred the functions of the Pennsylvania Public Utility Commission ("PUC") under the Chapter 24 of the Public Utility Code ("the Medallion Act") and with respect to limousine service in Philadelphia to the Authority. Prior to Act 94, the Philadelphia Police Department was empowered to confiscate and impound vehicles providing unlicensed taxicab service ("gypsy cabs") under 66 Pa. C.S. §2404(g). Act 94 repealed this provision and substantially reenacted it as 53 Pa. C.S. §5714(g), giving the Authority the same power to confiscate and impound gypsy cabs, instead of the Philadelphia Police Department.

Unlike the Philadelphia Police Department, however, the Authority overstepped its statutory powers and began confiscating PUC-certified taxicabs, including PUC-certified partial rights taxicabs, which were picking up street hails in Philadelphia outside of their service territories. As the Commonwealth Court noted in *Sawink*, "section 5714(g) does not state that impoundment applies to taxicabs missing a medallion but having a certificate." *Sawink*, supra at 931. Rather, the Court explained:

> Subsection (g) states that impoundment will apply to "vehicles" lacking "a proper certificate of public convenience." 53 Pa. C.S. §5714(g). Stated otherwise, the impoundment penalty is targeted at the more serious scofflaws: those that do not have a valid certificate from any authority. Examples include persons driving a vehicle after its certificate has been suspended, using a forged certificate, not having a certificate at all, or using a valid certificate improperly by borrowing it from a friend. All are examples of driving a vehicle without a "proper" certificate. By contrast, the taxicabs owned by Petitioners have "proper certificates of public convenience," even though they may not be in full compliance with the rights and duties conferred by those certificates.

The Commonwealth Court's interpretation in this regard makes sense because a territorial violation by a PUC-certificate taxicab does not pose any threat to public safety as does the operation of a "gypsy cab." PUC-certified taxicabs are regulated by the PUC and must comply with standards pertaining to drivers, vehicles and insurance. A passenger's safety is not in jeopardy just because the driver of a licensed taxicab wanders outside of its authorized territory. Impoundment under such circumstances is neither justified nor reasonable and raises significant constitutional concerns.

> As originally enacted, §5714(g)(1) provided, in pertinent part, as follows:
>
> In addition to the penalties provided for in subsection (f), the authority is empowered to confiscate and impound vehicles, medallions and

> equipment which are utilized to provide call or demand service without a proper certificate of public convenience in cities of the first class or which are in violation of regulations of the authority.
>
> Act 119 amended the foregoing language to read as follow:
>
> The authority is empowered to confiscate and impound vehicles, medallions and equipment which are utilized to provide call or demand service in cities of the first class without a proper certificate of public convenience issued by the authority or which are in violation of regulations of the authority.

The Authority finds great significance in these minor changes in language to Section 5714(g); however, once again, such subtlety in the wake of the Sawink case is not sufficient in order to overturn the Commonwealth Court's interpretation of the statute as originally enacted. There simply isn't a sufficient basis for concluding that these changes extends the impoundment power to PUC-certified taxicabs.

The Authority's interpretation of the statue also raises constitutional concerns. Warrantless seizures of property by the government are a serious concern for every citizen because they implicate important constitutional protections. Article I, Section 8 of the Pennsylvania Constitution[2] provides security from unreasonable searches and seizures and provides as follows:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

The Pennsylvania Supreme Court has stated repeatedly that Article 1, Section 8 is meant to embody a strong notion of privacy, carefully safeguarded in this Commonwealth for the past two centuries.[3]

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[2] The wording of the Pennsylvania Constitution is similar to the wording of the Fourth Amendment to the United States Constitution; however, the Pennsylvania Supreme Court has determined that the Pennsylvania Constitution provides broader protections against unreasonable searches and seizures by the government. See *Commonwealth v. Edmunds*, 586 A.2d 887 (Pa. 1991). Article I, Section also pre-dates the Fourth Amendment by at least 15 years.

[3] In *Commonwealth v. Sell*, 470 A.2d 457, 467 (Pa. 1983), the Supreme Court stated that "the survival of the language now employed in Article 1, Section 8 through over 200 years of profound change in other areas demonstrates that the paramount concern for privacy first adopted as part of our organic law in 1776 continues to enjoy the mandate of the people of this Commonwealth."

In the seminal case of *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2n 1000 (1976), which established the parameters for vehicle inventory searches by the police, the Supreme Court stated:

> In determining whether a proper inventory search has occurred, the first inquiry is whether the police have lawfully impounded the automobile, i.e., have lawful custody of the automobile. The authority of the police to impound vehicles derives from the police's reasonable community care-taking functions. Such functions include removing disabled or damaged vehicles from the highway, impounding automobiles which violate parking ordinances (thereby jeopardizing public safety and efficient traffic flow), and protecting the community's safety.

Both the Pennsylvania Constitution and the United States Constitution restrict the scope of the community caretaking function and, consequently the impoundment power, to circumstances that truly pose an immediate threat to public safety, such as the operation of an unlicensed taxicab, or operation of a taxicab by an impaired driver or a taxicab in a visibly unsafe condition. It does not and should not apply to territorial violations by certificated taxicabs. Such violations pose no safety threat to the public and warrant lesser sanctions, such as fines, suspension, or ultimately revocation of operating rights.

For its part, the Authority has an inflated perception of its own role in protecting public safety. The Authority believes that almost every function it performs falls within the realm of its community caretaking function and justifies the use of its power to confiscate and impound private property under Section 5714. The Final Form regulations define various impoundable offenses, among them the operation of a vehicle designated out of service. Pursuant to the Authority's regulations, a vehicle may be designated "out-of-service" simply by failing to file its annual renewal application on time. Such circumstances cannot reasonably be considered as an occasion for the Authority to exercise its community caretaking function and to employ the drastic sanction of impoundment. The Authority's implementation of the statute in this manner raises significant constitutional concerns.

The Authority places great emphasis on the change of the word "an" to the word "the" in subparagraph (a) of Section 5714. As originally enacted, Section 5714(a) read, in pertinent part:

> A vehicle may not be operated as a taxicab with citywide call or demand rights in cities of the first class unless a certificate of public convenience is issued by *an authority* authorizing the operation of the taxicab and a medallion is attached to the hood of the vehicle.

The statute now reads:

> A vehicle may not be operated as a taxicab with citywide call or demand rights in cities of the first class unless a certificate of public convenience is

> issued by *the authority* authorizing the operation of the taxicab and a medallion is attached to the hood of the vehicle.

The Authority claims that this amendment is "tremendously specific" and was meant to counter the Commonwealth Court's supposedly erroneous interpretation of the statute in *Sawink*. The Authority asserts that "the Commonwealth Court seemed to have determined that there is a general certification of taxicabs by 'an authority'... and that because the [Sawink petitioners were] certificated by the PUC, which fell into the category of 'an authority', [they were] 'certificated.'" The Commonwealth Court determined nothing of the sort.

First of all, as noted above, the Authority's claim that the Commonwealth Court misread the statute is simply another example of its stubborn refusal to acknowledge that its arguments before both the Commonwealth Court and the Supreme Court had no merit. In order to empower the Authority to impound PUC-certified taxicabs in the wake of *Sawink*, the General Assembly needed to enact more than subtle clarifying amendments to the language of Section 5714. It needed to be explicit and it did not do so. Without such an explicit grant of power, the Authority is only left with a pathetic plea that the arguments that the courts rejected still have merit.

Secondly, the "tremendously specific" amendment does not add any clarity to Section 5714(a) and, as the Commonwealth Court explained in *Sawink*, the rule of lenity applies to ambiguous penalty statutes:

> [W]hen, a statute that imposes a penalty is capable of more than one interpretation, it is ambiguous, and the rule of lenity applies. This rule requires a statutory penalty, such as impoundment, to be read in favor of the respondent or defendant. (citation omitted) Further, if there is an ambiguity or doubt, courts must interpret the statute in the light most favorable to the accused. (citation omitted) The rule of lenity provides "a means of assuring fairness to persons subject to the law by requiring penal statutes to give clear and unequivocal warning in language that people generally would understand, as to what actions would expose them to liability for penalties and what the penalties would be." (citations omitted) Because Section 5714(g) is unclear, it must be construed in favor of Petitioners and against the Parking Authority. Even the Parking Authority admits that Section 5714 "is not a model of clarity." Parking Authority Brief at 15.

For all of the foregoing reasons, Germantown respectfuly urges the Authority to reject the Final Form regulations submitted by the Authority.

Very truly yours,

Michael S. Henry

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