STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
WE CARE TRANSPORTATION, INC.	:	DECISION DTA NO. 816883
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law and of Petroleum Business Tax under Article 13-A of the Tax Law for the Period December 1, 1993 through March 31, 1997.	:	

Petitioner We Care Transportation, Inc., 401 East Amherst Street, Buffalo, New York 14215, filed an exception to the determination of the Administrative Law Judge issued on September 7, 2000. Petitioner appeared by William A. Conti. The Division of Taxation appeared by Barbara G. Billet, Esq. (John E. Matthews, Esq., of counsel).

Neither party filed a brief on exception. Oral argument was not requested.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner is an omnibus carrier operating a local transit service and, therefore, eligible for a refund of sales taxes under section 1119(b) of the Tax Law.

II. Whether petitioner is eligible for reimbursement of petroleum business taxes under section 301-c(c) of the Tax Law because it either operates vehicles in a local transit service or transports school children under a contract made pursuant to the Education Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "15" and "17" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

Petitioner, We Care Transportation, Inc. ("We Care"), filed a petition with the Division of Tax Appeals challenging three notices of refund denials issued by the Division of Taxation ("Division"). Although We Care indicated on the face of the petition that the Division denied claims for refund of sales tax and motor fuel tax, the refund denial letters address claims for refund of sales tax and petroleum business tax. Inasmuch as We Care's original claims for refund were not placed in the record and the Division's denial letters provide the Division of Tax Appeals with jurisdiction, the determination only addressed claims for refund of sales tax and petroleum business tax.

We Care operates an omnibus service which provides transportation to persons with disabilities. For this purpose, it operates 59 vehicles each having a capacity of 8 passengers or more.

Forty-five of We Care's vehicles are specially outfitted for the transportation of children. These omnibuses are yellow; they have yellow and red flashing lights; and they have stop signs which can be extended from the side of the bus. Thirteen of the yellow buses are equipped with wheelchair lifts and wheelchair spaces.

The 45 yellow buses are used to transport children pursuant to a Special Transportation Contract for Children Ages 0-5 with Special Needs made with the County of Erie (the "Special Transportation contract"). The Special Transportation contract was entered into on September 1,

1995 and was renewed annually through June 30, 1998. The scope and nature of the transportation services rendered by We Care are described on page 3 of the Special Transportation contract as follows:

> The New York State Laws of 1992, Chapter 428 and 1993, Chapter 231, established an Early Intervention Program for children ages birth through two (0-2) diagnosed with developmental delays and their families, including provision by the County of Erie for transportation services. Eligibility for the program is determined by the County as part of each child's Individual Family Service Plan (I.F.S.P.).
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> The New York State Education Law of 1989, Section 4410, established a Preschool Education Program for children ages three through five (3-5) with developmental delays, including provision by the County of Erie for transportation services. Eligibility for the program is determined by Local School Districts as part of the child's approved Individual Education Plan (I.E.P.).
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> This contract provides transportation services for all Early Intervention Program and Preschool Program children ages birth through five (0-5) who do not *arrive and depart* a Service Provider's half day or full day center-based program site at normal transportation arrival and dismissal times. This contract provides for a wide range of transportation services which include day time, evening and weekend transportation to a variety of locations for periods of time ranging from less than an hour to several hours in duration. (Emphasis in original.)

The Service Providers are identified in the Special Transportation contract as Baker Victory Services, Early Childhood Program; Buffalo Hearing & Speech Center; Cantalician Center for Learning; Language Development Program; Children's Hospital, Therapeutic Preschool Program; and Silver Creek Montessori School. The contract provides for different classes of transportation services, including curb-to-curb transportation where the child is accompanied by a parent or attendant; door-to-curb transportation services where a child travels

unaccompanied and is discharged to an authorized adult or service provider; wheelchair transportation from curb to door; and additional transportation services including transportation of children with medical needs, transportation of children in wheelchairs requiring door-to-door service and three legged trips. Ordinarily, We Care provides a driver and an attendant to assist children between the curb or driveway of each child's residence and the door of the rehabilitation center. Eligibility for these transportation services is determined either by Erie County officials or by officials of the resident school district of the individual child. Four transportation districts, or "cells," are established under the contract, and each cell includes 2 to 12 school districts within Erie County. We Care was obligated to provide transportation services from the cell awarded under the contract to the service provider site, which was not necessarily in the same cell. Transportation orders were to be sent to We Care by personnel involved with Early Intervention and Preschool programs, such as caseworkers, service coordinators and transportation coordinators. However, if the school district within a child's pick-up site or the school district of the child's service site was closed, no transportation services could be provided.

When these vehicles were not being used to transport children under the Special Transportation contract, they were used to transport children under contracts with other public and private service providers.

Fourteen of We Care's vehicles are operated under a contract with Niagara Frontier Transit Metro System, Inc. ("Metro"). Under the Metro contract, We Care provides curb-to-curb services in designated service areas. The Metro contract includes the following requirement:

> The Contractor is required to provide trips throughout the Metro identified paratransit[1] service area, which extends ¾ mile beyond and on either side of any fixed-route bus line, except express routes. The paratransit service area is subject to change in the event there is a change in the fixed route system.

We Care's services are provided from 7 A.M. to 1 A.M. on weekdays; 5 A.M. to 2 A.M. on Saturdays; and 6 A.M. to 10 P.M. on Sundays. Eligible riders are determined by Metro in accordance with the Americans with Disabilities Act (ADA) and regulations promulgated under the authority of the ADA. Eligible riders make their own requests for transportation services directly to We Care's reservation service, usually during normal business hours. Fares charged by We Care are governed by ADA regulations and are in direct relation to the fare for fixed route service.

The same 14 buses used to satisfy the Metro contract are used to provide transportation services under other contracts and agreements. For instance, We Care has entered into contracts with Erie County for Medicaid transportation services. Essentially, these are transportation services from a patient's home to a medical provider, rehabilitation service center, daycare center or other service provider eligible for Medicaid payments. Although the Erie County Medicaid contract placed in evidence was not for the refund periods, testimony from Leonard Sciandra, a We Care supervisor, establishes that similar transportation services were offered during the refund period.

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[1] Neither party offered a definition of "paratransit"; however, a workable definition is found in the New York State Transportation Law where "paratransit transportation" is defined as "specialized demand-responsive, shared-ride revenue services provided to transportation disabled persons on a regular and continuing basis" (Transportation Law § 15-b[1][d]; footnote omitted). This definition is consistent with the description of We Care's services under the Metro contract.

Petitioner also entered into contracts to provide transportation services for persons attending programs at the Jewish Community Center of Greater Buffalo, Inc., Father Baker Manor, Amherst Developmental Center, Episcopal Church Home, People, Inc. (a daycare program) and Millard Fillmore Hospital, among others.

On April 4, 1997, We Care filed a petition with the Division for an Advisory Opinion. The issues raised were similar to the issues raised in this proceeding: whether We Care is eligible for refund of motor fuel taxes, petroleum business taxes and sales taxes pursuant to sections 289-c(3)(d), 30l-c(c) and 1119(b) of the Tax Law, respectively.[2] On December 11, 1997, the Division issued an Advisory Opinion to We Care where it arrived at the following determinations.

(a) We Care was found to be not eligible to receive full reimbursement of motor fuel or sales tax paid with respect to transportation services provided under the Special Transportation contract. Since transportation is only made available to a select group of pre-school age children identified by Erie County or school district officials as eligible for rehabilitation services, the services provided were deemed not to be mass transit services, and We Care was found not to be operating the 45 vehicles in a local transit service. However, We Care was found to qualify for the partial reimbursement provided to all omnibus carriers under Tax Law § 289-c(3)(b) and for the partial reimbursement provided by Tax Law § 301-c(c)(ii) for omnibuses used to provide services under provisions of the Education Law.

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[2] Briefly, Tax Law § 289-c(3)(d) provides complete reimbursement for motor fuel taxes paid for fuel consumed in the operation of an omnibus in local transit service; Tax Law § 301-c(c) provides reimbursement of petroleum business tax in relation to fuel consumed in the operation of an omnibus in local transit service or in the transportation of school children under a contract made under the Education Law; and Tax Law § 1119(b) provides a refund of sales tax for taxes paid on purchases of fuel, parts, equipment and maintenance and repair services used or consumed in the operation of an omnibus in local transit.

(b) Regarding transportation services performed pursuant to the Metro contract, We Care was found to be eligible for full reimbursement of motor fuel tax, petroleum business tax and sales tax since the services were deemed a local transit service. In addition, the Advisory Opinion states: "Where petitioner's 11 vehicles are not operated under the Metro contract but are used to regularly pick up or discharge disabled persons at their convenience within the same general area established by Metro as the paratransit service area, the operations of these vehicles also qualify as being 'in local transit service.'"

Following the issuance of the Advisory Opinion, We Care filed three claims for refund of tax which were denied by the Division based primarily upon the positions stated in the Advisory Opinion.

(a) The first claim (FT97090175) is for refund of petroleum business tax for the period September 1, 1995 through September 30, 1995 in the amount of $627.23. In a letter dated November 10, 1998, the Division informed We Care that this claim was being denied because the fuel consumed in the omnibuses relevant to this claim was not consumed in the performance of local transit service. The Division based its assertion that the omnibuses were not used in local transit service on the fact that the Metro contract did not take effect until March 31, 1997, and the claim was for a period before that.

(b) The second claim (FT97060284) is for refund of sales tax for the period May 1, 1994 through August 31, 1994 in the amount of $84.88. This claim was also denied because the fuel consumed in the omnibuses relevant to the claim was not consumed in the performance of a local transit service.

(c) The third claim (199704189) is for refund of sales tax for the period December 1, 1993 through May 31, 1997 in the amount of $144,786.08. By letter dated July 20, 1998, the Division reiterated its position that only the vehicles operated under the Metro contract are operated in local transit service and, therefore, eligible for refund of sales tax. To compute the amount of refund for which We Care qualified, the Division asked We Care to file revised refund applications which would show the total miles operated by the 11 vehicles in New York State and the number of miles operated in a local transit service.

On October 4, 1984, We Care was issued a certificate of public convenience and necessity to operate as a common carrier of passengers with disabilities between all points in Erie County. That certificate of convenience was amended January 27, 1989 to include all points in Niagara County and between Niagara and Erie counties on. It was renewed in 1997.

At the end of the administrative hearing, the Division reiterated that an accurate computation of the refunds due could only be made if We Care provided documents showing the total miles operated by its vehicles in New York State and the number of miles operated in local transit service. Although We Care came to the hearing unprepared to provide this information, the Division expressed its willingness to review additional documents after the hearing. To facilitate narrowing or settlement of the issues, the record of hearing was left open for the submission of additional documents by We Care.

Following the administrative hearing, We Care submitted the following records to the Division: (1) mileage reports for 59 omnibuses for the months of April, May and June of 1997; gallonage reports for 49 omnibuses for the months of September, October and November of 1995; and a listing, by bus number, of the kind of fuel used by each omnibus.

We modify finding of fact "15" of the Administrative Law Judge's determination to read as follows:

> By letter dated "January 12, 1999" [sic], the Division informed the Administrative Law Judge that its review of the additional documents was complete, and the Division expressed its position on each of the three claims for refund after taking into account the documents submitted by We Care, and modified its refund denials as follows:
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> (a) The Division concedes that the 14 larger buses were used in local transit service after the date the Metro contract went into effect, March 31, 1997. Therefore, it conceded that We Care qualified for a refund of sales tax paid on gas and diesel fuel consumed in operating those omnibuses in local transit *after that date*. To determine the amount of the refund due, the Division made the following calculations:
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> Using mileage reports for the period April 1, 1997 through June 30, 1997, the Division calculated that 30 percent of total miles driven were local transit miles which was arrived at by dividing total miles (296,467) by miles driven in local transit (89,153). An exempt percentage of 40 percent was then calculated using the formula set forth in section 534.4 of the Division's regulations. Invoices provided by We Care to substantiate the amount of sales tax paid only covered the period May 1, 1997 through May 31, 1997. They totaled $1,002.31. The Division applied the exempt percentage to that total to arrive at a refund of sales tax of $400.92 for the period May 1, 1997 through May 31, 1997. It denied that portion of Refund Claim number 1997040189 which exceeds that amount.
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> (b) The Division continued to deny that any refund of sales tax was due for the period May 1, 1994 through August 31, 1994 based on its view that petitioner has failed to show that it was engaged in local transit service during this period. Thus, the Division denied petitioner's claim for refund of $84.88 for that period (FT97060284).
>
> (c) Tax Law § 301-c(c) provides for a reimbursement of petroleum business tax previously imposed and included in the cost of motor fuel and diesel motor fuel purchased in New York and

> consumed in the operation of an omnibus in the *transportation of school children*. Based on that provision,[3] the Division conceded that We Care was entitled to a refund of petroleum business tax for the period September 1, 1995 through September 30, 1995 in the amount of $627.00 (Refund Claim No. FT97090175).[4]

By letter to the parties dated January 25, 2000, the Administrative Law Judge established a schedule for submission of briefs. The letter also stated: "If either party wishes to place in evidence the documents that petitioner submitted to the Division of Taxation, it may do so by forwarding them to me by February 14, 2000. No other evidence will be received, and after that date, the record will be closed to evidence."

We modify finding of fact "17" of the Administrative Law Judge's determination to read as follows:

> In a letter dated "January 26, 1999" [sic], the Division's attorney requested that his previous letter and the documents attached to it be received in evidence. That request is granted. We Care did not submit additional documents before February 14, 2000.[5]

In a letter written in reply to the Division's brief, dated April 28, 2000, We Care's representative noted that the calculation of the appropriate refunds was complicated. The letter states:

> The problem is that the computations are numerous depending on when the petitioner first qualifies and which vehicles so qualify [as being in local transit service]. . . . The percentages can and do

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[3]And not based on petitioner's claim that it was engaged in a "local transit service" during this period.

[4]We modified finding of fact "15" of the Administrative Law Judge's determination to more completely set forth the record.

[5]We modified finding of fact "17" of the Administrative Law Judge's determination to make clear that the documents were, in fact, received in evidence.

> change from time to time depending on use of the 56 omnibuses as a fleet during numerous relevant time periods. Thus petitioner reiterates its request to defer these determinations until resolution of the two main issues, namely, what vehicles qualify as operating in "local transit service" and when. However, should this deferral not be acceptable to your honor, then the petitioner requests until May 31, 2000 to make all possible calculations and present them to the Commissioner for an accuracy determination.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

At the outset, the Administrative Law Judge noted that Tax Law § 1119(b) provides a refund or credit for sales tax paid on the sale to an omnibus carrier of any omnibus, or of any parts, equipment, fuel, maintenance or service used in the operation of any such omnibus by the carrier. To be eligible, the omnibus carrier must show that it provides a "local transit service in this state *and* operate[s] pursuant to a certificate of public convenience and necessity issued by the commissioner of transportation" (Tax Law § 1119[b], emphasis added). The Administrative Law Judge found that We Care operated pursuant to a certificate of public convenience and necessity issued by the New York State Commissioner of Transportation. Therefore, the Administrative Law Judge stated, to qualify for a refund of sales tax, it need only establish that it provided a local transit service.

The Administrative Law Judge referred to section 534.4(a)(3) of the Division's regulations which defines local transit service, in pertinent part, as:

> a mass transit service (as distinguished from a charter, contract, school bus, sight-seeing or other service) provided by an omnibus carrier in which passengers are carried by omnibuses from one point in this State to another point in this State and in performance of which omnibuses either:
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> (i) regularly pick up or discharge passengers at their convenience or at bus stops on the street or highway, as

> distinguished from buildings or facilities used for bus terminals or stations; or
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> (ii) pick up and discharge passengers at bus terminals or stations, the distance between which is not more than 75 miles, measured along the route traveled by the bus.

The Administrative Law Judge found that the paratransit service offered by We Care under the Metro contract was essentially a mass transit service modified to accommodate the needs of persons who require specially equipped omnibuses. The paratransit service, the Administrative Law Judge determined, was like any other local transit service in that passengers may be picked up and discharged anywhere within a defined area (within ¾ miles beyond and on either side of a fixed-route bus line) and service was provided at the convenience of the passengers within the established hours of operation.

However, the Administrative Law Judge also concluded that We Care failed to show that the transportation services it provided under contracts with other public and private entities were local transit services. The Administrative Law Judge noted that a local transit service is a "mass transit" service and not a service performed pursuant to a contract (***see***, 20 NYCRR 534.4[a][3]). Transportation services provided by We Care under other contracts, such as the Erie County Medicaid contract and contracts with private service providers — the Jewish Community Center, People, Inc. and others — are not mass transit services. Under the contracts, the Administrative Law Judge pointed out, We Care provides transportation services to persons who are identified by Erie County or by the service providers as eligible for transportation services — not to all disabled persons. Passengers are not regularly picked up and

discharged at their convenience. Rather, transportation services are offered at specified times and to specified locations *in accordance with the contracts* between We Care and the service provider. The Administrative Law Judge noted the following examples highlighting the differences between the services provided under the Metro contract and services provided under the other contracts. During the extended periods of operation, a person using the Metro service could take the omnibus to visit a friend, attend a movie or go to a job, as long as he or she was picked up and discharged within the paratransit service area. A person being transported under a contract with a service provider could only be transported in accordance with the terms of the contract between the service provider or Erie County and We Care. Accordingly, the Administrative Law Judge found that the transportation services provided under contracts, other than the Metro contract, are not "mass transit" services, and We Care's vehicles are not engaged in "local transit service" when transporting persons under those contracts. The Administrative Law Judge held that sales tax paid for fuel consumed when We Care's omnibuses were operating under contracts other than the Metro contract did not qualify for the refund provided by Tax Law § 1119(b).

The Administrative Law Judge also held that the 45 yellow buses used to transport children were not used in local transit service, since they were not used in a mass transit service, and they did not pick up and discharge passengers at their convenience. The Administrative Law Judge noted that these buses were used under the Special Transportation contract with Erie County to transport children, ages 0-5, to and from specific programs, or they were used to transport children under contracts with public school districts or other service providers. In all

cases, the Administrative Law Judge concluded, service was limited by the contracts, and the omnibuses were not in local transit service.

The Administrative Law Judge also found that We Care established that the 14 omnibuses used to perform services under the Metro contract were eligible for the refund of sales tax provided in Tax Law § 1119(b), however, it failed to establish that the vehicles were used in local transit service prior to March 31, 1997.

The Administrative Law Judge noted that if a local transit service amounted to 70% or more of a carrier's total mileage operated in New York State, then 100% of the combined State and local tax paid on eligible purchases is subject to credit or refund. If the local transit service percentage is greater than 10% but less than 70%, then 10%, plus the product of 1.5 times each whole percent in excess of 10%, of the combined state and local tax paid on such purchases are subject to credit or refund (***see***, Tax Law § 1119[b]).

Based on the information provided by We Care, the Division calculated a percentage to determine the proportion that We Care's vehicle mileage in local transit service bore to its total mileage in New York State per the requirements of Tax Law § 1119(b) and 20 NYCRR 534.4(a). The regulations under 20 NYCRR 534.4(a)(4) and (5) provide the definition of "vehicle mileage" and "total mileage operated" as follows:

> (4) Vehicle mileage. Vehicle mileage means the number of miles run by all omnibuses operated by a carrier in the performance of local transit service plus the number of idle miles run to the point at which service begins and from the point at which such service terminates. Such mileage includes only miles operated within New York State.
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> (5) Total mileage operated. Total mileage operated includes the vehicle mileage computed in paragraph (4) of this

> subdivision, plus the number of miles operated in charter service, school contract service, other contract service, excursion service, sight-seeing service, and all other passenger service which is not included within the meaning of vehicle mileage. Such mileage includes only miles operated within New York State.

The Administrative Law Judge noted that based on the information provided by We Care and the regulations, the Division calculated a refund of sales tax for the period March 31, 1997 through June 30, 1997 in the amount of $400.92. The Administrative Law Judge found that We Care had not shown that this calculation was incorrect or that it was entitled to a larger refund.

Since petitioner failed to provide proof that it provided a local transit service before March 31, 1997, the Administrative Law Judge concluded that it has not established that it is entitled to a refund of sales tax for the period May 1, 1994 through August 31, 1994.

Next, the Administrative Law Judge addressed section 301-c(c) of the Tax Law which provides for reimbursement of petroleum business tax with respect to gallonage purchased and used by the purchaser in the operation of an omnibus in local transit service *or* "in the transportation of school children in the state under a contract made pursuant to the provisions of the education law." The Special Transportation contract with Erie County was made pursuant to section 4410 of the New York State Education Law. Although it provides for the transportation of preschool age children, the Division conceded that, with respect to petroleum purchased for omnibuses used to transport children under this contract, petitioner was eligible for reimbursement. The Administrative Law Judge agreed and found that We Care was entitled to a refund of petroleum business tax in the amount of $439.00 for the period September 1, 1995 through September 30, 1995. The Administrative Law Judge found that petitioner offered no evidence to show that it was entitled to a larger refund for that period.

The record in this matter was closed to additional evidence as of February 14, 2000, and the parties were informed that no evidence would be received into the record after that date. Accordingly, the Administrative Law Judge denied petitioner's request to be provided with an opportunity to submit evidence after that date (***see***, ***Matter of Schoonover***, Tax Appeals Tribunal, August 15, 1991). The Administrative Law Judge found that We Care had a full opportunity to address the factual and legal issues presented here. We Care's representative identified "the two main issues, namely, what vehicles qualify as operating in 'local transit service' and when" (Petitioner's letter dated April 28, 2000, unnumbered p. 3). The Administrative Law Judge noted that not only was petitioner provided with an opportunity to address these issues at hearing, but the record was left open to give We Care an opportunity to present additional documentary evidence to the Division after the hearing and to offer that evidence into the record. The Administrative Law Judge pointed out that petitioner elected to take the position that all of its vehicles were used to provide local transit service and, therefore, provided only cursory documentation related to vehicle mileage.

ARGUMENTS ON EXCEPTION

Petitioner offered no arguments on appeal. Its exception asks us to find that petitioner has established that the transportation services it provided under contract with other public and private entities were local transit services for the period March 1, 1994 through June 30, 1997. Petitioner continues to take the position that all of its omnibuses were used in local transit service and have been used in that way since their purchase. It does not distinguish between the nature of the services provided under the Metro contract and the nature of services provided under its other contracts.

OPINION

We affirm the determination of the Administrative Law Judge for the reasons stated therein. The Administrative Law Judge thoroughly and correctly addressed each of the issues raised by petitioner. Petitioner failed to offer proof of the total miles operated in New York State by each of its vehicles and the number of miles, if any, each of its vehicles operated in a local transit service for any period prior to March 31, 1997. Petitioner has offered no argument in support of its exception and we can find no basis to modify the Administrative Law Judge's determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of We Care Transportation, Inc. is denied;

2. The determination of the Administrative Law Judge is affirmed; and

3. The petition of We Care Transportation, Inc. for refund of sales and use taxes and reimbursement of petroleum business taxes is granted in accordance with conclusions of law "D"and "F" of the Administrative Law Judge's determination, but in all other respects is denied.

DATED: Troy, New York
April 5, 2001

/s/Donald C. DeWitt
Donald C. DeWitt
President

/s/Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/Joseph W. Pinto, Jr.
Joseph W. Pinto, Jr.
Commissioner