STATE OF MICHIGAN
EMPLOYMENT RELATIONS COMMISSION
LABOR RELATIONS DIVISION

In the Matter of:

INTERURBAN TRANSIT PARTNERSHIP,
Public Employer-Respondent,

Case No. C05 I-202

-and-

AMALGAMATED TRANSIT UNION, LOCAL 836,
Labor Organization-Charging Party.
____/

APPEARANCES:

Miller Johnson, by Craig A. Mutch, Esq., and Catherine A. Tracey, Esq., for Respondent

Law Office of Mark H. Cousens, by John E. Eaton, Esq., and Mark H. Cousens, Esq., for Charging Party

DECISION AND ORDER

On June 11, 2007, Administrative Law Judge David M. Peltz (ALJ) issued his Decision and Recommended Order finding that Respondent, Interurban Transit Partnership (ITP), violated Section 10(1)(e) of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210(1)(e). The ALJ found a violation when Respondent unilaterally subcontracted bargaining unit work to non-unit labor without giving Charging Party notice and an opportunity to bargain at a time when bargaining would be meaningful. Rejecting Respondent's contention that a portion of the Charge was untimely, the ALJ held that Charging Party had no duty to demand bargaining because the decision to subcontract was presented as a *fait accompli*. He rejected Respondent's contentions that subcontracting was not a mandatory subject of bargaining, that Charging Party had waived its right to bargain, and that the matter was covered under the terms of the collective bargaining agreement. The ALJ held that the latter issues had been resolved previously in *Interurban Transit Partnership*, 17 MPER 40 (2004) and in the subsequent Court of Appeals decision involving these same parties, *Interurban Transit Partnership v Amalgamated Transit Union, Local 836*, unpublished opinion per curiam of the Court of Appeals issued March 9, 2006 (Docket No. 256796).

The Decision and Recommended Order was served on the interested parties in accordance with Section 16 of PERA. Respondent received an extension of time for its filing and filed exceptions to ALJ's Decision and Recommended Order on August 6, 2007. After

filing a stipulation of the parties agreeing to an extension of time to file a response, Charging Party filed a Brief in Support of the ALJ's Decision and Recommended Order on September 19, 2007.

In its exceptions, Respondent alleges that the ALJ erred in calculating the statute of limitations and in finding the charge timely in all respects. Respondent excepts to the ALJ's finding that it was precluded by collateral estoppel from arguing whether the decision to subcontract was a mandatory subject of bargaining. Respondent alleges that because the work had not been exclusively performed by this bargaining unit, the ALJ erred in concluding that the subcontracting was a mandatory subject of bargaining. Respondent also argues that the right to subcontract this work was a matter "covered by" the agreement. Finally, Respondent excepts to the holding that Charging Party did not waive its right to bargain and had no duty to demand bargaining because the plans were presented as a *fait accompli*. We have reviewed Respondent's exceptions and find them to be without merit.

Factual Summary:

We adopt the factual findings of the ALJ and repeat them here only as necessary. Respondent Interurban Transit Partnership (ITP) provides public transportation service to the City of Grand Rapids and surrounding communities. Charging Party, Amalgamated Transit Union (Union), is the exclusive bargaining representative for all non supervisory ITP employees, including bus drivers and mechanics. The transit system operated by the ITP is primarily comprised of "line-haul" buses that are driven exclusively by Union members along assigned routes on established schedules.

ITP also provides a service, known as Go!Bus, where transportation is provided to customers on an as-needed basis and where the vehicles do not follow preassigned routes or connect with the line-haul system. Go!Bus vehicles are operated by employees of a private company under contract with the ITP.

In April of 2001, the ITP implemented a service called Passenger Adaptive Suburban Shuttle (PASS), to provide access to the regular line-haul system on a fixed schedule between hubs located along assigned routes. Initially, Union members drove the PASS runs. However, in October of 2001, the ITP abolished PASS service on weekends and evenings and began to refer customers during those hours to Go!Bus. Thereafter, the Union filed an unfair labor practice charge alleging that the ITP had unlawfully subcontracted unit work.

In our 2004 decision in *Interurban Transit Partnership*, 17 MPER 40, the Commission, adopted the ALJ's recommended decision, finding a PERA violation. We ordered ITP to restore the status quo ante and make whole any Union members who lost work as a result of the unlawful subcontracting. The Court of Appeals, in a per curiam opinion issued on March 9, 2006 (Docket No. 256796), affirmed the Commission's Decision and Order

Without prior notice to the Union, on January 25, 2005, the ITP authorized its staff to implement a service called County Connection and to enter into an agreement with a private company to operate the service. ITP and MV Transportation subsequently executed a contract

on March 15, 2005, and County Connection began operating five days later, providing curb-to-curb service to its customers. The service is available to all residents of Kent County, with priority given to work-related trips. County Connection vans are owned by ITP, which is also responsible for scheduling. MV Transportation operates the service from 6:00 a.m. until 12:00 p.m., Sunday through Saturday excluding holidays.

At an open meeting held on April 27, 2005, ITP authorized its staff to implement a program called the Airport Shuttle, a line-haul operation providing transportation between the Gerald R. Ford International Airport and three downtown hotels, with a stop at ITP's central bus station. This program operates from 7:00 a.m. to 9:30 p.m., seven days per week. No prior notice was given to the Union regarding the implementation of this program. ITP and MV Transportation entered into a contract governing the operation of the Airport Shuttle and service began on January 3, 2006. The Airport Shuttle uses vehicles equipped to enable drivers to communicate with ITP road supervisors.

On May 9, 2005, while the parties were negotiating a successor to their 2002-2005 collective bargaining agreement, Union president, Juanita Merritt sent a letter to ITP's operations manager, Brian Pouget, demanding to negotiate over the subcontracting of these two new services. Pouget did not respond because he interpreted the demand as a request to place two more issues on the bargaining table.

During contract negotiations in June 2005, the subcontracting of County Connection and Airport Shuttle services was not discussed, nor was there any attempt to schedule the negotiation of the subcontracting issues. Although Pouget called Merritt in August of 2005, and suggested that the parties discuss subcontracting, neither party raised the issues during negotiations on September 1 and 2, 2005.

On September 13, 2005, Merritt wrote to Pouget, reiterating the Union's position that subcontracting should be bargained separately from contract negotiations, and she suggested that Pouget contact her to schedule bargaining over subcontracting. In a separate letter to Pouget on September 13, 2005, Merritt requested information concerning the County Connection and the Airport Shuttle. In a letter to Merritt dated September 22, 2005, Pouget stated, "We remain ready to bargain over contract issues in order that a new collective bargaining agreement may be completed." On October 4, 2005, Pouget responded to the Union's information request by providing various documents pertaining to the County Connection and the Airport Shuttle.

Because ITP planned to start the Airport Shuttle service on January 1, 2006, Pouget told Merritt that the Union needed to make a proposal prior to November 1, 2005. On or about October 25, 2005, Merritt advised Pouget that the Union was working on a proposal that it intended to present the following day. Although the parties met for bargaining on October 26, no subcontracting proposal was presented by the Union. At that meeting, Pouget provided additional information regarding these new services and answered a number of questions concerning them.

On October 27, 2005, a tentative agreement was reached on a collective bargaining agreement for the period 2005 to 2008, and the Union ratified the agreement two weeks later. On

November 17, 2005, Pouget notified Merritt that ITP had entered into a contract with MV Transportation to operate the Airport Shuttle. In a letter dated November 30, 2005, Merritt requested additional information regarding the subcontracting of the County Connection and the Airport Shuttle programs and indicated that the Union remained open to negotiations "provided that it's possible that the contracts can be terminated and allow our members to do the work." In December of 2005, the ITP ratified the agreement reached on October 27, and the contract was executed on December 22, 2005.

Discussion and Conclusions of Law:

ITP claims that the ALJ erred in finding the charge timely as to subcontracting of the County Connection program. The statute of limitations under Section 16(a) of PERA is jurisdictional and cannot be waived. *Walkerville Rural Communities Sch*, 1994 MERC Lab Op 582, 583. The limitations period begins to run when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

ITP argues that the Union knew or should have known of the January 26, 2005, decision to subcontract work because it was made at a public and open meeting, and copies of the meeting minutes were disseminated throughout the work place. However, ITP did not provide notice to the Union or its president, and Merritt testified that she did not learn of the ITP's plans until March or April of 2005. No evidence was presented that Union representatives attended the meeting or that the Union knew of the County Connection program prior to the date testified to by Merritt. ITP presented no evidence to refute that claim or to establish that any other Union representative knew about its decision prior to March or April, 2005. Consequently, we find no merit to the assertion that the charge is untimely with respect to the County Connection program.

ITP also claims that it had no duty to bargain over the County Connection program because bargaining unit work is limited to line-haul runs and does not encompass the demand-response service at issue here. This same argument was considered and rejected in our 2004 decision involving these same parties. In *Interurban Transit Partnership*, 17 MPER 40 (2004), ITP argued that its decision to subcontract night and weekend shuttle service was not a mandatory subject of bargaining because such demand-response work was not exclusively performed by members of Charging Party's unit. There we adopted the ALJ's finding that ITP's decision to subcontract night and weekend transportation services was a mandatory subject of bargaining because the ITP did not significantly alter the scope and nature of the operation but, instead, continued to provide public transportation within the Grand Rapids metropolitan area. Here, too, we see no significant difference between the County Connection and the Airport Shuttle programs and the work historically performed by bargaining unit members.

The Airport Shuttle is a line haul operation utilizing vehicles owned by the ITP. Drivers communicate with ITP supervisors while performing the work. The County Connection buses are owned and scheduled by ITP. Both the Airport Shuttle and the County Connection serve the Grand Rapids metropolitan area. There are no restrictions on who may utilize the Airport Shuttle or the County Connection, and the County Connection is a demand-response program, similar to

the service that was previously held to constitute bargaining unit work. Thus, we conclude that as in the prior case, ITP's diversion of Airport Shuttle and County Connection work to non-unit members is a mandatory subject of bargaining.

We also find no merit in ITP's reliance upon the "exclusivity rule" discussed in *City of Detroit (Dep't of Transp)*, 1998 MERC Lab Op 500; 11 MPER ¶ 29084 (no exceptions) Rather, we adopt the Court of Appeals reasoning in its unpublished opinion in *Interurban Transit Partnership v Amalgamated Transit Union, Local 836*, issued March 9, 2006 (Docket No. 256796).

> The "exclusivity rule" states that the transfer of union work to non-unit members is not a mandatory subject of bargaining unless unit members exclusively performed the work before it was diverted. *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 176, 179; 445 NW2d 98 (1989). We have found no authority to extend the exclusivity rule beyond disputes over work claimed to be exclusive to one of at least two bargaining units. *Id*. at 176. Respondent claims *Detroit Dep't of Transportation v Amalgamated Transit Union, Local 26*, 11 MPER ¶ 29084 (1998), is controlling. We disagree. In *Detroit Dep't of Transportation*, non-unit labor performed certain work for several years when the respondent employer began to consider transferring that work to the charging party bargaining unit. However, the employer reconsidered and paid a different non-unit company to perform the work. *Id*. at slip op pp 2-3. The MERC panel agreed that since the work had not previously been performed exclusively by the bargaining unit, it was therefore not bargaining unit work, and the employer accordingly had no duty to bargain with the bargaining unit before subcontracting the work to another subcontractor. *Id*. at 6. Here, non-unit labor never performed evening and weekend service for all individuals before respondent decided to transfer the evening and weekend PASS service performed by charging party members to non-unit labor. Thus, *Detroit Dep't of Transportation*, *supra*, is not controlling.

In the instant case, non-unit labor never performed the County Connection. Further, the Airport Shuttle services have been made available to essentially the same customer base that is served by members of the Union's bargaining unit. Reliance on the exclusivity rule under these circumstances is misplaced.

ITP relies on *Goodyear Tire & Rubber – Beaumont Chem Plant*, 312 NLRB 674 (1993), and other federal decisions for the proposition that a waiver may result from a union's failure to diligently pursue bargaining. Thus, Respondent argues that the Union waived its right to bargain by failing to make a timely request or raise the subcontracting issue during negotiations on a successor collective bargaining agreement. However, a union has no duty to demand bargaining if the bargaining subject is presented as a *fait accompli*. *Allendale Pub Sch*, 1997 MERC Lab Op 183, 189; *City of Westland*, 1987 MERC Lab Op 793, 797. Here, the ITP's board, without notice to the Union, voted to subcontract the County Connection and Airport Shuttle services at its meetings on January 26, 2005 and April 27, 2005 respectively. Under such circumstances, the Union had no duty to demand or pursue bargaining prior to filing an unfair labor practice charge

because the decisions were presented as a *fait accompli*. The fact that the Union subsequently requested to bargain did not obviate the PERA violations that already had occurred.

Moreover, ITP did not immediately respond to the Union's initial bargaining demand or otherwise indicate its willingness to negotiate over subcontracting. It simply assumed that the Union intended to discuss subcontracting during contract negotiations. Also, the Union's proposal to bargain separately on the subcontracting issue was ignored as was the invitation to schedule times and dates to bargain. Consequently, we agree with the ALJ that Respondent's assertion that the Union failed to diligently pursue bargaining is without merit.

We have considered all other arguments presented by Respondent and conclude that they would not change the result in this case. Instead, because we hold that the ITP's unilateral decision to contract out the operation of the Airport Shuttle and the County Connection violated Section 10(1)(e) of PERA, we adopt the ALJ's recommended order.

ORDER

IT IS HEREBY ORDERED that the Order recommended by the Administrative Law Judge shall become the Order of the Commission.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

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Christine A. Derdarian, Commission Chair

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Nino E. Green, Commission Member

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Eugene Lumberg, Commission Member

Dated: ____________

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APPEARANCES:

Miller Johnson, by Craig A. Mutch and Catherine A. Tracey, for Respondent

Law Office of Mark H. Cousens, by John E. Eaton and Mark H. Cousens, for Charging Party

DECISION AND RECOMMENDED ORDER OF ADMINISTRATIVE LAW JUDGE

Pursuant to Sections 10 and 16 of the Public Employment Relations Act (PERA), 1965 PA 379, as amended, MCL 423.210 and 423.216, this case was heard at Detroit, Michigan on February 3, 2005, before David M. Peltz, Administrative Law Judge for the Michigan Employment Relations Commission. Based upon the entire record, including the pleadings, transcript and post-hearing briefs filed by the parties on or before April 10, 2006, I make the following findings of fact, conclusions of law, and recommended order.

The Unfair Labor Practice Charge:

On September 7, 2005, the Amalgamated Transit Union (ATU), Local 836, filed an unfair labor practice charge alleging that the Interurban Transit Partnership (ITP) violated Section 10(1)(e) of PERA by subcontracting bargaining unit work without first giving Charging Party notice and an opportunity to collectively bargain. The ITP filed an answer denying the allegation on October 3, 2005.

Findings of Fact:

I. BACKGROUND

Respondent provides public transportation services for the City of Grand Rapids and surrounding communities. Charging Party is the exclusive bargaining representative for all nonsupervisory employees of the ITP, including bus drivers and mechanics. The transit system operated by the ITP is primarily comprised of "line-haul" buses which are driven exclusively by members of Charging Party's unit. Line-haul buses run along assigned routes on an established schedule. Customers access the system by boarding buses along these assigned routes.

In 1975, the ITP's predecessor, the Grand Rapids Area Transit Authority, began operating a para-transit service for disabled and elderly passengers. This service, known as Go!Bus, is a "demand-response" system, meaning that transportation is provided to customers on an as-needed basis. Passengers access the service by calling the Respondent's Go!Bus office and making a reservation. ITP personnel are responsible for scheduling the trips. Go!Bus vehicles do not follow prearranged routes or connect with the regular line-haul system. Drivers who perform this work receive specialized training in servicing the needs of the elderly and disabled. Since 1986, Go!Bus vehicles have been operated by employees of a private company under contract with the ITP.

In April of 2001, the Employer implemented a new "deviated line-haul" service, Passenger Adaptive Suburban Shuttle (PASS), to provide passengers throughout the Grand Rapids metropolitan area with access to the regular line-haul system. PASS vehicles operate on a fixed schedule between hubs located along assigned routes. Customers access the PASS service by calling ITP and making a reservation to be picked up at a specific time. Initially, Charging Party's members drove the PASS runs. In October of 2001, the ITP's Board of Directors voted to abolish PASS service on weekends and evenings and to refer customers seeking to use the service during those hours to Go!Bus. The night and weekend runs which were formerly part of PASS were then driven by employees of a private contractor. Thereafter, Charging Party filed an unfair labor practice charge alleging that the ITP had unlawfully subcontracted unit work.

In a Decision and Recommended Order issued on July 13, 2003, I held that the night and weekend service constituted bargaining unit work which the ITP had unlawfully subcontracted without first giving the Union notice and an opportunity to bargain. In reaching this conclusion, I found that the ITP had not significantly altered the scope and nature of its basic operation and that the only material change which occurred was that the work was being performed by nonunit employees of an independent contractor rather than by Charging Party's members:

> Although there are no longer any scheduled PASS routes on nights and weekends, the record establishes that the ITP continues to serve the same geographic areas using, at least in part, the same vehicles previously driven by bargaining unit members. In fact, Respondent admitted that it plans on having Calder City [a private contractor] utilize ITP owned vehicles exclusively for all night and

> weekend runs in the future. Furthermore, the scheduling of night and weekend runs continues to be handled by the ITP.
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> * * *
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> There is nothing in the record to establish that the subcontracting decision involved capital investment, nor is there any suggestion that Calder City drivers have unique skills or require specialized training.

I also found no merit to the ITP's assertion that the Union waived its right to bargain over the decision to contract out transportation services by agreeing to a management rights clause giving the Employer the authority to determine the type and amount of service to be provided.

The Commission adopted my findings of fact and conclusions of law in a Decision and Order issued on June 30, 2004. See *Interurban of Transit Partnership*, 17 MPER 40 (2004). The relief ordered by the Commission included a requirement that Respondent fully restore the status quo ante and make whole any of Charging Party's members who lost work as a result of the unlawful subcontracting. The Court of Appeals subsequently affirmed the Commission's Decision and Order on March 9, 2006. See *Interurban Transit Partnership v Amalgamated Transit Union, Local 836*, unpublished opinion per curiam of the Court of Appeals (Docket No. 256796).

II. COUNTY CONNECTION

From December of 2000 through September of 2001, the ITP ran a pilot program intended to address the needs of the unemployed and underemployed by providing low-cost transportation services to job sites. The program, known as Better Employment Safety-net Transportation (BEST), operated within a targeted zone within Kent County in which there were areas of both high unemployment and high job concentrations. BEST was a "demand-response" system. It was operated by a private contractor responsible for running the Go!Bus service. The ITP purchased two vans for the BEST program which were similar to the vehicles used in connection with the Go!Bus service.

After the BEST pilot program concluded, ITP staff met with local groups and business leaders to discuss the creation of a permanent job transportation service. The ITP applied for, and ultimately received, two federal grants to fund the program, which became known as the County Connection. At an open meeting on January 25, 2005, Respondent's Board of Directors authorized ITP staff to implement the County Connection program and to enter into a contractual agreement with a private company, MV Transportation, to operate the service.[1] Charging Party was not given any prior notice that the board was considering implementing such a program. Respondent and MV Transportation subsequently executed a contract pertaining to the County Connection on March 15, 2005, and the program began operation five days later.

The County Connection is a demand-response program which provides curb-to-curb service to its customers. Individuals contact the Go!Bus office to make an advance or same day

[1] Minutes of ITP board meetings are routinely published and made available for review by Respondent's employees and the general public.

reservation. The County Connection utilizes vans owned by Respondent, which is also responsible for scheduling the rides. The County Connection services all of Kent County, excluding areas served by existing line-haul and PASS routes. The primary target customers for the County Connection program are individuals within Kent County who are just entering the workforce or who have repeatedly cycled through new jobs, make less than $9.00 per hour, have short tenure with employers and who are likely to be receiving aid.

Federal funding requires that fifty percent of County Connection customers be eligible for Temporary Assistance for Needy Family (TANF) benefits. However, the service is available to all residents of Kent County, with priority given to work-related trips. MV Transportation operates the service from 6:00 a.m. until 12:00 p.m., Sunday through Saturday excluding holidays.

III. AIRPORT SHUTTLE

At a public meeting on April 27, 2005, Respondent's Board of Directors authorized ITP staff to implement a new program, the Airport Shuttle, to purchase three vehicles and fare boxes to be utilized as part of the program, and to award a contract to MV Transportation to operate the service. No prior notice was given to the Union regarding the implementation of this program. Respondent and MV Transportation subsequently entered into a contract dated November 4, 2005, governing the operation of the Airport Shuttle. The service began running on January 3, 2006.

The Airport Shuttle is a line-haul operation providing transportation between the Gerald R. Ford International Airport and three downtown hotels, along with a stop at Respondent's central bus station. The shuttle runs from 7:00 a.m. to 9:30 p.m., seven days per week. There are no limitations on who may use the service and advance reservations are not required. The Airport Shuttle uses three 14 passenger cut-away vans similar to the vehicles used in the Go!Bus and PASS programs. The vehicles are equipped with radios or phones so that drivers can communicate with ITP road supervisors. Drivers are responsible for assisting riders with their luggage, if necessary.

IV. BARGAINING DEMAND AND AFTERMATH

Sometime in March or April of 2005, Charging Party's president, Juanita Merritt, learned of Respondent's plans for the County Connection and Airport Shuttle services. On May 9, 2005, Merritt sent a letter to Brian Pouget, Respondent's operations manager, asserting that all transportation services for the "general population" constitute a mandatory subject of bargaining and demanding that Respondent negotiate over the subcontracting of the two new services. Pouget received the bargaining demand on May 11, 2005. At the time, the parties were in the midst of negotiating a successor to their 2002-2005 collective bargaining agreement, which was scheduled to expire on June 30, 2005. Pouget testified that he did not respond to Merritt's letter because he interpreted her demand as simply a request by the Union to place two more issues on the bargaining table.

The parties met on four consecutive days in June 2005 for the purpose of contract negotiations. Subcontracting of the County Connection and Airport Shuttle services was not discussed at any time during those bargaining sessions, nor did either party make any attempt to schedule specific dates to negotiate regarding that work. In August of 2005, Pouget called Merritt and suggested that the parties discuss the subcontracting issue soon so that the issue would not interfere with their ability to reach agreement on a new contract. Despite that request, neither party brought up the subcontracting issue during contract negotiation sessions held on September 1 and 2.

On September 13, 2005, approximately one week after the Union filed the instant unfair labor practice charge, Merritt stopped by Pouget's office on other business. Pouget showed Merritt a copy of the charge and expressed surprise that the Union had taken such action. Merritt told Pouget that the Union wished to bargain the subcontracting issue separately from the ongoing contract negotiations. Pouget did not specifically reject the Union's request, nor did he explicitly agree to bargain the issue separately.

Later that same day, Merritt wrote a letter to Pouget in which she reiterated the Union's position that the subcontracting issue should be bargained separately from the ongoing contract negotiations. Merritt suggested that Pouget contact her to set up times and dates to devote to bargaining that issue. In a separate letter to Pouget also dated September 13, 2005, Merritt requested that Respondent provide the Union with certain information relating to the County Connection and the Airport Shuttle, including copies of all contracts between the ITP and subcontractors and "specific costs associated with the running of these services."

In a letter to Merritt dated September 22, 2005, Pouget admitted that he never responded to the Union's initial bargaining demand. However, he characterized Merritt's allegations concerning an alleged failure to bargain by the ITP as "specious" and he pointed out that Charging Party had failed to raise the issue of subcontracting the County Connection and Airport Shuttle during the bargaining sessions which occurred in June and September. Pouget wrote that "the only logical conclusion that can be drawn is that the Union was not prepared to bargain over these services." Pouget concluded the letter by stating, "We remain ready to bargain over contract issues in order that a new collective bargaining agreement may be completed."

On October 4, 2005, Pouget responded to Charging Party's September 13, 2005, information request by providing the Union with various documents pertaining to the County Connection and the Airport Shuttle, including copies of contracts and material from the ITP's Board of Directors. In his cover letter, Pouget noted that although the board had authorized its staff to enter into an agreement with MV Transportation to operate the Airport Shuttle, no agreement between Respondent and the private contractor had yet been executed.

Towards the end of October 2005, Pouget learned that MV Transportation needed at least sixty days notice prior to beginning operation of the Airport Shuttle. Because Respondent planned to start the service on January 1, 2006, Pouget contacted Merritt and told her that if the Union wanted to make a proposal, it needed to do so prior to November 1, 2005. On or about October 25, 2005, Merritt advised Pouget that the Union was working on a proposal which Charging Party intended to present the following day. Although the parties met for bargaining

on October 26th, no proposal regarding subcontracting was presented by the Union. However, at the request of Charging Party's chief negotiator, Javier Perez, the parties met in Pouget's office after contract negotiations had concluded for the day. During that meeting, Pouget provided the Union with additional information concerning the County Connection and the Airport Shuttle and Perez asked a number of questions about the new services. No proposals were exchanged during or after this meeting.

The next contract negotiation session was scheduled for October 27, 2005. On that date, a tentative agreement was reached on a successor collective bargaining agreement covering the period 2005 to 2008. Two weeks later, the Union ratified the agreement. On November 17, 2005, Pouget notified Merritt in writing that Respondent had entered into a contractual agreement with MV Transportation to operate the Airport Shuttle. In a letter dated November 30, 2005, Merritt requested additional information from Respondent regarding the subcontracting of the County Connection and the Airport Shuttle programs. In the letter, Merritt indicated that Charging Party remained open to negotiations over the issue "provided that it's possible that the contracts can be terminated and allow our members to do the work." In December of 2005, the ITP's Board of Directors ratified the tentative agreement reached between Respondent and the Union. The contract was executed on December 22, 2005.

V. CONTRACT PROVISIONS

The 2005-2008 collective bargaining agreement between the parties contains a management rights clause, Article III, which provides, in pertinent part:

> THE MANAGEMENT of the Authority's operations and the direction of the working forces shall be retained by the Authority, to be exercised in its sole discretion except for any rights specifically and explicitly restricted in this Agreement. The Authority has the right to determine the types and amount of service to be provided, including the making of schedules, frequency of service, and the amount of time allowed on individual runs; to modify, adopt, install, operate and maintain existing, new or improved equipment or methods of operation; to hire, promote, discharge for cause and maintain discipline and efficiency, subject to any limitations of this Agreement.

Seniority for bargaining unit members is governed by Article VIII of the collective bargaining agreement. Section 8.01 of the contract states that the seniority of "all Operators" shall be determined according to the length of continuous employment with the ITP. That section further provides that paratransit operators will "drive paratransit service only and maintain seniority within their classification" and that line-haul operators "whether regular, extra board or part-time, will drive linehaul service only and maintain seniority within that classification." The prior contract between the parties covering the period 2002 to 2005 contained essentially identical language with respect to management rights and seniority

Positions of the Parties:

Charging Party argues that the ITP violated Section 10(1)(e) of PERA by subcontracting the operation of the Airport Shuttle and the County Connection to MV Transportation without giving the Union notice and an opportunity to bargain. According to the Union, the Airport Shuttle and County Connection constitute bargaining unit work because the programs are merely an extension of the transportation services historically performed by its members. Charging Party contends that the ITP's determination to subcontract the work was presented to the Union as a fait accompli by virtue of the board's resolutions of January and April of 2005 respectively, and that the Union timely filed its charge within six months of learning of those decisions. Charging Party further asserts that the management rights clause in the parties' collective bargaining agreement was not specific with respect to subcontracting so as to constitute a waiver of the Union's right to bargain that issue, and that the seniority clause in the contract does not restrict the bargaining unit to line-haul work. As relief in the instant case, Charging Party requests that the ITP be ordered to cease and desist from subcontracting the driving of the new routes and the maintenance of the vehicles used to provide those services.

Respondent asserts that the portion of the charge relating to the subcontracting of the County Connector is barred by the statute of limitations because it was filed more than six-months after the ITP's Board of Directors announced its decision to subcontract that service at an open meeting on January 25, 2005. Respondent further contends that its decision to utilize an independent contractor to operate the County Connection was not a mandatory subject of bargaining because the new service involves "demand-response" work, which is not the type of work performed by Charging Party's members. According to Respondent, unit members are in fact prohibited from driving demand-response runs by the seniority provision in the parties' collective bargaining agreement. Respondent argues that even if the decision to subcontract the County Connection work to a private company constituted a mandatory subject of bargaining, the Union waived its right to bargain over the issue by its past practice of permitting the ITP to subcontract the BEST system. Respondent also claims that Charging Party waived its right to bargain over the subcontracting of both services by agreeing to a management rights clause in the contract giving the ITP the authority to determine the type and amount of service to be provided. Additionally, the ITP argues that the Union waived its right to bargain over the issue by failing to pursue its initial demand to bargain.

Discussion and Conclusions of Law:

Respondent contends that the portion of the instant charge pertaining to the County Connection was not timely filed because the Union had notice of the ITP's intent to subcontract that service more than six months prior to the filing of the charge. Respondent asserts that Charging Party knew or should have known of the board's decision because it was made at a public meeting, and because copies of the minutes of that meeting were disseminated throughout the work place.

Under Section 16(a) of PERA, no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Commission. The Commission has consistently held that the statute of limitations is jurisdictional and cannot

be waived. *Walkerville Rural Community Schools*, 1994 MERC Lab Op 582, 583. The limitations period under PERA commences when the charging party knows or should have known of the acts constituting the unfair labor practice and has good reason to believe the acts were improper or done in an improper manner. *Huntington Woods v Wines*, 122 Mich App 650, 652 (1983).

In the instant case, it is undisputed that the ITP did not provide actual notice to Union representatives prior to January 25, 2005 that it was considering implementing the County Connection program. Charging Party's president, Juanita Merritt, testified that she did not learn of the ITP's plans until March or April of 2005, and Respondent presented no evidence to refute that claim or to establish that any other Union representative knew about the County Connection prior to the Union president becoming aware of the program. The fact that the decision to implement the program and subcontract the work was approved at a public board meeting in January of 2005 is of no import here, as there is nothing in the record to suggest that any Charging Party representative attended that meeting or read the minutes which were subsequently published and disseminated. See *Buena Vista Schools*, 16 MPER 25 (2003) (no exceptions) (resolution adopted at public board meeting insufficient to constitute notice to union of wage change). Accordingly, I find no merit to Respondent's assertion that the charge is untimely with respect to the County Connection program.

Next, Respondent contends that it had no duty to negotiate with Charging Party over the County Connection because bargaining unit work is limited to line-haul runs and does not encompass the demand-response service at issue here. This same argument has already been considered and rejected in a prior case involving the same parties. In *Interurban Transit Partnership*, 17 MPER 40 (2004), the ITP argued that its decision to subcontract night and weekend shuttle service was not a mandatory subject of bargaining because such demand-response work was not exclusively performed by members of Charging Party's unit. I disagreed, concluding that there was no significant difference between the work subcontracted by the ITP and the services that unit members previously performed. My findings were subsequently adopted by the Commission and affirmed by the Court of Appeals. Under such circumstances, Respondent is precluded from raising this issue by the doctrine of collateral estoppel, which bars relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. See e.g. *Ditmore v Michalik*, 244 Mich App 577 (2001). For the same reason, I find no merit to the Employer's assertion that Charging Party waived its right to bargain over the subcontracting of work by agreeing to a broad management rights clause in the parties' contract, an argument which was considered and rejected in the prior case.

With respect to whether the subcontracting of the County Connection and the Airport Shuttle programs constitutes a mandatory subject of bargaining, I see no significant difference between those services and the work historically performed by bargaining unit members. As in the prior case, the ITP did not significantly alter the scope and nature of its basic operation when it made the decision to subcontract the County Connection and Airport Shuttle work. The Airport Shuttle is a line haul operation utilizing cut-away vans which are owned by the ITP and are similar to the Go!Bus and PASS vehicles. Shuttle drivers are in communication with ITP

supervisors while performing the work. The County Connection buses are also owned by Respondent, which is responsible for scheduling the rides. Both the Airport Shuttle and the County Connection serve customers in the Grand Rapids metropolitan area. Although federal funding requires that a percentage of County Connection customers be eligible for federal benefits, the service is open to all residents of the County. There are no restrictions whatsoever on who may ride the Airport Shuttle. The County Connection is a demand-response program, much like the night and weekend service which the Commission previously found to constitute bargaining unit work. No unique skills or specialized training is required for either of the new programs. Based upon these facts, I conclude, as I did in the prior case, that Respondent's diversion of work to non-unit employees was a mandatory subject of bargaining.

The ITP contends that even if the subcontracting of the County Connection and Airport Shuttle constituted a mandatory subject of bargaining, no PERA violation occurred because the Employer remained ready and willing to negotiate with the Union over the subcontracting of that work. According to Respondent, the Union waived its right to bargain by failing to make a timely request to negotiate over the County Connection and by failing to raise the subcontracting issue during negotiations on a successor collective bargaining agreement. In support of this assertion, the ITP cites *Goodyear Tire & Rubber – Beaumont Chem Plan*, 312 NLRB 674 (1993), and other federal decisions purportedly standing for the proposition that a waiver may result from a union's failure to diligently pursue bargaining. I find Respondent's reliance on such decisions unpersuasive.

It is well established that an employer seeking to make a change in a mandatory subject of bargaining must first ensure that the union has adequate notice of the proposed change to allow for meaningful bargaining. If the union then fails to make a timely demand to bargain, the employer has satisfied its obligation. *SEIU, Local 586 v Union City*, 135 Mich App 553 (1984). However, the Commission has consistently held that a union has no duty to demand bargaining if such a request would be futile or the bargaining subject is presented as a fait accompli. *Allendale Public Schools*, 1997 MERC Lab Op 183, 189; *City of Westland*, 1987 MERC Lab Op 793, 797. The Commission has also recognized that the date of a unilateral change is the date of the announcement, resolution or other action finalizing the change, and not the date of implementation. *Detroit Bd of Ed,* 1974 MERC Lab Op 813. In the instant case, the ITP's board voted to implement the County Connection and Airport Shuttle services and subcontract the work at its meetings on January 26, 2005 and April 27, 2005 respectively. Under such circumstances, Charging Party had no duty to demand or pursue bargaining prior to filing an unfair labor practice charge because the decisions were presented as a fait accompli. The fact that the Union subsequently made a request to bargain in no way obviates the PERA violation which had already occurred.

Even assuming arguendo that meaningful negotiations could have taken place after the Board had already resolved to implement the programs and subcontract the work, I find no basis upon which to conclude that the Union somehow waived its right to bargain over the County Connection and Airport Shuttle programs. Respondent did not immediately acknowledge receipt of Charging Party's bargaining demand or take any action which would indicate to the Union the ITP's willingness to negotiate over the subcontracting of the programs. Rather, Pouget simply assumed that the Union intended to include the issue as a matter to be discussed during contract

negotiations. Later, when Merritt specifically proposed that the parties bargain separately regarding the County Connection and Airport Shuttle, Pouget essentially ignored the request. Similarly, Pouget failed to respond to Merritt's written invitation to contact the Union for the purpose of scheduling times and dates to devote to bargaining the subcontracting issue. Thus, I find no merit to Respondent's assertion that the Union failed to diligently pursue bargaining in this matter.

Next, Respondent asserts it had no duty to bargain with Charging Party over the subcontracting of the County Connection because that work is not exclusive to the ATU bargaining unit. According to ITP, the County Connection is substantially similar to the BEST pilot program which the ITP operated via a private contractor from December of 2000 to September of 2001. I disagree. The exclusivity rule states that the transfer of union work to non-unit members is not a mandatory subject of bargaining unless unit members exclusively performed the work before it was diverted. *Southfield Police Officers Ass'n v City of Southfield*, 433 Mich 168, 176 (1989). However, as the Court of Appeals recognized in the prior case involving these parties, the exclusivity rule applies only in disputes involving at least two bargaining units of the same employer. *Interurban Transit Authority, supra* at 4. Even assuming that the BEST program and the County Connection involve the same work, the former service was operated by individuals who were not employees of the ITP, as opposed to members of a different bargaining unit. Thus, Respondent's reliance on the exclusivity rule in the instant case is unpersuasive.

I also find no merit to Respondent's assertion that the Union's waived its right to bargain over the subcontracting of the County Connection by failing to object to the ITP's operation of the BEST program. There is no evidence suggesting that Respondent ever gave Charging Party notice and an opportunity to bargain over the implementation of the BEST service. Moreover, the Union cannot be presumed to have the same interest in a temporary pilot program as it does in permanent work.

Charging Party argues that a remedy for the unlawful subcontracting by Respondent in this case should also address the Employer's use of non-unit personnel to provide maintenance for ITP vehicles used in connection with the County Connection and Airport Shuttle services. Although maintenance employees are included in the ATU bargaining unit, the Union did not make this assertion in its charge. Additionally, there is no evidence in the record establishing that Respondent has actually subcontracted maintenance work to non-unit personnel. Accordingly, I conclude that a remedy as to maintenance employees would be inappropriate in the instant case.

I have carefully considered the remaining arguments of the parties and conclude that they do not warrant a change in the result. For the foregoing reasons, I conclude that the ITP's unilateral decision to contract out the operation of the Airport Shuttle and the County Connection violated Section 10(1)(e) of PERA. Accordingly, I recommend that the Commission issue the order set forth below:

RECOMMENDED ORDER

Respondent Interurban Transit Partnership, its officers and agents, are hereby ordered to:

1. Cease and desist from subcontracting work performed by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

2. Restore the status quo that existed prior to Respondent's unlawful actions and make bargaining unit members whole for all losses attributable to such actions.

3. Cease and desist from any further subcontracting of bargaining unit work, pending satisfaction of the obligation to bargain.

4. Post the attached notice to employees in conspicuous places on Respondent's premises, including all places where notices to employees are commonly posted, for a period of 30 consecutive days.

MICHIGAN EMPLOYMENT RELATIONS COMMISSION

____
David M. Peltz
Administrative Law Judge

Dated: ____________

NOTICE TO EMPLOYEES

After a public hearing before the Michigan Employment Relations Commission, INTERURBAN TRANSIT PARTNERSHIP, a public employer under the MICHIGAN EMPLOYMENT RELATIONS ACT, has been found to have committed an unfair labor practice in violation of this Act. Pursuant to the terms of the Commission's order, we hereby notify our employees that:

WE WILL NOT subcontract work performed by members of the Amalgamated Transit Union, Local 836, the duly certified bargaining agent of its employees, without giving that labor organization notice and an opportunity to demand bargaining at a time when such bargaining would be meaningful.

WE WILL restore the status quo that existed prior to our unlawful actions and make bargaining unit members whole for all losses attributable to such actions.

WE WILL cease and desist from any further subcontracting of bargaining unit work, pending satisfaction of the obligation to bargain.

ALL of our employees are free to engage in lawful activity for the purpose of collective bargaining or other mutual aid and protection as provided in Section 9 of the Public Employment Relations Act.

INTERURBAN TRANSIT PARTNERSHIP

By: ________________________

Title: _______________________

Date: __________

This notice must be posted for a period of 30 consecutive days and must not be altered, defaced or covered by any material. Any questions concerning this notice or compliance with its provisions may be directed to the office of the Michigan Employment Relations Commission, Cadillac Place Building, 3026 W. Grand Blvd, Suite 2-750, P.O. Box 02988, Detroit, MI 48202-2988. Telephone: (313) 456-3510.