

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

DOCKET NO. 03A-466CP-EXTENSION

IN THE MATTER OF THE APPLICATION OF R & R TRANSPORTATION, INC., FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY AUTHORIZING AN
EXTENSION OF OPERATIONS UNDER PUC NO. 55693.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MANA L. JENNINGS-FADER
GRANTING MOTION TO DISMISS
APPLICATION, DISMISSING APPLICATION
WITHOUT PREJUDICE, VACATING
HEARING DATE, AND CLOSING DOCKET**

Mailed Date: March 22, 2004

I. STATEMENT, FINDINGS, AND CONCLUSION

1. By its Application for an Extension of Certificate of Public Convenience and Necessity PUC Number 55693 (Application), R & R Transportation, Inc. (Applicant), seeks to extend operations under its existing Certificate of Public Convenience and Necessity as more specifically described in the Notice of Application Filed (Notice). The Application, filed on October 23, 2003, commenced this docket.

2. On October 27, 2003, the Commission gave public notice of the Application. *See* Notice, dated October 27, 2003, at 3.

3. On November 12, 2003, Metro Taxi, Inc. (Metro), intervened of right. *See also* intervention filed by Metro on December 19, 2003. On November 14, 2003, Golden West Commuter, LLC (Golden West), intervened of right. These are the only interventions in this proceeding.

4. On December 10, 2003, Applicant filed a request that the Application be renoticed. Included in that request was language which amended the scope of the Application as noticed on October 27, 2003.

5. On December 15, 2003, the Commission renoticed the Application and provided public notice of the Application as described in the December 10, 2003, filing. *See* Notice dated December 15, 2003, at 1. That Notice also scheduled the hearing on the renoticed Application for January 30, 2004.

6. On December 16, 2003, the undersigned Administrative Law Judge (ALJ) issued Decision No. R03-1416-I. That Order informed the parties that the hearing date and procedural schedule contained in the December 15, 2003, Notice would govern this proceeding.

7. On January 13, 2004, Applicant filed a restriction to the Application as renoticed on December 15, 2003. On January 21, 2004, Metro served notice that the restriction would not satisfy its interests in this matter.

8. On January 23, 2004, Applicant and Golden West filed a Stipulation and Motion to Restrictively Amend Application and to Withdraw Intervention. The ALJ accepted the Stipulation, granted the Motion, and dismissed the intervention of Golden West by Decision No. R04-0096-I, entered on January 26, 2004.

9. On January 30, 2004, the ALJ called the hearing as scheduled. As a preliminary matter, Metro orally made a motion to dismiss the Application without prejudice. The motion had two bases: first, Applicant is a corporation and was not represented by counsel as required by statute and Commission rule; and, second, Applicant had not made the filings required by the Commission's procedural order in this docket.

10. Applicant requested a continuance for the purpose of obtaining counsel. The ALJ granted the request for a continuance and, therefore, denied the motion to dismiss. The ALJ established the following procedural schedule and hearing date: (a) on or before February 13, 2004, counsel for Applicant would enter her/his appearance; (b) on or before March 3, 2004, Applicant would file its list of witnesses and copies of its exhibits; (c) on or before March 15, 2004, if it wished to do so, Metro could supplement its list of witnesses and copies of its exhibits filed on December 19, 2003; and (d) hearing would be held on March 29, 2004. Each of these dates was discussed with, and was acceptable to, the Applicant.

11. At the time the ALJ granted the continuance, the ALJ emphasized to Applicant that the Application would be dismissed without prejudice if Applicant did not retain counsel by February 13, 2004. Applicant assured the ALJ that counsel would be retained and that the procedural schedule would be met.

12. On January 30, 2004, the ALJ issued Decision No. R04-0114-I, which Order set out the procedural schedule agreed to, and the decisions made, during the hearing. In that Order, at ¶ II.A.1, the ALJ specifically stated that Applicant's request for a continuance was granted "subject to the following conditions: *first*, counsel for R & R Transportation, Inc., must enter her/his appearance on or before February 13, 2004; and, *second*, if no counsel has entered an appearance for R & R Transportation, Inc., by close of business on February 13, 2004, and absent further order, the Application will be dismissed without prejudice." (Emphasis in original.) See also *id.* at ¶ I.5.

13. No counsel entered her/his appearance on behalf of Applicant on or before February 13, 2004. In fact, as of the date of this recommended decision, no counsel has entered an appearance on behalf of Applicant in this matter.

14. As of the date of this recommended decision, Applicant has not requested an extension of time to retain counsel.

15. On March 2, 2004, Metro filed a Motion to Dismiss Application (Motion). As the basis for the Motion, Metro stated that no counsel for Applicant has entered her/his appearance in this matter. In support of the Motion, Metro quoted from Decision No. R04-0114-I (*see above*). Metro asks that the Application be dismissed without prejudice.

16. Applicant's list of witnesses and copies of exhibits were due on or before March 3, 2004. As the date of this recommended decision, Applicant has not filed a list of witnesses and has not filed copies of its exhibits.

17. As of the date of this recommended decision, Applicant has not requested an extension of time to file its list of witnesses and copies of its exhibits.

18. Response to the Motion was due on March 16, 2004. Applicant did not file a response to the Motion to Dismiss, thus confessing the Motion. In addition, as of the date of this recommended decision, Applicant has not responded to the Motion and has not requested an enlargement of time within which to respond to the Motion.

19. In view of the foregoing facts, in view of Applicant's agreement to the procedural schedule and specific agreement to the date for obtaining counsel, and particularly in view of Applicant's stated understanding of the consequences of a failure to obtain counsel, the Motion

will be granted.¹ The Motion is unopposed and states good grounds. Granting the Motion and dismissing the Application without prejudice will not prejudice Applicant as it can file and pursue another application, should it wish to do so.

20. In view of the dismissal of the Application, the hearing in this docket scheduled for March 29, 2004, will be vacated.

21. In accordance with § 40-6-109, C.R.S., the ALJ recommends that the Commission enter the following order.

II. ORDER

A. The Commission Orders That:

1. The Motion to Dismiss the Application, which Motion was filed by Metro Taxi, Inc., on March 2, 2004, is granted.

2. The Application for an Extension of Public Convenience and Necessity PUC Number 55693 filed by R & R Transportation, Inc., is dismissed without prejudice.

3. The hearing scheduled for March 29, 2004, is vacated.

4. This Recommended Decision shall be effective on the day it becomes the Decision of the Commission, if that is the case, and is entered as of the date above.

¹ The failure of Applicant to file its list of witnesses and copies of its exhibits as required by the procedural schedule, and the prejudice to Metro's ability to prepare for hearing resulting from that failure to file, provides an additional basis for the granting of the Motion. *See, e.g.*, December 15, 2003, Notice (informing Applicant that, should "a party ... not meet the requirements of this Notice [*i.e.*, the procedural schedule set out in the Notice], the Commission may dismiss the application ... upon motion filed by any party, or upon the Commission's own motion, unless good cause for the failure to meet the requirements is shown.").

5. As provided by § 40-6-106, C.R.S., copies of this Recommended Decision shall be served upon the parties, who may file exceptions to it.

a) If no exceptions are filed within 20 days after service or within any extended period of time authorized, or unless the recommended decision is stayed by the Commission upon its own motion, the recommended decision shall become the decision of the Commission and subject to the provisions of § 40-6-114, C.R.S.

b) If a party seeks to amend, modify, annul, or reverse a basic finding of fact in its exceptions, that party must request and pay for a transcript to be filed, or the parties may stipulate to portions of the transcript according to the procedure stated in § 40-6-113, C.R.S. If no transcript or stipulation is filed, the Commission is bound by the facts set out by the administrative law judge; and the parties cannot challenge these facts. This will limit what the Commission can review if exceptions are filed.

6. If exceptions to this Recommended Decision are filed, they shall not exceed 30 pages in length, unless the Commission for good cause shown permits this limit to be exceeded.

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

Administrative Law Judge