

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0212CP

IN THE MATTER OF THE APPLICATION OF DLT TRANSPORT LLC FOR A
CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO OPERATE AS A
COMMON CARRIER BY MOTOR VEHICLE FOR HIRE.

**RECOMMENDED DECISION OF
ADMINISTRATIVE LAW JUDGE
MELODY MIRBABA
DISMISSING APPLICATION WITHOUT PREJUDICE**

Mailed Date: July 9, 2019

I. STATEMENT AND FINDINGS

A. Summary.

1. This Decision dismisses DLT Transport LLC's (DLT) Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire (Application) without prejudice for failing to prosecute it. Dismissal without prejudice means that although this Application is dismissed, DLT may submit a new application seeking the same relief. This Decision also denies Ramblin' Express Inc.'s "Exceptions," challenging Interim Decision No. R19-0532-I as moot.

B. Background and Factual Findings.

2. DLT initiated this proceeding on April 25, 2019 when it filed its Application with the Colorado Public Utilities Commission. DLT did not include a summary of witness testimony with its Application, but did submit a confidential filing relating to its financial fitness.

3. After the Commission provided public notice of the Application, Estes Valley Transport, Inc. (Estes Valley) filed a timely intervention in this matter objecting to the

Application. Estes Valley's Entry of Appearance and Intervention. Aspire Tours LLC (Aspire) also filed a timely intervention objecting to the Application. Aspire's Entry of Appearance and Petition for Intervention.

4. Ramblin' Express, Inc. (Ramblin') filed an untimely intervention in this matter objecting to the Application. Ramblin' Intervention.

5. On June 12, 2019, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition.

6. On June 18, 2019, the ALJ denied Ramblin's Intervention as untimely in Interim Decision No. R19-0532-I (Ordering ¶ 2).

7. The same Decision determined that the matter must move forward to an evidentiary hearing on the Application, as it remains disputed. Decision No. R19-0532-I, ¶ 9. As a result, the Decision scheduled a prehearing conference for July 1, 2019, at 11:00 a.m., and advised DLT that "failure to appear at the prehearing conference may result in dismissal of the Application for failing to pursue or prosecute it." Decision No. R19-0532-I, ¶ 12; and Ordering ¶ 1.

8. The Decision scheduling the prehearing conference (Decision No. R19-0532-I), was sent to DLT on June 18, 2019 by U.S. Mail.¹ Certificate of Service for Decision No. R19-0532-I.

9. On June 24, 2019, Ramblin' filed "Exceptions" to the portion of Interim Decision No. R19-0532-I denying its untimely Intervention. Because Commission Rules do not permit

¹ As demonstrated by the Certificate of Service, the Decision was mailed to 1159 S. Waco Street, Unit B, Aurora, Colorado 80017; this matches the address DLT provided in its Application. Application at 1, *compare*, Certificate of Service for Decision No. R19-0532-I.

exceptions to interim decisions, the ALJ construes this filing as a motion to reconsider or to set aside that portion of Interim Decision No. R19-0532-I. See Rule 1502(b) (interim decisions are not subject to exceptions), and Rule 1502(c) (party may file motion with presiding officers seeking to set aside, modify or stay an interim decision), 4 *Code of Colorado Regulations* (CCR) 723-1, Rules of Practice and Procedure.

10. As noticed in Decision No. R19-0532-I, the prehearing conference was convened on July 1, 2019 at 11:00 a.m., at a Commission hearing room. Counsel for Estes Valley and Aspire appeared. DLT did not. After a 15-minute recess to allow DLT additional time to appear, the prehearing conference was reconvened. DLT still did not appear.

11. Estes Valley made a verbal motion to dismiss the Application, which Aspire joined, arguing that DLT's failure to appear at the mandatory prehearing conference amounts to failure to prosecute the Application. The presiding ALJ deferred ruling on the verbal motion.

12. Since filing the Application on April 25, 2019, DLT made no other filings in this proceeding. Indeed, DLT did not file a summary of the testimony and exhibits in support of the Application, as required by Commission Rule 1405(k)(I). Rules of Practice and Procedure, 4 *Code of Colorado Regulations* (CCR) 723-1 (requiring DLT to file such documents within ten days of the expiration of the public notice period).

13. DLT never submitted a filing requesting that the prehearing conference be continued; nor did it submit a filing showing good cause for its failure to appear at the prehearing conference.

14. The ALJ finds that DLT has made no efforts to prosecute its Application since it was filed on April 25, 2019. Given this, DLT's delay in prosecuting the matter is indefinite. And, the record lacks information as to the reasons for the delay.

II. RELEVANT LAW, ANALYSIS, AND CONCLUSIONS.

15. As the party asking the Commission to approve the Application, DLT carries the burden to prove that the Application should be granted. Rule 1500, 4 CCR 723-1 (proponent of an order carries the burden of proof; party commencing proceeding is the proponent of the order). As such, DLT also has the duty to prosecute (or pursue) its Application without unnecessary or unreasonable delay. *See People in the Interest of R.F.A.*, 744 P.2d 1202, 1203 (Colo. App. 1987).

16. An application may be dismissed for failing to prosecute it when the applicant fails to appear at a properly noticed hearing. *See Rathbun v. Sparks*, 425 P.2d 296, 298-99 (1967).

17. When determining whether to dismiss for failure to prosecute, the tribunal should “consider several factors when balancing the policies against unreasonable delay and favoring resolution of disputes on the merits,” including the length of delay, the reason for the delay, any prejudice that may result to other parties based on the delay, and the extent to which the applicant has renewed efforts to prosecute the application. *See Edmond v. City of Colorado Springs*, 226 P.3d 1248, 1253 (Colo. App. 2010).

18. Commission filings may be served upon a party by U.S. mail. Rule 1205(a), 4 CCR 723-1.

19. Because the Decision scheduling the prehearing conference, (Decision No. R19-0532-I), was mailed to DLT at the address it provided, the ALJ concludes that the Decision was properly served on DLT, and that it received proper notice of the July 1, 2019 prehearing conference. *Id.*; Certificate of Service for Decision No. R19-0532-I; Application at 1.

20. Since the Decision scheduling the prehearing conference specifically warned DLT that failing to appear may result in dismissal of the Application for failing to prosecute it, when it

failed to appear, DLT assumed the risk that its Application may be dismissed. Decision No. R19-0532-I, ¶ 12.

21. Given DLT's failure to appear and indefinite delay in prosecuting the Application, the ALJ finds that DLT's delay in prosecuting the Application is unreasonable.

22. The ALJ has considered all factors relevant to determining whether the Application should be dismissed, including policies favoring resolution of disputes on the merits and disfavoring unreasonable delay. *See Edmond*, 226 P.3d at 1253.

23. Based on the foregoing reasons and authorities, the ALJ concludes that the Application should be dismissed for failure to prosecute.

24. Dismissing the Application renders Ramblin's Exceptions moot. The ALJ will deny it as moot.

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

III. ORDER

A. The Commission Orders That:

1. Consistent with the discussion above, Estes Valley Transport, Inc.'s verbal motion to dismiss made at the July 1, 2019 prehearing conference is granted.

2. DLT Transport LLC's Application for a Certificate of Public Convenience and Necessity to Operate as a Common Carrier by Motor Vehicle for Hire in this matter is dismissed without prejudice.

3. Ramblin' Express, Inc.'s "Exceptions" filed on June 24, 2019 are denied as moot.

4. Proceeding No. 19A-0212CP is closed.

5. This Recommended Decision will 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.

6. As provided by § 40-6-109, C.R.S., copies of this Recommended Decision will 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 decision is stayed by the Commission upon its own motion, the recommended decision will 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 basic findings 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.

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

(S E A L)



THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge

ATTEST: A TRUE COPY

A handwritten signature in cursive script that reads "Doug Dean".

Doug Dean,
Director