

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF COLORADO

PROCEEDING NO. 19A-0187CP-EXTENSION

IN THE MATTER OF THE APPLICATION OF DELTA TRANSPORT LLC FOR
PERMANENT AUTHORITY TO EXTEND OPERATIONS UNDER CERTIFICATE
OF PUBLIC CONVENIENCE AND NECESSITY NO. 55879.

**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 Delta Transport LLC's (Delta) Application for Permanent Authority to Extend Operations under Certificate of Public Convenience and Necessity No. 55879 (Application) without prejudice for failing to prosecute it. Dismissal without prejudice means that although this Application is dismissed, Delta may submit a new application seeking the same relief.

B. Background and Factual Findings.

2. Delta initiated this proceeding on April 9, 2019 when it filed its Application with the Colorado Public Utilities Commission. Delta did not include a summary of witness testimony and exhibits with its Application.

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.

4. On May 22, 2019, the Commission referred this matter to an Administrative Law Judge (ALJ) for disposition.

5. Because the Application is disputed, the ALJ determined that the matter must move forward to an evidentiary hearing on the Application. Decision No. R19-0527-I, ¶ 4. As a result, on June 18, 2019, the Decision scheduled a prehearing conference for June 26, 2019, at 11:00 a.m., and advised Delta that “failure to appear at the prehearing conference may result in dismissal of the Application for failing to pursue or prosecute it.” Decision No. R19-0527-I, ¶ 7 and Ordering ¶ 1.

6. The Decision scheduling the prehearing conference (Decision No. R19-0527-I), was served electronically on Delta on June 18, 2019 through the Commission’s E-Filings System. Certificate of Service for Decision No. R19-0527-I.

7. The record shows that Delta is a registered filer with the Commission’s E-Filing System.

8. As noticed in Decision No. R19-0527-I, the prehearing conference was convened on June 26, 2019 at 11:00 a.m., at a Commission hearing room. Counsel for Estes Valley appeared. Delta did not.

9. Estes Valley made a verbal motion to dismiss the Application arguing that Delta’s failure to appear at the mandatory prehearing conference amounts to failure to prosecute the Application. The ALJ took the motion under advisement, and decides it here.

10. Since filing the Application on April 9, 2019, Delta made no other filings in this proceeding. Indeed, Delta 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 Delta to file such documents within ten days of the expiration of the public notice period).

11. Delta 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.

12. The ALJ finds that Delta has made no efforts to prosecute its Application since it was filed on April 9, 2019. Given this, Delta'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.

13. As the party asking the Commission to approve the Application, Delta 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, Delta 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).

14. 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).

15. 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. *Edmond v. City of Colorado Springs*, 226 P.3d 1248, 1253 (Colo. App. 2010).

16. When a party registers as a filer with the Commission's E-Filing System, the party "expressly" agrees to accept service in all Commission proceedings through the E-Filings System. Rule 1205(b), 4 CCR 723-1. Filing through the Commission's E-Filing System constitutes service on registered users in the System. *Id.*

17. Because Delta is a registered filer with the Commission's E-Filing System, and Decision No. R19-0527-I was served on Delta through the Commission's E-Filing System, the ALJ concludes that the Decision was properly served on Delta, and that it received proper notice of the June 26, 2019 prehearing conference. *Id.*; Certificate of Service for Decision No. R19-0527-I.

18. Since the Decision scheduling the prehearing conference specifically warned Delta that failing to appear may result in dismissal of the Application for failing to prosecute it, when it failed to appear, Delta assumed the risk that its Application may be dismissed. Decision No. R19-0527-I, ¶ 7.

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

20. 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.

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

22. 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 June 26, 2019 prehearing conference is granted.

2. Delta Transport LLC's Application for Permanent Authority to Extend Operations under Certificate of Public Convenience and Necessity No. 55879 in this matter is dismissed without prejudice.

3. Proceeding No. 19A-0187CP-Extension is closed.

4. 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.

5. 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.

6. 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)



ATTEST: A TRUE COPY

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

Doug Dean,
Director

THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF COLORADO

MELODY MIRBABA

Administrative Law Judge