**PENNSYLVANIA**

**PUBLIC UTILITY COMMISSION**

**Harrisburg, PA 17105-3265**

Public Meeting held September 23, 2010

**Commissioners Present:**

James H. Cawley, Chairman

Tyrone J. Christy, Vice Chairman

John F. Coleman, Jr.

Wayne E. Gardner

Robert F. Powelson

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| Application of Kennedy Transfer, Inc., for the right to transport, as a common carrier, by motor vehicle, household goods in use, which is to be a transfer of all household goods in use rights authorized under the certificate issued at A-00089629 to Robert R. Kennedy and Lois J. Kennedy, d/b/a Kennedy Transfer, subject to the same limitations and conditions | A-2009-2148204 |
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**OPINION AND ORDER**

**BY THE COMMISSION:**

Before the Commission for consideration and disposition is the Petition for Reconsideration (Petition) filed by Kennedy Transfer, Inc. (Petitioner). On June 25, 2010, the Commission’s Bureau of Transportation and Safety (BTS) filed a Reply to the Petition. The Petition concerns the Order entered on March 26, 2010 (*March 26 Order)*, relative to the above-captioned proceeding.

**History of the Proceedings**

On October 27, 2009, Petitioner filed a Transfer Application for the above-captioned right. By letter of December 3, 2009, BTS rejected the Petitioner’s Transfer Application and the accompanying “Appendix A” for failure to sufficiently define the authority sought for transfer, as required by Form PUC 190, Section 12a. Specifically, BTS advised Petitioner that it would be required to restate the rights it believed were transferable and not simply identify all rights presently held by the transferor. BTS made this request due to the intermingling of both property and household goods rights in the transferor’s authority. Also, Petitioner was advised that property rights are non-transferable.

In response, Petitioner filed an extract of its household goods rights that it believed accurately reflected its Certificate. The extract was attached to the Petition as “Exhibit B.”

In the *March 26 Order,* the Commission approved Petitioner’s Application for a common carrier of household goods Certificate. The Commission granted Petitioner the right to transport household goods in use by transfer of the rights authorized under the Certificate issued at A-00089629 to Robert R. Kennedy and Lois J. Kennedy, d/b/a Kennedy Transfer (Transferor), subject to the same limitations and conditions.

By Letter dated March 30, 2010, and addressed to BTS, Petitioner asked that the *March 26 Order* be corrected to include the transfer of the property portion of the Transferor’s authority at Folder 1. In the alternative, Petitioner asked that its letter be considered a Petition for Reconsideration.

On May 14, 2010, BTS informed Petitioner that the requested change would not be made administratively and that, if it desired the additional authority, Petitioner must file an application for amendment or a petition for reconsideration.

Petitioner filed the instant Petition on May 28, 2010. BTS filed its Reply as noted above.

**Discussion**

Initially, we note that the instant Petition for Reconsideration was filed after the thirty-day deadline set forth in 52 Pa. Code § 5.572. We shall nevertheless consider it because Petitioner responded to the Order entered March 26, 2010, by sending correspondence to BTS dated March 30, 2010, asking that the Order be corrected administratively, or, in the alternative, that the correspondence be treated as a Petition for Reconsideration. Although this is not the proper procedure for filing a Petition for Reconsideration, in order to ensure that Petitioner’s due process rights are preserved, we will treat the Petitioner as having timely requested Reconsideration.

In addition, we note that BTS’ Reply to the Petition was not timely filed. Accordingly, BTS filed its Reply *Nunc Pro Tunc*. BTS avers that this was due to the fact that the Petitioner failed to serve its Petition on BTS, or otherwise provide it with a courtesy copy of the Petition. BTS points out that Petitioner has had previous communications regarding this matter directly with BTS, and that it should have been aware that BTS would be affected by its Petition. BTS requests that its Reply be considered *nunc pro tunc*, since it only recently became aware of Petitioner’s request for reconsideration of the *March 26 Order*. Reply at ¶ 1.

We shall consider BTS’ Answer herein. Our Regulations state:

This subpart shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which it is applicable. The Commission or presiding officer at any stage of an action or proceeding may disregard an error or defect of procedure *which does not affect the substantive rights of the parties*.

52 Pa. Code § 1.2(a) (emphasis supplied). In this case, we fail to see how any Party’s substantive rights would be prejudiced by the consideration of BTS’ late-filed Reply.

The Public Utility Code (Code) establishes a party’s right to seek relief following the issuance of our final decisions pursuant to Subsections 703(f) and (g), 66 Pa. C.S. §§ 703(f) and 703(g), relating to rehearings, as well as the rescission and amendment of orders. Such requests for relief must be consistent with Section 5.572 of our Regulations, 52 Pa. Code § 5.572, relating to petitions for relief following the issuance of a final decision.

The standards for granting a Petition for Reconsideration or Modification were set forth in *Duick v. Pennsylvania Gas and Water Company*, 56 Pa. P.U.C. 553, 1982 Pa. P.U.C. LEXIS 4 (1982). *Duick* held that a petition for rehearing under Subsection 703(f) of the Code must allege newly discovered evidence not discoverable through the exercise of due diligence prior to the close of the record. *Duick* at 558. A petition for reconsideration under Subsection 703(g), however, may properly raise any matter designed to convince us that we should exercise our discretion to amend or rescind a prior order, in whole, or in part. Furthermore, such petitions are likely to succeed only when they raise “new and novel arguments” not previously heard or considerations which appear to have been overlooked or not addressed. *Duick* at 559. A petition seeking reopening of the record (more properly one for rehearing) may be entertained as a petition for reconsideration, under the provisions of 66 Pa C.S. § 703(g), if the newly discovered evidence was not in existence, or was not discoverable through the exercise of due diligence, prior to the expiration of the time within which to file a petition for rehearing, under the provisions of 66 Pa. C.S. § 703(f). *Id*.

In the history of the proceedings, *supra*, we noted that Petitioner filed an extract of its household goods rights that it believed accurately reflected its Certificate. Petitioner’s Exhibit “B.” We note that, in its extract, Petitioner inaccurately restated the rights at Docket No. A‑00089629, F.1. Petitioner provided the following restatement of the right in question: “[t]o transport *household goods in use* between points in the city of DuBois, Clearfield County, and within ten (10) miles by the usually traveled highways of the limits of said city.” The actual paragraph for Docket No. A-00089629, F.1, specifically states: “[t]o transport *property* between points in the city of Dubois, Clearfield County, and within ten (10) miles by the usually traveled highways of the limits of said city” (emphasis added).

In its Petition, Petitioner generally avers that the Commission erred in that transferable portions of the rights of Robert R. Kennedy and Lois J. Kennedy, d/b/a Kennedy Transfer, issued at Docket No. A-00089629, were not included in the final ordering paragraph of the *March 26 Order*. Petitioner’s argument was that, because this portion of the Transferor’s authority “did not specifically exclude household goods in use, it would be deemed to include household goods in use.” Petition at 2-3.

In response, BTS opposes the Petition. BTS’ arguments against the Petition will be briefly summarized, as follows: (1) property rights are not transferable; (2) Petitioner’s interpretation of the term “property” is not supported by the Commission’s Regulations; (3) the Commission has not previously determined that the authority to transport “property” includes the authority to transport “household goods;” and (4) Petitioner is incorrect in its argument that, because it has always transported household goods under its property authority, it should be permitted to continue this practice. Reply at ¶ 11(a)-(d).

On review of the record, we find Petitioner’s request for reconsideration fails to meet the *Duick* standard. We will discuss Petitioner’s arguments *seriatim*.

We note initially that, contrary to Petitioner’s contention, property rights are not transferable. In *Regulation of Motor Carriers of Property*, Docket No. P‑00940884 (Order entered December 20, 1994, with an effective date of January 1, 1995), the Commission eliminated the transfer of property rights by property carriers. The Commission therein stated that “[w]e wish to emphasize that motor carriers of property will not be authorized to conduct transportation which is usually deemed to be household goods transportation . . . carriers of property . . . will be authorized to transport property, except household goods in use” (emphasis in original).

Accordingly, we consider that any existing authority that does not specifically include “household goods in use” in the ordering paragraphs, will be treated strictly as a property right, and will be considered non-transferable. The rights at issue in this case are property rights and, therefore, Petitioner’s request to transfer the property rights of Transferor, at Folder 1, will be denied.

Second, Petitioner’s interpretation of the term “property” is not supported by the Commission’s Regulations. In its Petition, Petitioner argues that “property . . . by definition include[s] the right to transport household goods.” However, we note that, at 52 Pa. Code § 31.1, property is defined as “[t]angible property other than household goods in use” (emphasis added). Also, at 52 Pa. Code § 21.1(i), “household goods in use” is defined as “personal effects and property used or to be used in a dwelling, when part of the equipment or supply of the dwelling, and similar property if the transportation of the effects or property is arranged and paid for by either the householder or another party.” Review of the above definitions leads us to conclude that property of specified use may be considered part of household goods, but “household goods” are specifically excluded from the definition of property.

Third, contrary to Petitioner’s allegation, the Commission has not previously determined that the authority to transport “property” includes the authority to transport “household goods.” Petition at ¶ 7. In support of its argument, Petitioner cites *Re: Application of Central Van & Storage of Charleston, Inc. t/d/b/a Central Van & Storage*, Docket No. A-00121970 (Order entered May 5, 2006). However, a careful reading of *Central Van* does not support Petitioner’s argument. Although *Central Van* did involve modification of a Commission order which transferred household goods in use rights, the transfer at issue in that case was household goods in use from one company to another, not the transfer of property rights to household goods in use rights. Since the instant case is clearly distinguishable from *Central Van*, Petitioner’s argument on this issue must fail.

Petitioner also argues that, because it has always transported household goods under its property authority, it should be permitted to continue this practice. Petition at ¶ 10-13. We conclude that this argument is without merit. A review of Petitioner’s previously filed tariffs clearly shows that it has property authority “between points in the city of DuBois, Clearfield County, and within ten (10) miles by the usually traveled highways of the said city.” Petitioner’s Exhibit “A.” The fact that Petitioner may have been operating outside of its tariff for many years does not expand its property authority to include household goods authority.

Finally, Petitioner also argues that it always included the transportation of household goods in its published tariff rates. Petition at ¶ 12. In fact, Petitioner’s tariff includes no such designation, but rather states a general hourly rate. Petitioner’s Exhibit “A.” Petitioner’s position that the Commission did not take prior action about its possibly operating outside the scope of its operating authority in the past is irrelevant.

As discussed above, we find Petitioner’s request for reconsideration is not meritorious. We conclude that Petitioner has not met the criteria of *Duick*, *supra*.

**Conclusion**

We have carefully reviewed the record as developed in this proceeding. Based upon our review, for the above reasons, we will deny the Petition; **THEREFORE,**

**IT IS ORDERED:** That the Petition for Reconsideration filed by Kennedy Transfer, Inc., with reference to our Order herein entered on March 26, 2010, is denied.

 **BY** **THE COMMISSION,**

Rosemary Chiavetta

Secretary

(SEAL)

ORDER ADOPTED: September 23, 2010

ORDER ENTERED: September 24, 2010